



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

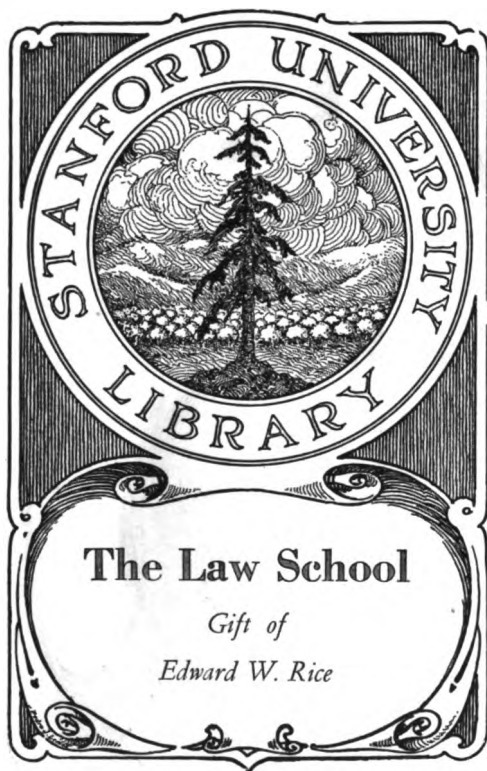
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

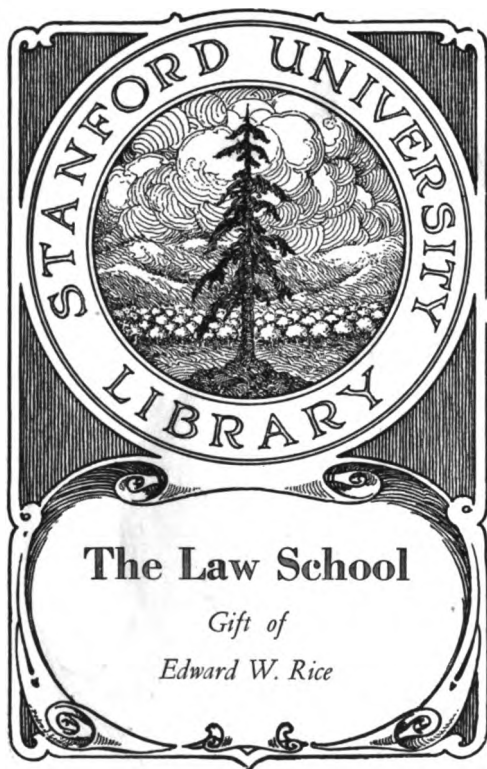
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1880:

COMPRISING

REPORTS OF CASES

IN

The House of Lords and in the Privy Council,

IN

**The Court of Appeal, the Court for Crown Cases Reserved,
and the Court of Bankruptcy;**

AND IN

THE HIGH COURT OF JUSTICE

VIZ.

**Chancery; Queen's Bench; Common Pleas; Exchequer;
Probate, Divorce and Admiralty, Divisions;
And in other Divisional Courts.**

MICHAELMAS, 1879, to MICHAELMAS, 1880.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the Divisions and Courts from which the Appeals respectively come. These Cases form four distinct Volumes, having separate Indexes of Subjects and Tables of Cases; viz., the Chancery Volume; the Bankruptcy Volume; the Bench, Pleas and Exchequer Volume; and the Probate, Divorce and Admiralty Volume.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY

**MONTAGU CHAMBERS, Esq., ONE OF HER MAJESTY'S COUNSEL,
FREDERICK HOARE COLT, Esq.,**

AND

JOHN GEORGE WITT, Esq., BARRISTERS-AT-LAW.

QUEEN'S BENCH, COMMON PLEAS AND EXCHEQUER, VOL. XLIX.

LONDON:

PRINTED BY SPOTTISWOODE AND CO., NEW-STREET SQUARE.

PUBLISHED BY EDWARD BRET INCE, 5, QUALITY COURT, CHANCERY LANE.

MDCCLXXX.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

59,022

CASES
ARGUED AND DETERMINED
IN THE
Queen's Bench, Common Pleas & Exchequer Divisions
AND IN
Other Divisional Courts
OF THE
HIGH COURT OF JUSTICE,
REPORTED BY
J. H. ETHERINGTON SMITH AND RICHARD HOLMDEN AMPHLETT—
Queen's Bench,
WILLIAM PATERSON AND GILBERT GEORGE KENNEDY—*Common Pleas,*
W. DECIMUS I. FOULKES AND FRANCIS PARKER—*Exchequer,*
BARRISTERS-AT-LAW;
AND ON APPEAL FROM THOSE DIVISIONS AND COURTS
IN
Her Majesty's Court of Appeal,
REPORTED BY
WILLIAM ROBERT COLLYER AND ROBERT BRUCE RUSSELL,
BARRISTERS-AT-LAW,
AND IN
The House of Lords,
REPORTED BY
LIONEL LANCELOT SHADWELL,
BARRISTER-AT-LAW.

MICHAELMAS, 1879, TO MICHAELMAS, 1880.

SUPREME COURT OF JUDICATURE.

RULES.

Dated December, 1879.

I, the Right Honourable Hugh MacCalmont Earl Cairns, Lord High Chancellor of Great Britain, do hereby, in pursuance of the seventeenth section of "The Appellate Jurisdiction Act, 1876," appoint Lord Justice Brett, Mr. Justice Lush, Mr. Baron Pollock, and Mr. Justice Manisty to be the four Judges of the Supreme Court of Judicature, by whom, together with the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, Rules of Court shall be made as therein mentioned. And this appointment is to continue in force until the 1st day of January, 1880.

March 22nd, 1879.

CAIRNS, C.

1. These Rules may be cited as "The Rules of the Supreme Court, December, 1879," or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Order and Rule mentioned in the margin.

2. These Rules shall come into operation on the 22nd of December, 1879.

ORDER XXXV.

3. So much of Order XXXV. Rule 1a, as directs that actions in the Queen's Bench, Common Pleas, and Exchequer Divisions shall not be entered for trial in the District Registries is hereby repealed.

ORDER XXXVI.

4. Order XXXVI. Rule 15, is hereby repealed, and the following Rule substituted:—

After notice of trial has been given of any action or issue to be tried elsewhere than in London or Middlesex, either party may at any time before the day next before the Commission day enter the action or issue for trial at the next Assizes in the District Registry (if any) of the city or town where the trial is to be had, or with the Associate at the Assize town as heretofore.

So long as there is no District Registry in the places enumerated in the first of the fol-

lowing columns, entries for trial may be made in the District Registries in the second of the following columns, i.e., actions and issues for trial at—

Bodmin	{ may be entered in the District Registry at }	Truro.
Carnarvon	" "	Bangor.
Chelmsford	" "	Colchester.
Lancaster	" "	Preston.
Lewes	" "	Brighton.
Monmouth	" "	Newport, Mon.
Stafford	" "	Hanley.
Taunton or Wells	" "	Bridgwater.
Warwick	" "	Birmingham.
Winchester	" "	Southampton.

The entry shall be made in a numbered list to be provided by the District Registrar in such vacant number as the party entering shall select, and the list shall be open for the inspection of all parties interested therein at all times during office hours. At the time of entry two copies of the pleadings shall be delivered as directed by Order XXXVI. Rule 17a, one of which shall be duly stamped with the amount of the fee payable on entry of the cause for trial.

When the trial of an action or issue which has been entered for trial has been postponed or withdrawn under Order XXIII. Rule 2, or settled, the party who made the entry shall immediately thereupon give no-

tice thereof to the Registrar, and such entry shall be expunged from the list.

The Registrar shall close the list and transmit a corrected copy of the said list, together with the two copies of the pleadings, to the Associate at the Assize town, in such time that the same may be received at his office before the opening of the Commission.

Causes or issues entered for trial by the Associate shall be entered in such vacant numbers in the list so transmitted as the party entering may select. The list shall then be re-numbered consecutively, and shall be the cause list for the Assizes.

If both parties enter the action or issue for trial, it shall be tried in the order of the plaintiff's entry, and the defendant's entry shall be vacated.

ORDER XLIIA.

AMENDMENTS OF JUDGMENTS.

5. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be cor-

rected by the Court or a Judge on motion without an appeal.

ORDER LX.

6. The office of Master of the Supreme Court of Judicature shall be deemed to be substituted for the several offices specified in the first part of the first schedule to the Supreme Court of Judicature (Officers) Act, 1879, and all enactments and documents referring to any of those offices, or to any of the persons holding them, shall, unless the context otherwise requires, be construed and have effect accordingly.

ORDER LX A.

CENTRAL OFFICE.

7. The central office shall, for the convenient despatch of business, be divided into the departments specified in the first column of the following scheme, and the business and staff of the office shall be distributed among the departments in accordance with that scheme :—

SCHEME.

Name of Department	Business	Staff
1. Writ, appearance, and judgment.	The sealing and issue of writs of summons for the commencement of actions. The entry in the cause book of writs of summons, appearances, and judgments. The sealing and issue of notices for service under Order XVI., Rule 18. The receipt and filing of pleadings delivered on entry of judgment. The transaction of all business heretofore conducted in the Record and Writ Office, except such part thereof as is transacted in the Record department.	The clerks employed in similar duties in the Record and Writ Office. Such of the clerks employed in the issue of writs and the entry of appearances and judgments in the Masters' offices of the Queen's Bench, Common Pleas, and Exchequer Divisions as may be selected by the Masters for the purpose. And such of the officers employed under the registrars of the Probate, Divorce, and Admiralty Divisions as are selected for transfer to the central office.
2. Summons and Order.	The issue of summonses in the Queen's Bench, Common Pleas, and Exchequer Divisions, and the drawing up of all Orders made either in Court or in Chambers in those divisions.	The clerks employed in the Rule offices, and such of the other clerks in the Masters' offices of the Queen's Bench, Common Pleas, and Exchequer Divisions as may be selected by the Masters for the purpose. And such additional clerks as may be appointed from time to time for the purpose.
3. Filing and Record.	The filing of all affidavits to be filed in the Central Office, and all depositions to be used in the Chancery Division, and such other documents as may from time to time be directed by the Masters	The clerks and writers employed in similar duties in the Record and Writ Office, with such additional clerks and such writers and messengers as may be from time to time found necessary.

Name of Department	Business	Staff
	to be filed, and the making and examination of office copies of documents filed in the department. The custody of all deeds and documents ordered to be left with the Masters. The business heretofore performed in the Report Office under the direction and control of the Clerks of Records and Writs.	
4. Taxing . . .	The taxation of costs in the Queen's Bench, Common Pleas, and Exchequer Divisions, except such costs as have heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office.	Such of the clerks in the Masters' offices of these three Divisions as may be selected by the Masters for the purpose.
5. Enrolment . . .	The business heretofore performed in the Enrolment Office.	The clerks of the Enrolment Office.
6. Judgments . . .	The Registry of Judgments, execution, &c.	The clerks employed in similar duties under the registrar of judgments.
7. Bills of Sale . . .	The registry of bills of sale and other duties connected therewith.	The clerks employed in similar duties under the Masters of the Queen's Bench Division as registrars of bills of sale.
8. Married Women's acknowledgments.	The registry of acknowledgments of deeds by married women.	The clerks employed in similar duties under the registrar of acknowledgments of deeds by married women.
9. Queen's Remembrancer	The business heretofore performed in the Queen's Remembrancer's Office.	The clerks of the Queen's Remembrancer's Office.
10. Crown Office . . .	The business heretofore performed in the Crown Office.	The clerks of the Crown Office.
11. Associates . . .	The business heretofore performed in the Associates' Offices.	The clerks of the three Associates.

8. It shall be the special duty of one of the Masters to be present at, and control the business of, the central office, and he shall give the necessary directions with respect to questions of practice and procedure relating to the business of the central office. The Masters shall select five of their number to discharge this duty in turn, according to a rota to be fixed by themselves.

9. A sufficient number of Masters, not being less than three, shall, except in vaca-

tion, attend each day at the central office to tax costs. In vacation one Master shall so attend. The Taxing Masters shall be selected according to a rota to be fixed by the Masters.

10. Every Master, and every first and second-class clerk in the Filing and Record department, shall, by virtue of his office, have authority to take oaths and affidavits in the Supreme Court.

LAW JOURNAL REPORTS, 1880.

SUPREME COURT OF JUDICATURE.

RULES AND SCHEDULE OF FORMS.

Dated December 12th, 1879.

SUMMARY JURISDICTION ACT, 1879.

ARRANGEMENT.

RULES.

1. Short title.
2. Commencement.
3. Register.
4. Special appropriation of fine under a statute.
5. Returns.
6. Form of account of fines, &c.
7. Rule as to sums of which payment is deferred or to be made by instalments.
8. Provision for dispensing with unnecessary accounts.
9. Entry of receipts by clerk.
10. Remitted fees book.
11. Crown fines.
12. Application of sum due under forfeited security.
13. Form of security under Act.
14. Security book.
15. Notice to principal of forfeiture of security.
16. Mode of application to vary order for sureties.
17. Time for stating special case.
18. Particulars of claim for civil debt.
19. Judgment summons.
20. Service of judgment summons.
21. Issue and proof of service of judgment summons.
22. Time of service.
23. Adjournment of hearing of judgment summons.
24. Witnesses on judgment summons.
25. Date of order of commitment.
26. Payment by judgment debtor.
27. Discharge of judgment debtor.
28. Costs of plaintiff in enforcing order.
29. Fee for taking declaration.
30. Forms.

SCHEDULE.

PART I.—FORMS APPLICABLE TO SUMMARY PROCEEDINGS OTHER THAN PROCEEDINGS FOR THE RECOVERY OF A CIVIL DEBT.

1. Summons to person bound by a recognisance which is alleged to have been forfeited by conviction of principal. [s. 9 (4).]
2. Summons to attend an application for varying or dispensing with sureties. [s. 26.]
3. Indorsement on summons to witness. [ss. 36, 41.]
4. Warrant where witness has not obeyed an indorsed summons. [s. 36.]
5. Conviction for fine, to be levied by distress, and in default of sufficient distress, imprisonment. Payment forthwith, or by a given day, or by instalments. [ss. 7, 8.]
6. Conviction for fine, and in default of payment, imprisonment. Payment

- forthwith, or by a given day, or by instalments. [ss. 7, 8.]
7. Conviction where punishment is by imprisonment. No costs.
 8. Conviction where punishment is by imprisonment. Costs. [s. 7.]
 9. Conviction or order where security is to be given for payment. [s. 7.]
 10. Order for any matter (other than the payment of a civil debt) where disobedience to the order is punishable by imprisonment. (See s. 21, &c.)
 11. Order to enter into recognisance to keep the peace or to be of good behaviour. [s. 25.]
 12. Adjudication of forfeiture of recognisance where person bound as principal has been convicted of an offence which is a breach of the condition. [s. 9 (2).]
 13. Summary conviction of child for indictable offence. [ss. 10, 27.]
 14. Summary conviction (by consent) of juvenile offender for indictable offence. [ss. 11, 27.]
 15. Summary conviction (by consent) of adult for indictable offence. [ss. 12, 27.]
 16. Summary conviction (on plea of guilty) of adult for indictable offence. [ss. 13, 27.]
 17. Order of dismissal of child dealt with summarily for indictable offence. [ss. 10, 27.]
 18. Order of dismissal of young person or adult dealt with summarily for indictable offence. [ss. 11, 12, 27.]
 19. Order dismissing information and directing person charged to pay damages. [s. 16 (1).]
 20. Summary conviction where person convicted is discharged conditionally on giving security to appear or to be of good behaviour. [s. 16 (2).]
 21. Warrant of distress on conviction for fine, with or without costs or damages, or for costs or damages without fine. [ss. 21, 43.]
 22. Warrant of distress on an order for the payment of any sum other than a civil debt. [s. 21.]
 23. Warrant of distress where the charge is dismissed, but the person charged is ordered to pay damages or costs, or both. [s. 16.]
 24. Warrant of distress for sum due under recognisance declared to be forfeited. [s. 9 (1).]
 25. Warrant of distress for sum due under recognisance adjudged to be forfeited by conviction of principal. [s. 9 (2).]
 26. Warrant of distress for sum due by a principal in pursuance of a forfeited security for payment of a sum adjudged by a conviction. [s. 23 (3).]
 27. Order for imprisonment and warrant of commitment where it appears that there are no goods, or insufficient goods, whereon to levy distress, or that distress would be more injurious than imprisonment. [s. 21 (3).]
 28. Warrant of commitment pending return to warrant of distress. [11 & 12 Vict. c. 43. s. 20.]
 29. Warrant of commitment for want of distress.
 30. Warrant of commitment reducing term of imprisonment on part payment. [s. 21 (4).]
 31. Warrant of commitment on a conviction where the punishment is by imprisonment.
 32. Warrant of commitment where person liable to summary conviction demands trial by jury. [s. 17 (1).]
 33. Recognisance conditioned for appearance or for doing some other thing in, to, or before or in a proceeding in a Court of summary jurisdiction. [ss. 9 (1), 42.]
 34. Declaration of forfeiture (to be indorsed on recognisance).
 35. Order cancelling or mitigating forfeiture of recognisance. [s. 9 (1).] (To be indorsed on recognisance.)
 36. Recognisance conditioned to keep the peace or to be of good behaviour, or not to do or commit some act or thing. [s. 9 (2).]
 37. Oral or written acknowledgment of undertaking to pay a sum adjudged by a conviction. [ss. 7, 13.]
 38. Oral or written acknowledgment of undertaking to perform condition of forfeited recognisance. [ss. 9 (1), 23.]
 39. Notice to principal of forfeiture of security. [s. 23 (3).]
 40. Order varying order for sureties. [s. 26.]
 41. Order for restitution of property. [s. 27.]
 42. Order to bring up appellant in custody to enter into recognisances for appeal. [s. 31 (4).]
 43. Notice to parent or guardian of child charged with an indictable offence before a Court of summary jurisdiction. [s. 10 (3).]
 44. Declaration of service of summons or other document. [s. 41.]
 45. Declaration as to handwriting and seal. [s. 41.]
 46. Certificate of costs of prosecution of indictable offence dealt with summarily. [s. 28.]
 47. Account of costs and charges incurred in respect of the execution of a warrant of distress. [s. 43 (6).]

PART II.—FORMS APPLICABLE TO PROCEEDINGS FOR THE RECOVERY OF A CIVIL DEBT.

1. Summons to appear.
2. Summons to witness.
3. Judgment for plaintiff.
4. Judgment for defendant.
5. Judgment summons.
6. Order of commitment.
7. Certificate for discharge of a prisoner from custody.

8. Distress warrant.
9. Oral or written acknowledgment of undertaking to pay civil debt.

PART III.—GENERAL FORMS.

1. Register.
2. Account of fines and fees.
3. Remitted fee book.
4. Return of exchequer fines, penalties, &c.

RULES.

1. These Rules may be cited as the Summary Jurisdiction Rules, 1880.

2. These Rules shall come into operation on the 1st day of January, 1880.

3. The clerk of each Court of Summary Jurisdiction shall keep the register required to be kept by him in pursuance of the Summary Jurisdiction Act, 1879, with such particulars as appear by the form in Part III. of the Schedule hereto.

4. Where in pursuance of any statute the Court specially directs the appropriation of a fine, the statute under which the appropriation is made shall be set forth in the register and authenticated by the signature of the Justice or one of the Justices constituting the Court.

5. The return referred to in section 22, sub-section (4) of the Summary Jurisdiction Act, 1879, shall contain the particulars required to be entered in the register. The Justice signing any such return shall cause it to be sent to the clerk who keeps the register for his Petty Sessional Division, and that clerk shall enter the return in his register.

6. The form of account to be rendered by clerks of Courts of Summary Jurisdiction of fines, fees, and other sums received by them, shall be the form given in Part III. of the Schedule hereto, or a form to the like effect approved by the local authority under the Justices' Clerks Act, 1877, and shall be rendered quarterly or at any less interval as may be directed by that authority. Provided that nothing in this rule shall apply to the Police Courts of the Metropolis, Chatham, or Sheerness.

7. All fines imposed by the Court shall appear in this account in chronological order, and where payment is deferred or to be made by instalments, the fact shall be shewn in the column headed "Remarks." When the whole of the sum has been paid or recovered by distress, or the term of imprisonment imposed in default of payment or of sufficient distress has expired, the clerk shall then enter the sum in the account. Provided that, though the whole of the sum may not have been paid or recovered, the instalments received shall be accounted for at such times and in such manner as the above-mentioned local authority may direct.

8. Where a clerk of a Court of Summary Jurisdiction renders an account in the form required or authorised by these Rules to the authority to whom he is required to render it, he shall not be required to render any other account relating to the same particulars.

9. The clerk of each Court of Summary Jurisdiction shall enter on the day of its receipt each sum of money received by him on any account whatever. Each instalment so received shall be entered in a book called the Instalment Ledger, to an account to be opened in respect of the proceeding in which the sum is paid.

10. The book required to be kept by section 12 of the Act 14 & 15 Vict. c. 55, shall be kept according to the form in Part III. of the Schedule hereto, and shall be called the Remitted Fees Book.

11. The clerk of every Court of Summary Jurisdiction shall send on the 10th day of

January, April, July and October, in each year, to the Secretary of State for the Home Department, Whitehall, without paying the postage, a certified statement, in the form in Part III. of the Schedule hereto, of all fines which have been imposed by the Court during the previous three months, and which are payable wholly or in part to Her Majesty or to the Exchequer. If no such fines have been imposed, the statement shall be certified in blank.

12. Where a Court of Summary Jurisdiction has enforced payment of any sum due by a principal in pursuance of a security under the Summary Jurisdiction Act, 1879, which appears to the Court to be forfeited, the sum shall, unless it is recoverable as a civil debt, be paid to the clerk of the Court, and shall be paid and applied by him in the manner in which fines imposed by the Court, in respect of which fines no special appropriation is made, are payable and applicable.

13. Any security given under the Summary Jurisdiction Act, 1879, by an oral or written acknowledgment, shall be in the form of an undertaking, and may be in the appropriate form in Part I. or Part II. of the Schedule hereto, or in any other form to the like effect.

14. The clerk of each Court of Summary Jurisdiction shall keep a security book, and shall enter therein, with respect to each security given in relation to any proceeding before the Court, the name and address of each person bound, shewing whether he is bound as principal or as surety, the sum in which each person is bound, the undertaking or condition by which he is bound, the date of the security, and the person before whom it is taken. Where any such security is not entered into before the Court, or before the clerk of the Court, the person before whom it is entered into shall make a return of it, shewing the above particulars, to the clerk of the Court. The security book, and any certified extract therefrom, shall be evidence of the several matters hereby required to be entered in the security book in like manner as if the security book were the register.

15. Not less than two clear days before a warrant of distress is issued for a sum due by a principal in pursuance of a forfeited security under the Summary Jurisdiction Act, 1879, the clerk of the Court issuing the warrant shall cause notice of the forfeiture to be served on the principal. Service of the notice may be effected either by prepaid letter sent to the address mentioned in the security, or as service of a summons may be effected under the Summary Jurisdiction Acts.

16. An application under section 26 of the Summary Jurisdiction Act, 1879, shall be an application for a summons requiring the complainant to shew cause why the order made on his complaint should not be varied.

17. An application to a Court of Summary Jurisdiction under section 33 of the Summary Jurisdiction Act, 1879, to state a special case, shall be made in writing, and may be made at any time within seven days from the date of the proceeding to be questioned, and the case shall be stated within three calendar months after the date of the application.

18. In the case of a claim for a civil debt recoverable summarily, the particulars of the claim shall, unless embodied in the summons, be annexed to, and, if so annexed, shall be deemed part of the summons.

19. An order of commitment under section 35 of the Summary Jurisdiction Act, 1879, shall not be made unless a summons to appear and be examined on oath (hereinafter called a judgment summons) has been served on the judgment debtor.

20. The judgment summons shall, whenever it is practicable, be served personally on the judgment debtor; but if it is made to appear on oath to the Court that prompt personal service is for any reason impracticable, the Court may make such order for substituted or other service as to the Court may seem just.

21. A judgment summons may issue, although no distress warrant has been applied for, and its service, where made out of the jurisdiction of the Court, may be proved by affidavit or solemn declaration.

22. A judgment summons shall be served not less than two clear days before the day on which the judgment debtor is required to appear.

23. The hearing of a judgment summons may be adjourned from time to time.

24. Any witness may be summoned to prove the means of the judgment debtor, in the same manner as witnesses are summoned to give evidence on the hearing of a complaint.

25. An order of commitment made under section 35 of the Summary Jurisdiction Act, 1879, shall, on whatever day it is issued, bear date on the day on which it was made.

26. When an order of commitment for non-payment of money is issued, the defendant may, at any time before he is delivered into the custody of the gaoler, pay to the officer holding the order the amount indorsed thereon as that on the payment of which he may be discharged, and on receiving that amount the officer shall discharge the defendant, and shall forthwith pay over the amount to the clerk of the Court.

27. The sum indorsed on the order of commitment as that on payment of which the prisoner may be discharged may be paid to the clerk of the Court from which the commitment order was issued, or to the gaoler in whose custody the prisoner is. Where it is paid to the clerk, he shall sign a certificate of the payment, and upon receiving the certificate by post or otherwise, the gaoler in whose custody the prisoner then is shall forthwith discharge the prisoner. Where it is paid to the gaoler, he shall, on payment to him of that amount, with costs sufficient to pay for sending the amount by post-office order or otherwise, to the Court under the order of which the prisoner was committed, sign a certificate of the payment, and discharge the prisoner, and forthwith transmit the sum so received to the clerk of the Court.

28. All costs incurred by the plaintiff in endeavouring to enforce an order shall, unless the Court otherwise order, be deemed to be due in pursuance of the order, as if it were made under section 5 of the Debtors Act, 1869.

29. The fee for taking a declaration under section 41 of the Summary Jurisdiction Act, 1879, shall be one shilling.

30. The forms in the Schedule hereto, or forms to the like effect, may be used, with such variations as circumstances require.

The forms S. 1 and S. 2 in the Schedule to the Summary Jurisdiction Act, 1848, are hereby annulled.

CAIRNS, C.

12th December, 1879.

SCHEDULE.

Note.—The headings and the descriptions at the foot of these forms will be altered as circumstances require. For instance, in the Metropolitan Police District the heading will be—
In the Metropolitan Police District.

Before the Court of Summary Jurisdiction sitting at the Police Court [*Bow Street*].
And the conviction will be signed—

A.B.,
One of the Magistrates of the Police
Courts of the Metropolis.

In a borough the heading will be—

In the borough of [*Birmingham*],
and a justice for a borough will sign as such.

These forms do not supersede those in the schedule to 11 & 12 Vict. c. 43, which may, as far as they are not inconsistent with the provisions of any later Act, be still used in cases to which they are applicable.

PART I.

FORMS APPLICABLE TO SUMMARY PROCEEDINGS OTHER THAN PROCEEDINGS FOR THE RECOVERY OF A CIVIL DEBT.

1.

SUMMONS TO PERSON BOUND BY A RECOGNISANCE WHICH IS ALLEGED TO HAVE BEEN FORFEITED BY CONVICTION OF PRINCIPAL.
[s. 9 (2).]

In the [county of] . Petty Sessional
Division of].
To A.B. of
You are hereby summoned to appear be-

fore the Court of Summary Jurisdiction
sitting at on day the
day of next, at the hour of
in the forenoon, to shew cause why the recognisance entered into the day of
whereby you are bound to pay the
sum of should not be adjudged to be
forfeited, and why you should not be adjudged to pay that sum.

Dated the day of
(Signed)
One of Her Majesty's Justices of the Peace for the [county] of

Seal.

2.

**SUMMONS TO ATTEND AN APPLICATION FOR
VARYING OR DISPENSING WITH SECURI-
TIES. [s. 26.]**

In the [county of] . Petty Sessional
Division of []
To A.B. of

You are hereby summoned to appear be-
fore the Court of Summary Jurisdiction
sitting at on day the
day of at the hour of in the
noon, to shew cause why the amount
for which it is proposed that the suret of
should be bound should not be re-
duced [or why the obligation of to
find suret should not be dispensed with].

Dated the day of 18 .
(Signed)

One of Her Majesty's Jus-
tices of the Peace for the
[county] of

Seal.

3.

**INDORSEMENT ON SUMMONS TO WITNESS.
[ss. 36, 41.]**

Proof on oath [or solemn declaration]
having this day been made before me the
undersigned that the name of J.S. to the
within summons subscribed is of the hand-
writing of the Justice of the Peace within
mentioned I authorise W.T., who brings to
me this summons, and all other persons by
whom it may be lawfully served, and also all
constables of the [county] of , to
serve the same within the said [county].

Dated the day of 18 .
(Signed)

One of Her Majesty's Justices of the
Peace for the [county] of

4.

**WARRANT WHERE WITNESS HAS NOT OBEYED
AN INDORSED SUMMONS. [s. 36.]**

In the [county of] . Petty Sessional
Division of []

To each and all of the constables of
A.B. has been charged for that [state shortly
offence charged].

And it appearing that E.F. of
was likely to give material evidence concern-
ing the said charge, he was by summons
commanded to appear before the Court of
Summary Jurisdiction sitting at
on day, the day of
at the hour of in the noon, to

VOL. 49.—ORDERS AND RULES.

testify what he should know concerning the
said charge.

And on the day of
the summons was duly indorsed with an
authority to serve it within the [county]
of

And as it has been proved to me the under-
signed, the said E.F. has been duly served
with the summons, and a reasonable amount
has been paid [or tendered] to him for his
expenses, but he has neglected to appear
according to the summons, and has not offered
any sufficient excuse for his neglect.

Therefore you are hereby commanded to
take the said E.F., and to bring him and
have him before the Court of Summary Ju-
risdiction sitting at on
day the day of 18, at the
hour of in the noon, to testify
what he knows concerning the said charge.

Dated the day of
(Signed)
One of Her Majesty's Jus-
tices of the Peace for the
[county] of

Seal.

5.

**CONVICTION FOR FINE, TO BE LEVIED BY DIS-
TRESS, AND IN DEFAULT OF SUFFICIENT DIS-
TRESS, IMPRISONMENT. PAYMENT FORTH-
WITH, OR BY A GIVEN DAY, OR BY INSTAL-
MENTS. [ss. 7, 8.]**

In the [county of] . Petty Sessional
Division of []

Before the Court of Summary Jurisdiction
sitting at

The day of 18 .
A.B. (hereinafter called the defendant) is
this day convicted before this Court for that
he on the day of 18 , at
[place] [offence charged].

And it is adjudged that the defendant do
for his said offence forfeit and pay to the
clerk of this Court [or other the person to
whom payment is to be made] at
the sum of [amount of fine], and do also pay
to the said the sum of for
compensation [if awarded] and for
costs [or without costs].*

And it is ordered that the said sums be
paid forthwith [or on the day of
18 , or by instalments of
for every days, the first instalment
to be paid forthwith or on the day of
18 .

* Where the fine does not exceed 5s., omit the
direction to pay costs, and insert the words "with-
out costs," unless costs are expressly ordered.

B

And if default is made in payment according to this adjudication and order, it is ordered that the sum due thereunder be levied by distress and sale of the defendant's goods.

And in default of sufficient distress it is adjudged that the defendant be imprisoned in Her Majesty's prison at _____ there to be kept to hard labour [if so adjudged] for the space of _____ unless the said sum, and all costs and charges of the said distress, and of his commitment and conveyance to the said prison [if so ordered], be sooner paid.

(Signed)
of Her Majesty's Justices of
the Peace for the [county]
of _____

Seal.

NOTE.—It may be convenient in practice to have separate forms for the different alternatives of payment forthwith, by a given time, and by instalments.

6.

CONVICTION FOR FINE, AND IN DEFAULT OF PAYMENT, IMPRISONMENT. PAYMENT FORTHWITH, OR BY A GIVEN DAY, OR BY INSTALMENTS. [ss. 7, 8.]

In the [county of] _____ . Petty Sessional Division of _____]

Before the Court of Summary Jurisdiction sitting at _____

The _____ day of _____ 18 ____ .
A.B. (hereinafter called the defendant) is this day convicted before this Court for that he, on the _____ day of _____ 18 ____ , at [place] [offence charged].

And it is adjudged that the defendant do for his said offence forfeit and pay to the clerk of this Court [or other the person to whom payment is to be made] at the sum of [amount of fine], and do also pay to the said _____ the sum of _____ for compensation [if awarded] and _____ for costs [or without costs].*

And it is ordered that the said sums be paid forthwith [or on the _____ day of _____ 18 ____], [or by instalments of _____ for every _____ days, the first instalment to be paid forthwith or on the _____ day of _____ 18 ____].

And if default is made in payment according to this adjudication and order, it is adjudged that the defendant be imprisoned in Her Majesty's prison at _____ , there to be kept to hard labour [if so adjudged] for the space of _____ unless the said sum, and all costs and charges of his commitment

* Where the fine does not exceed 5s., omit the direction to pay costs, and insert the word "without costs," unless costs are expressly ordered

and conveyance to the said prison [if so ordered], be sooner paid.

(Signed)

of Her Majesty's Justices of
the Peace for the [county]
of _____

Seal.

7.

CONVICTION WHERE PUNISHMENT IS BY IMPRISONMENT. NO COSTS.

In the [county of] _____ . Petty Sessional Division of _____]

Before the Court of Summary Jurisdiction sitting at _____

The _____ day of _____ 18 ____ .
A.B. (hereinafter called the defendant) is this day convicted before this Court for that he on the _____ day of _____ 18 ____ , at [place] [offence charged].

And it is adjudged that the defendant be for his said offence imprisoned in Her Majesty's prison at _____ [there to be kept to hard labour] for the space of _____

(Signed)
of Her Majesty's Justices of
the Peace for the [county]
of _____

Seal.

8.

CONVICTION WHERE PUNISHMENT IS BY IMPRISONMENT. COSTS. [s. 7.]

In the [county of] _____ . Petty Sessional Division of _____]

Before the Court of Summary Jurisdiction sitting at _____

The _____ day of _____ 18 ____ .
A.B. (hereinafter called the defendant) is this day convicted before this Court for that he on the _____ day of _____ 18 ____ , at [place] [offence charged].

And it is adjudged that the defendant be for his said offence imprisoned in Her Majesty's prison at _____ [there to be kept to hard labour] for the space of _____

And it is ordered that the defendant pay to the said _____ the sum of _____ for costs forthwith [or on the _____ day of _____ 18 ____], or by instalments of _____ for every _____ days, the first instalment to be paid forthwith, or on the _____ day of _____ next].

And if default is made in payment according to this adjudication and order, it is declared that the sum thereunder due be levied by distress and sale of the defendant's goods.

And in default of sufficient distress it is adjudged that the defendant be imprisoned

in Her Majesty's prison at [there to be kept to hard labour] for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum, and all costs and charges of the said distress and of his commitment and conveyance to the said prison [if so ordered] be sooner paid.

(Signed)

of Her Majesty's Justices of the Peace for the [county] of

Seal.

9.

CONVICTION OR ORDER WHERE SECURITY IS TO BE GIVEN FOR PAYMENT. [ss. 7, 23, (3).]

[Proceed as in ordinary conviction or order down to direction as to time of payment inclusive, and then, instead of inserting any direction as to distress or imprisonment, proceed as follows:]

And it is ordered that be at liberty to give to the satisfaction of this Court [or such Court of Summary Jurisdiction, or person or persons, as may be specified by the Court] security in the sum of

with two sureties [or one surety] in the sum of [each] for the payment of the said sums as above directed.

10.

ORDER FOR ANY MATTER (OTHER THAN THE PAYMENT OF A CIVIL DEBT) WHERE DISOBEDIENCE TO THE ORDER IS PUNISHABLE BY IMPRISONMENT. (See s. 21, &c.)

In the [county of] . Petty Sessional Division of]

Before the Court of Summary Jurisdiction sitting at

The day of 18 .

A.B. having made a complaint that C.D. (hereinafter called the defendant) on the day of at [state the facts entitling the complainant to the order], and the defendant having appeared [or the defendant not having appeared, but proof having been given that the defendant was duly summoned to appear], and on hearing the matter of the complaint, it is this day adjudged and ordered by this Court that the defendant do [state the matter required to be done].

And if on a copy of a minute of this order being served on the defendant, either per-

sonally or by leaving it for him at his last or usual abode, he neglects or refuses to obey this order, then it is adjudged that the defendant for such his disobedience be imprisoned in Her Majesty's prison at [there to be kept to hard labour], for the space of unless the said order be sooner obeyed [if the statute authorises this].

And it is also adjudged and ordered that the defendant pay to the complainant the sum of for costs forthwith [or on the day of [or by instalments, &c.]]

And if default is made in payment according to this adjudication and order, it is ordered that the sum due thereunder be levied by distress and sale of the defendant's goods.

And in default of sufficient distress, it is adjudged that the defendant be imprisoned in Her Majesty's prison at , there to be kept to hard labour [if so adjudged] for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum, and all costs and charges of the said distress, and of the commitment and conveyance of the defendant to the said prison [if so ordered], be sooner paid.

(Signed)

of Her Majesty's Justices of the Peace for the [county] of

Seal.

11.

ORDER TO ENTER INTO RECOGNISANCE TO KEEP THE PEACE OR TO BE OF GOOD BEHAVIOUR. [s. 25.]

In the [county of] . Petty Sessional Division of]

Before the Court of Summary Jurisdiction sitting at

The day of 18 .

A.B. having made a complaint that C.D. [hereinafter called the defendant] on the day of at [state the facts entitling the complainant to the order], and the defendant having appeared, and on hearing the matter of the complaint, it is this day adjudged and ordered by this Court that the defendant do forthwith to the satisfaction of enter into a recognisance in the sum of with suret in the sum of [each] to keep the peace and be of good behaviour towards Her Majesty and all her liege people, and especially towards the complainant, for the term of now next ensuing.

And if the defendant fails to comply with this order it is adjudged that he be imprisoned in Her Majesty's prison at for the space of unless he sooner complies with this order.

[If costs are ordered, proceed as follows:]

And it is also adjudged and ordered that the defendant pay to the complainant the sum of for costs forthwith [or on the day of next, or by instalments, &c.]:

And if default is made in payment according to this adjudication and order, it is ordered [proceed as in last form].

[Signed]

of Her Majesty's Justices of the Peace for the [county]

Seal.

12.

ADJUDICATION OF FORFEITURE OF RECOGNISANCE WHERE PERSON BOUND AS PRINCIPAL HAS BEEN CONVICTED OF AN OFFENCE WHICH IS A BREACH OF THE CONDITION. [s. 9 (2).]

In the [county of] . Petty Sessional Division of [].

Before the Court of Summary Jurisdiction sitting at

The day 18 .

A.B. (hereinafter called the defendant) was by his recognisance entered into the day of 18 , bound in the sum of the condition of the recognisance being that of should [state condition of recognisance]:

And proof having been given that the said has been convicted of the offence of having [state offence], being an offence which is in law a breach of the condition of the said recognisance:

Therefore it is adjudged that the said recognisance is forfeited, and that the defendant do pay to the clerk of this Court the said sum of and also pay to the sum of for costs:

And it is ordered that the said sums be paid forthwith [or on the day of next, or by instalments of for every days, the first instalment to be paid forthwith, or on the day of next]:

And if default is made in payment according to this adjudication and order, it is ordered [proceed as in conviction for fine to be levied by distress].

13.

SUMMARY CONVICTION OF CHILD FOR INDICTABLE OFFENCE. [ss. 10, 27.]

In the [county of] . Petty Sessional Division of [].

Before the Court of Summary Jurisdiction (being a Petty Sessional Court) sitting at

The day of 18 .

A.B. (hereinafter called the defendant) being a child within the meaning of the Summary Jurisdiction Act, 1879, and above the age of seven years, and of sufficient capacity to commit crime, and having been charged for that he on the day of at [state offence].

And the parent [or guardian] of the defendant* having been informed by this Court of his right to have the defendant tried by a jury, and not having objected to the case being* dealt with summarily,† and the Court thinking it expedient so to deal with the case:†

The defendant is this day convicted before this Court of the said offence:

And it is adjudged that he do [or be] for his said offence [Proceed as in other forms of summary conviction. If whipping ordered, insert either in addition to or in substitution for any other punishment.]

And it is adjudged that the defendant, being a male child, be, as soon as practicable, privately whipped with strokes of a birch rod by a constable, in the presence of an inspector, or other officer of police of higher rank than a constable, and also in the presence, if he desires to be present, of the defendant's parent [or guardian].

*† Omit words between asterisks and crosses if the parent or guardian is absent, and substitute for the words between asterisks, "Not having been present at the hearing of the charge, but the Court thinking it expedient that the case be".

14.

SUMMARY CONVICTION (BY CONSENT) OF JUVENILE OFFENDER FOR INDICTABLE OFFENCE. [ss. 11, 27.]

In the [county of] . Petty Sessional Division of [].

Before the Court of Summary Jurisdiction (being a Petty Sessional Court) sitting at

The day of 18 .

A.B. (hereinafter called the defendant) being a young person within the meaning of the Summary Jurisdiction Act, 1879, and

having being charged for that he on the day of at [state offence] and having been informed by the Court of his right to be tried by a jury, and having consented to be dealt with summarily, and the Court thinking it expedient so to deal with the case :

The defendant is this day convicted before this Court of the said offence, and it is adjudged that he do [or be] for his said offence [proceed as in other forms of summary conviction. If whipping ordered, insert either in addition to or in substitution for any other punishment].

And it is adjudged that the defendant, being a male under the age of 14 years, be, as soon as practicable, privately whipped with strokes of a birch rod by a constable, in the presence of an inspector, or other officer of police of higher rank than a constable, and also in the presence, if he desires to be present, of the defendant's parent [or guardian].

15.

SUMMARY CONVICTION (BY CONSENT) OF ADULT FOR INDICTABLE OFFENCE. [ss. 12, 27.]

In the [county of . Petty Sessional Division of]

Before the Court of Summary Jurisdiction (being a Petty Sessional Court) sitting at

The day of 18 .

A.B. (hereinafter called the defendant) having been charged for that he on the day of at [state offence] and having been informed by the Court of his right to be tried by a jury, and having consented to be dealt with summarily, and the Court thinking it expedient so to deal with the case :

The defendant is this day convicted before this Court of the said offence, and it is adjudged that he do [or be] for his said offence [proceed as in ordinary forms of summary conviction].

16.

SUMMARY CONVICTION (ON PLEA OF GUILTY) OF ADULT FOR INDICTABLE OFFENCE. [ss. 13, 27.]

In the [county of . Petty Sessional Division of]

Before the Court of Summary Jurisdiction (being a Petty Sessional Court) sitting at

The day of 18 .

A.B. (hereinafter called the defendant) having been charged for that he on the day of at

[state offence] and having pleaded guilty to the said charge, and the Court being satisfied that the case is one which may properly be dealt with summarily under section 13 of the Summary Jurisdiction Act, 1879 :

The defendant is this day convicted before this Court of the said offence, and it is adjudged that he be for his said offence imprisoned in Her Majesty's prison at and there kept to hard labour [if so adjudged] for the space of

[If costs ordered, proceed as in conviction for fine with costs.]

17.

ORDER OF DISMISSAL OF CHILD DEALT WITH SUMMARILY FOR INDICTABLE OFFENCE. [ss. 10, 27.]

In the [county of . Petty Sessional Division of]

Before the Court of Summary Jurisdiction (being a Petty Sessional Court) sitting at

The day of 18 .

A.B. (hereinafter called the defendant) being a child within the meaning of the Summary Jurisdiction Act, 1879, has been charged on the information of of for that he on the day of [state offence].

And the Court, in exercise of its jurisdiction, has dealt with the case summarily :

And the matter of the said charge having being duly considered by the Court, it manifestly appears to the Court that the said charge is not proved :

Therefore the Court doth hereby dismiss the said information.

And it is ordered that the informant pay to the sum of for costs forthwith [or on the day of 18]

And if default is made [proceed as in conviction for fine to be levied by distress].

18.

ORDER OF DISMISSAL OF YOUNG PERSON OR ADULT DEALT WITH SUMMARILY FOR INDICTABLE OFFENCE. [ss. 11, 12, 27.]

In the [county of . Petty Sessional Division of]

Before the Court of Summary Jurisdiction (being a Petty Sessional Court) sitting at

The day of

A.B. (hereinafter called the defendant) being a young person within the meaning of the Summary Jurisdiction Act, 1879 [or being an adult], having been charged on the information of of for that he on the day of at [state offence] and having been informed by the Court of his right to be tried by a jury, consented to be dealt with summarily, and the Court thought it expedient so to deal with the case :

And the matter of the said charge having been duly considered by the Court, it manifestly appears to the Court that the said charge is not proved :

Therefore the Court doth hereby dismiss the said information :

And it is ordered that the informant pay to the defendant the sum of for costs forthwith, or on the day of ,

And if default is made [*proceed as in conviction for fine to be levied by distress*].

19.

ORDER DISMISSING INFORMATION AND DIRECTING PERSON CHARGED TO PAY DAMAGES. [s. 16 (1).]

In the [county of] . Petty Sessional Division of]

Before the Court of Summary Jurisdiction sitting at

The day of 18 .

A.B. (hereinafter called the defendant) has been charged on the information of C.D. for that he on the day of at [state offence].

And the Court is of opinion that though the said charge is proved the offence was of so trifling a nature that it is inexpedient to inflict any punishment :

Therefore the Court doth hereby dismiss the said information.

[If payment of damages or costs ordered, proceed as follows:]

And it is ordered that the defendant pay to the informant for damages and for costs :

And it is ordered that the said sums be paid forthwith [or on the day of , or by instalments of for every days, the first instalment to be paid forthwith, or on the day of next] :

And if default is made [*proceed as in form of conviction for fine to be levied by distress*].

20.

SUMMARY CONVICTION WHERE PERSON CONVICTED IS DISCHARGED CONDITIONALLY ON GIVING SECURITY TO APPEAR OR TO BE OF GOOD BEHAVIOUR. [s. 16 (2).]

In the [county of] . Petty Sessional Division of]

Before the Court of Summary Jurisdiction sitting at

The day of 18 .

A.B. (hereinafter called the defendant) is this day convicted before this Court for that he on the day of at [state offence] :

But the Court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any punishment [or any other than a nominal punishment], and the defendant having given security to the satisfaction of this Court to appear for sentence when called upon [or to be of good behaviour], he is discharged :

And it is ordered that the defendant pay to the said for damages and for costs [if so ordered] forthwith [or on or before the day of or by instalments of for every days, the first instalment to be paid on or before the day of next].

And if default is made [*proceed as in conviction to be levied by distress*].

21.

WARRANT OF DISTRESS ON CONVICTION FOR FINE WITH OR WITHOUT COSTS OR DAMAGES, OR FOR COSTS OR DAMAGES WITHOUT FINE. [ss. 21, 43.]

In the [county of] . Petty Sessional Division of]

To each and all of the constables of

A.B. (hereinafter called the defendant) was on the day of convicted before the Court of Summary Jurisdiction sitting at for that he [state offence], and it was adjudged that the defendant should for his said offence forfeit and pay* [amount of fine], and should also pay to the said the sum of for compensation and for costs, and it was ordered that the said sums should be paid [etc. as in the conviction], and that if default should be made in payment according to the said adjudication and order, the sum due thereunder should be levied by distress and sale of the defendant's goods :

And default has been made in payment according to the said adjudication and order

* Omit direction as to payment of fine, or compensation, or costs, as the case requires.

Therefore you are hereby commanded to forthwith make distress of the goods of the defendant (except the wearing apparel and bedding of him and his family, and, to the value of five pounds, the tools and implements of his trade); and if within the space of $\frac{1}{2}$ days next after the making of such distress the sum of $\frac{1}{2}$, being the sum stated at the foot of this warrant to be due under the said adjudication and order, together with the reasonable costs and charges of the making and keeping of the said distress, be not paid, then to sell the said goods by you distrained, and pay this money arising therefrom to the clerk of that Court, in order that it may be applied according to law, and that the overplus, if any, may be rendered on demand to the defendant, and if no such distress can be found, to certify the same to that Court, in order that further proceedings may be had according to law.

Dated the $\frac{1}{2}$ day of 18 .
(Signed)
of Her Majesty's Justices of
the Peace for the [county]
of



	£	s.	d.
Amount adjudged			
Paid			
Remaining due			
Costs of issuing this warrant			
Total amount to be levied			

† N.B. The goods are not to be sold until after the end of five clear days next following the day on which they are seized, unless the defendant consents in writing.

22.

WARRANT OF DISTRESS ON AN ORDER FOR THE PAYMENT OF ANY SUM OTHER THAN A CIVIL DEBT. [s. 21.]

In the [county of] . Petty Sessional Division of [] .

On the $\frac{1}{2}$ day of $\frac{1}{2}$ it was adjudged and ordered by the Court of Summary Jurisdiction sitting at that A.B. (hereinafter called the defendant) should pay to $\frac{1}{2}$ the sum of $\frac{1}{2}$ and the sum of $\frac{1}{2}$ for costs [or as the case may be] on or before the $\frac{1}{2}$ day of $\frac{1}{2}$ [or as ordered]; and that if default should be made in payment according to the said adjudication and order, the sum due thereunder should be levied by distress and sale of the defendant's goods :

And default has been made in payment according to the said adjudication and order;

Therefore you are hereby commanded [proceed as in warrant of distress for fine on conviction].

23.

WARRANT OF DISTRESS WHERE THE CHARGE IS DISMISSED, BUT THE PERSON CHARGED IS ORDERED TO PAY DAMAGES OR COSTS, OR BOTH. [s. 16.]

In the [county of] . Petty Sessional Division of [] .

The $\frac{1}{2}$ day of $\frac{1}{2}$ 18 .
A.B. (hereinafter called the defendant) was charged for that he on the $\frac{1}{2}$ day of $\frac{1}{2}$ at $\frac{1}{2}$ [state offence] :

And on the hearing of the said charge on the $\frac{1}{2}$ day of $\frac{1}{2}$ before the Court of Summary Jurisdiction sitting at the Court, being of opinion that though the charge was proved, the offence was in the particular case of so trifling a nature that it was inexpedient to inflict any punishment, dismissed the information, but ordered that the defendant should pay to $\frac{1}{2}$ for damages $\frac{1}{2}$ and $\frac{1}{2}$ for costs $\frac{1}{2}$:

And it was ordered that the said sums should be paid [as in order] :

[Proceed as in warrant of distress on conviction for fine.]

Where no order to pay damages, omit words between asterisks * * .

Where no order to pay costs, omit words between crosses $\frac{1}{2}$ $\frac{1}{2}$.

In either case substitute "sum" for "sums."

24.

WARRANT OF DISTRESS FOR SUM DUE UNDER RECOGNISANCE DECLARED TO BE FORFEITED. [s. 9 (1).]

In the [county of] . Petty Sessional Division of [] .

To each and all of the constables of A.B. was by his recognisance entered into the $\frac{1}{2}$ day of $\frac{1}{2}$ bound in the sum of $\frac{1}{2}$ the condition of the recognisance being that $\frac{1}{2}$ should [state condition of recognisance] :

And default having been made in compliance with the said condition, the said recognisance was on the $\frac{1}{2}$ day of $\frac{1}{2}$ declared by the Court of Summary Jurisdiction sitting at $\frac{1}{2}$ to be forfeited:

And the said $\frac{1}{2}$ has made default in payment of the sum due under the said recognisance :

Therefore you are hereby commanded to forthwith make distress of the goods of the

said except the wearing apparel and bedding of him and his family, and, to the value of five pounds, the tools and implements of his trade, and if within the space of * days next after the making of such distress the sum of , being the sum stated at the foot of this warrant to be due under the said recognisance, together with the reasonable costs and charges of the making and keeping of the said distress, be not paid, then to sell the said goods by you distrained and pay the money arising therefrom to the clerk of that Court, in order that it may be applied according to law, and the surplus, if any, may be rendered on demand to the said , and if no such distress is found, to certify the same to that Court, in order that further proceedings may be had according to law.

Dated the day of 18 .
(Signed)

One of Her Majesty's Justices of the Peace for the [county] of



	£	s.	d.
Amount due under recognisance			
Paid			
Remaining due			
Costs of issuing warrant			
Total amount to be levied			

* N.B.—The goods are not to be sold until after the end of five clear days next following the day on which they are seized, unless the owner consents in writing.

25.

WARRANT OF DISTRESS FOR SUM DUE UNDER RECOGNISANCE ADJUDGED TO BE FORFEITED BY CONVICTION OF PRINCIPAL. [s. 9 (2).]

In the [county of] . Petty Sessional Division of [] .

To each and all of the constables of

A.B. (hereinafter called the defendant) was by his recognisance entered into on the day of bound in the sum of the condition of the recognisance being that should [state condition of recognisance]:

And the said having been convicted of the offence of having [state offence], being an offence which is in law a breach of the said condition, it was on the day of adjudged by the Court of Summary Jurisdiction sitting at that the said recognisance was forfeited, and that the defendant should pay to the clerk of that Court the said sum of and

should also pay to the said sum of for costs.

And it was ordered that the said sum should be paid [as in order], and that if default should be made in payment according to the said adjudication and order, the sum due thereunder should be levied by distress and sale of the defendant's goods:

And default has been made in payment according to the said adjudication and order:

Therefore you are hereby commanded [proceed as in warrant of distress for fine].

26.

WARRANT OF DISTRESS FOR SUM DUE BY A PRINCIPAL IN PURSUANCE OF A FORFEITED SECURITY FOR PAYMENT OF A SUM ADJUDGED BY A CONVICTION. [s. 23 (3).]

In the [county of] . Petty Sessional Division of [] .

A.B. [hereinafter called the defendant] was on the day of convicted before the Court of Summary Jurisdiction sitting at for that he [state offence], and it was adjudged by the conviction of the Court that the defendant should pay [as in conviction]:

And it was thereby ordered that the defendant should be at liberty to give to the satisfaction of the Court [or as in the conviction] security with suret for the payment of the said sum at the time and in the manner by the said conviction directed:

And the defendant and and his sureties undertook that the defendant would pay the said sum at the time and in the manner so directed, and severally acknowledged themselves bound to forfeit and pay to the sum of in case the defendant failed to make payment as so directed:

And it appears to this Court that the sum of due by the defendant in pursuance of the said undertaking has not been paid, and has been forfeited:

And notice of the said forfeiture has been duly served on the defendant:

Therefore you are hereby commanded [proceed as in warrant of distress for fine, substituting for the words "being the sum stated at the foot of this warrant to be due under the said adjudication and order," the words "being the sum stated at the foot of this warrant to be due in pursuance of the said undertaking," and stating the amount at the foot as "amount due in pursuance of undertaking"].

27.

ORDER FOR IMPRISONMENT AND WARRANT OF COMMITMENT WHERE IT APPEARS THAT THERE ARE NO GOODS, OR INSUFFICIENT GOODS, WHEREON TO LEVY DISTRESS, OR THAT DISTRESS WOULD BE MORE INJURIOUS THAN IMPRISONMENT. [s. 21 (3).]

In the [county of] . Petty Sessional Division of]

To each and all of the constables of and to the keeper of Her Majesty's prison at

A.B. (hereinafter called the defendant) was on the day of [or this day] convicted before the Court of Summary Jurisdiction sitting at for that he [etc.] [or on the day of it was adjudged and ordered by the Court of Summary Jurisdiction sitting at that] [state conviction or order, and then proceed as follows:]

And default has been made in payment according to the said adjudication and order:

And on such default application has been made to this Court to issue a warrant of distress in pursuance of the said conviction, but it appears to this Court that the defendant has no goods whereon to levy the said distress [or that in the event of a warrant of distress being issued, the goods of the defendant will be insufficient to satisfy the money payable by him, or that the levy of the said distress will be more injurious to the defendant and his family than imprisonment]:

Therefore it is ordered by this Court that the defendant, on non-payment of the sum due under the said adjudication and order, be imprisoned in Her Majesty's prison at [there to be kept to hard labour] for the space of , unless the said sum, and the costs and charges of his commitment and conveyance to the said prison [if ordered], be sooner paid.

And you are hereby commanded, you the said constables, to take the defendant, and convey him to Her Majesty's prison at and there deliver him to the keeper thereof, together with this warrant; and you the said keeper of the said prison to receive the defendant into your custody in the said prison, there to imprison him [and keep him to hard labour] for the space of , unless the said sum, and the costs and charges of his commitment and conveyance to the said prison [if ordered], be sooner paid.

Dated the day of 18

(Signed)

One of Her Majesty's Justices of the Peace for the [county] of

Seal.

28.

WARRANT OF COMMITMENT PENDING RETURN TO WARRANT OF DISTRESS. [11 & 12 Vict. c. 43. s. 20.]

In the [county of] . Petty Sessional Division of]

To each and all of the constables of and to the keeper of Her Majesty's prison at

A.B. (hereinafter called the defendant) was on the day of [or this day] convicted before the Court of Summary Jurisdiction sitting at for that he [state conviction]:

And default has been made in payment according to the said adjudication and order:

And a warrant of distress has been issued against the defendant in pursuance of the said conviction, but no return has been made thereto:

And the defendant has not given sufficient security to the satisfaction of this Court for his appearance at the time and place appointed for the return of the warrant of distress:

Therefore you are hereby commanded, you the said constables, to take the defendant and convey him to Her Majesty's prison at and there deliver him to the keeper thereof, together with this warrant; and you the said keeper of the said prison to receive the defendant into your custody in the said prison, there to keep and detain him until the day of , being the day appointed for the return of the said warrant of distress, unless he previously enters into a recognisance in the sum of £ with suret in the sum of [each] conditioned for his appearance on that day, and on that day, if such recognisance has not been entered into, to convey and have him before the Court of Summary Jurisdiction at , at the hour of in the noon, to be further dealt with according to law.

(Signed)

of Her Majesty's Justices of the Peace for the [county] of

Seal.

29.

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

In the county of] . Petty Sessional Division of]

To each and all of the constables of and to the keeper of Her Majesty's prison at

C

[*Proceed as in warrant of distress down to commanding part, and close thus:*]

And on the day of 18
a warrant of distress was issued to the constable of commanding him to levy the sum of [*state sum directed to be levied*] by distress and sale of the defendant's goods:

And it now appears, as well by the return of the said constable to the said warrant of distress as otherwise, that he has made diligent search for the defendant's goods, but that no sufficient distress whereon to levy the said sum could be found:

Therefore you are hereby commanded, you the said constables, to take the defendant and convey him to the said prison, and there deliver him to the keeper thereof, together with this warrant; and you the said keeper of the said prison to receive the defendant into your custody in the said prison, there to imprison him [and keep him to hard labour] for the space of unless the said sum, and all the costs and charges of the said distress, and of his commitment and conveyance to the said prison [*if ordered*], be sooner paid.

Dated the day of 18 .
(Signed)

One of Her Majesty's Justices of the Peace for the [county] of

Seal.

30.

WARRANT OF COMMITMENT REDUCING TERM OF IMPRISONMENT ON PART PAYMENT. [s. 21 (4).]

[*Adopt the ordinary form of warrant of commitment, but before the commanding part insert the following:*]

And on application to this Court to issue a warrant to commit the defendant to prison for non-payment of the sum adjudged to be paid by the said conviction [*or order*] [*or for default of sufficient distress*], it appears to this Court that by payment of part of the said sum [*or by the net proceeds of the said distress*], the amount of the sum so adjudged has been reduced to such an extent that the unsatisfied balance, if it had constituted the original amount so adjudged to be paid, would have subjected the defendant to a maximum term of imprisonment less than the term of imprisonment to which he is liable under the said conviction [*or order*]:

Therefore the said term of imprisonment is hereby revoked, and it is hereby ordered that the defendant be imprisoned in the said prison [there to be kept to hard labour] for the space of [*the reduced term*], unless the

said sum and all costs and charges of *the said distress, and of * his commitment and conveyance to the said prison [*if ordered*], be sooner paid.

And you are hereby commanded [*proceed as in ordinary warrant of commitment, inserting reduced term of imprisonment*].

* . . . Omit where there has been no distress.

31.

WARRANT OF COMMITMENT ON A CONVICTION WHERE THE PUNISHMENT IS BY IMPRISONMENT.

In the [county of . Petty Sessional Division of].

To each and all of the constables of , and to the keeper of Her Majesty's prison at

A.B. (hereinafter called the defendant) has been this day convicted before the Court of Summary Jurisdiction sitting at , for that he on the day of 18 , [*state offence as in conviction*].

And it has been adjudged by the Court that the defendant be for his said offence imprisoned in Her Majesty's prison at and there kept to hard labour [*if so ordered*] for the space of

Therefore you are hereby commanded, you the said constables, to take the defendant and convey him to the said prison, and there deliver him to the keeper thereof; together with this warrant, and you the said keeper of the said prison to receive the defendant into your custody in the said prison, and there to imprison him and keep him to hard labour [*if so ordered*] for the space of

Dated the day of 18 .
(Signed)

One of Her Majesty's Justices of the Peace for the [county] of

Seal.

32.

WARRANT OF COMMITMENT WHERE PERSON LIABLE TO SUMMARY CONVICTION DEMANDS TRIAL BY JURY. [s. 17 (1).]

In the [county of . Petty Sessional Division of].

To each and all the constables of and to the keeper of Her Majesty's prison at

A.B. (hereinafter called the defendant) was charged [on oath] for that he on the day of at [*state offence*]:

And the offence with which the defendant was so charged is an offence (not being an assault) for the commission of which the

offender is liable on summary conviction to be imprisoned for a term exceeding three months:

And on the hearing of the charge before the Court of Summary Jurisdiction sitting at on the day of the defendant appeared before the Court and claimed to be tried by a jury:

Therefore you are hereby commanded, you the said constables, to take the defendant and convey him to Her Majesty's prison at and there deliver him to the keeper thereof, together with this warrant; and you the said keeper of the said prison to receive the defendant into your custody in the said prison, and keep him there until he shall be thence delivered in due course of law.

Dated the day of 18 .
(Signed)
of Her Majesty's Justices of
the Peace for the [county]
of



33.

RECOGNISANCE CONDITIONED FOR APPEARANCE OR FOR DOING SOME OTHER THING IN, TO, OR BEFORE, OR IN A PROCEEDING IN, A COURT OF SUMMARY JURISDICTION. [ss. 9 (1), 42.]

The day of 18 .
We the undersigned of and
of

severally acknowledge ourselves to owe to our Sovereign Lady the Queen the several sums following, namely, the said as principal, the sum of and the said and as surety the sum of each, to be levied on our several goods, lands, and tenements if the said fails in the condition hereon indorsed.

Signed (where not taken orally)

A. B.
L. M.
N. O.

Taken [orally] before me the day of 18 .

J.P.

One of Her Majesty's Justices of the Peace for the county of

or

Clerk of the Court of Summary Jurisdiction for the Petty Sessional Division of

or

Superintendent of the police,
or as the case may be.

NOTE.—Where the recognisance is taken orally, omit the words "the undersigned," and insert the word "orally" after "taken."

CONDITION INDORSED.

The condition of the within-written recognisance is such that if the within-bounden appears before the Court of Summary Jurisdiction sitting at on day, the day of , at the hour of in the noon, to answer [further] to the charge made against him by and to be [further] dealt with according to law [or appears before the Court of Summary Jurisdiction sitting at for sentence when called upon, or as the case may be] then the said recognisance shall be void, but otherwise shall remain in full force.

34.

DECLARATION OF FORFEITURE (to be indorsed on recognisance. [ss. 9 (42).])

In the [county of] . Petty Sessional Division of]

Before the Court of Summary Jurisdiction sitting at

The day of 18 .

The said not having appeared * in accordance with the said condition, this Court declares that the within-written recognisance is forfeited.

(Signed)

of Her Majesty's Justices of the Peace for the [county of]

* or as the case may be.

35.

ORDER CANCELLING OR MITIGATING FORFEITURE OF RECOGNISANCE (to be indorsed on recognisance. [s. 9 (1).])

In the county of . Petty Sessional Division of]

Before the Court of Summary Jurisdiction sitting at

A warrant of distress was on the day of issued for levying the sum of declared to be forfeited under the within-written recognisance, but no goods have been sold thereunder:

And the said has applied to this Court to cancel [or mitigate] the forfeiture of the said recognisance, and has given security to the satisfaction of this Court for the future performance of the condition of the said recognisance, and has paid [or given security for payment of] the costs incurred in respect of the forfeiture thereof: [or insert such other condition as the Court may think just]:

formance of this condition, the recognisance was on the day of declared to be forfeited, and the said A.B. not having paid the said sum, a warrant of distress was on the day of issued for recovery thereof, but no goods have been sold under the warrant :

And the said A.B. has applied to the Court of Summary Jurisdiction sitting at to cancel or mitigate the forfeiture:

Now, therefore, I the said A.B., as principal, and we C.D. of and E.F. of [or I C.D. of] as sureties [or surety] hereby undertake that the condition of the said recognisance shall be duly performed [and that the said shall on or before the day of pay the sum of for costs incurred in respect of the said forfeiture] :

And I the said principal and we [or I] the said sureties [or surety] hereby severally acknowledge ourselves bound to forfeit and pay to [the clerk of the Court or other person specified] the sum of in case the said principal fails to perform the condition of the said recognisance.

(Signed) (where not taken orally)

A.B.

C.D.

E.F.

Taken [orally] before me, the day of

(Signed)

One of Her Majesty's Justices of the Peace for the [county] of

39.

NOTICE TO PRINCIPAL OF FORFEITURE OF SECURITY. [s. 23 (3).]

In the [county of]. Petty Sessional Division of

To of

Take notice that you have forfeited the sum of , for which you were bound as principal by your undertaking, entered into the day of 18 , and that unless you pay that sum to at on or before the day of next, a warrant of distress will be issued for the recovery thereof.

Dated the day of

Clerk of the Court of Summary Jurisdiction for the above [Division].

40.

ORDER VARYING ORDER FOR SURETIES. [s. 26.]

In the [county of]. Petty Sessional Division of

Before the Court of Summary Jurisdiction (being a Petty Sessional Court) sitting at

The day of 18

A.B. has been under a warrant of commitment dated the day of and issued by this Court [or the Court of Summary Jurisdiction sitting at] committed to prison for default in finding sureties [or a surety] in the

And on new evidence having been produced to this Court [or on proof of a change of circumstances having been given to this Court] the Court thinks it just to vary in manner hereinafter appearing the order under which the said warrant was issued.

Therefore it is ordered that the amount for which it is proposed that the sureties [or surety] of the said A.B. should be bound be reduced to or that the obligation of the said A.B. to find a surety [or sureties] be dispensed with [or as may be directed].

(Signed)

of Her Majesty's Justices of the Peace for the [county] of

Seal.

41.

ORDER FOR RESTITUTION OF PROPERTY. [s. 27 (3).]

In the [county of]. Petty Sessional Division of

Before the Court of Summary Jurisdiction (being a Petty Sessional Court) sitting at

The day of 18

A.B. was charged before this Court for that he on the day of at [state offence and describe goods as in conviction], and the Court having dealt with the case summarily, the said A.B. has been this day convicted before this Court of the offence with which he was so charged :

And it is proved to this Court that the said goods are now in the possession of of

Therefore it is hereby ordered that the said do forthwith restore the said goods to the said the owner thereof.

(Signed)

of Her Majesty's Justices of the Peace for the [county] of

Seal.

42.

ORDER TO BRING UP APPELLANT IN CUSTODY
TO ENTER INTO RECOGNISANCE FOR APPEAL.
[s. 31 (4).]

In the [county of] . Petty Sessional
Division of]

To the keeper of Her Majesty's prison
at

You are hereby ordered to bring A.B. now
in your custody, before the Court of Sum-
mary Jurisdiction sitting at on
day the day of at the hour
of in the noon, that he may
enter into a recognisance with suret
conditioned to appear and try an appeal from
the conviction [or order] dated the
day of of the Court of Summary
Jurisdiction sitting at and may be
thereupon, if the Court think fit, released
from your custody.

Dated the day of 18 .

(Signed)
of Her Majesty's Justices of
the Peace for the [county]
of

Seal.

43.

NOTICE TO PARENT OR GUARDIAN OF CHILD
CHARGED WITH AN INDICTABLE OFFENCE
BEFORE A COURT OF SUMMARY JURISDICTION. [s. 10 (3).]

In the [county of] . Petty Sessional
Division of]

To of

A.B. has been charged for that he on the
day of at
[state offence], and has been remanded until
the sitting of the Court of Summary Juris-
diction at on the day of
, and it has been alleged that you
are his parent [or guardian], and if you de-
sire that he be tried by a jury, and object to
his case being dealt with summarily, you
must attend at the hearing of the charge
before that Court on that day.

Dated the day of 18 .

(Signed)
of Her Majesty's Justices of the Peace
for the [county] of

44.

DECLARATION OF SERVICE OF SUMMONS OR
OTHER DOCUMENT. [s. 41.]

I of hereby solemnly
declare that I did on the
day of , serve of

with the [warrant, summons, notice, process,
or other document] now shown to me, and
marked A, by delivering a true copy thereof
to him [or by leaving a true copy thereof at
being his last [or most usual]

place of abode].

Taken the day of 18
before me

(Signed)
One of Her Majesty's Justices of the
Peace

or
A Commissioner to administer Oaths
in the Supreme Court of Judicature.

or
Clerk of the Peace for the [county] of
or
Registrar of the County Court at

45.

DECLARATION AS TO HANDWRITING AND SEAL.
[s. 41.]

I of hereby solemnly
declare that the signature to the
document now produced and shown to me,
and marked , is in the proper hand-
writing of of [and that
the seal on the said document is the proper
seal of]

Taken the day of 18
before me

(Signed)
One of Her Majesty's Justices of the
Peace

or
A Commissioner to administer Oaths
in the Supreme Court of Judicature

or
Clerk of the Peace for the [county] of
or
Registrar of the County Court of

46.

CERTIFICATE OF COSTS OF PROSECUTION OF
INDICTABLE OFFENCE DEALT WITH SUM-
MARILY. [s. 28.]

In the [county of] . Petty Sessional
Division of]

Before the Court of Summary Jurisdic-
tion (being a Petty Sessional Court) sitting
at

A.B. having been charged for that he
[state substance of charge], and the above
Court having in pursuance of its statutory
jurisdiction dealt with the case summarily,

and on the _____ day of _____ convicted
the said A.B. [or dismissed the said charge]:

It is hereby certified that the under-men-
tioned persons are for their expenses, trouble,
and loss of time in connection with the said
charge entitled to compensation as follows:—

C.D. (prosecutor). * £ s. d.

E.F. (witness).

. &c. &c.

Total . . . _____

Dated the _____ day of _____ 18 .

(Signed)

of Her Majesty's Justices of the Peace
for the [county of _____]

* Insert the usual particulars.

47.

ACCOUNT OF COSTS AND CHARGES INCURRED IN RESPECT OF THE EXECUTION OF A WAR- RANT OF DISTRESS. [s. 43 (6).]

In the matter of an information [or a com-
plaint] by _____

I _____ of _____ the constable
charged with the execution of the warrant of
distress upon the goods of _____ dated
the _____ day of _____ hereby declare
that the following is a true account of the
costs and charges incurred in respect of the
execution of the said warrant.

£ s. d.

Total . . . _____

PART II.

FORMS APPLICABLE TO PROCEEDINGS FOR THE RECOVERY OF A CIVIL DEBT.

1.

SUMMONS TO APPEAR.

In the [county of _____] . Petty Sessional
Division of _____]
Between _____ Plaintiff,

Address
Description

and

Address Defendant.
Description

To _____ of _____

You are hereby summoned to appear be-
fore the Court. of Summary Jurisdiction

sitting at _____ on _____ day the
day of _____ 187 , at the hour
of _____ in the _____ noon, to answer the
plaintiff to a claim the particulars of which
are hereto annexed.

Dated the _____ day of _____ 18 .

(Signed) J.P.

One of Her Majesty's Jus-
tices of the Peace for the
[county] of _____

Seal.

2.

SUMMONS TO WITNESS.

In the [county of _____] . Petty Sessional
Division of _____].

Between _____

Plaintiff,

Address

Description

and

Defendant.

Address

Description

To _____ of _____

You are hereby required to attend before
the Court of Summary Jurisdiction sitting
at _____ on _____ day the
day of _____ 11 , at the hour of
in the _____ noon, to give evidence in the
above cause on behalf of the [Plaintiff or
Defendant].

Dated the _____ day of _____ 18 .

(Signed)

One of Her Majesty's Jus-
tices of the Peace for the
[county] of _____

Seal.

3.

JUDGMENT FOR PLAINTIFF.

In the [county of _____] . Petty Sessional
Division of _____].

Before the Court of Summary Jurisdiction
sitting at _____

Between _____

Plaintiff,

Address

Description

and

Defendant.

Address

Description

The _____ day of _____ 18 .
It is this day adjudged that the plaintiff
recover against the defendant the sum of
_____ for debt [or damages], and
for costs, amounting together to the sum
of _____

And it is ordered that the defendant pay
the same to the plaintiff forthwith [or on the

day of _____, or by instalments of _____ for every _____ days, the first instalment to be paid forthwith or on the _____ day of 18 [] ; * and if default is made in payment according to this adjudication and order, it is ordered that the sum due thereunder be levied by distress and sale of the defendant's goods.*

(Signed)

of Her Majesty's Justices of the Peace for the [county] of _____

Seal.

* If security accepted substitute for words between asterisks "and it is ordered that the defendant be at liberty to give to the satisfaction of this Court [or of _____] security in the sum of _____ with one surety [or two sureties] in the sum of _____ [each] for the payment of the said sum as above directed."

4.

JUDGMENT FOR DEFENDANT.

In the [county of _____] . Petty Sessional Division of _____.

Before the Court of Summary Jurisdiction sitting at _____

Between _____
Address _____
Description _____

and

Defendant.

Address _____
Description _____

The _____ day of _____ 18 _____

Upon hearing this cause this day it is adjudged that judgment be entered for the defendant, and that the plaintiff pay the sum of _____ l. for the defendant's costs forthwith [or on the _____ day of _____ or by instalments of _____ for every _____ days, the first instalment to be paid forthwith or on the _____ day of _____] ; * and if default is made in payment according to this adjudication and order, it is ordered that the sum due thereunder be levied by distress and sale of the plaintiff's goods.*

(Signed)

of Her Majesty's Justices of the Peace for the [county] of _____

Seal.

* If security is accepted, substitute for words between asterisks "and it is ordered that the plaintiff be at liberty to give to the satisfaction of this Court [or of _____] security in the sum of _____ with two sureties [or with one surety] in the sum of _____ [each] for payment of the said sum as above directed."

5.

JUDGMENT SUMMONS.

In the [county of _____] . Petty Sessional Division of _____
Between _____ Plaintiff,
Address _____
Description _____

and

Defendant.

Address _____

Description _____

The day of _____ 18 _____

To the abovenamed defendant [or plaintiff].

The plaintiff (or) defendant obtained an order against you the abovenamed defendant (or) plaintiff before the Court of Summary Jurisdiction sitting at _____ on the _____ day of _____ 18 _____, for the payment of _____ pounds _____ shillings and _____ pence.

And you have made default in payment of the sum payable in pursuance of the said order.

Therefore you are hereby summoned to appear personally before the Court of Summary Jurisdiction sitting at _____ on _____ day the _____ day of _____

18 _____, at the hour of _____ in the noon, to be examined on oath by the Court touching the means you have or have had since the date of the order to satisfy the sum payable in pursuance of the said order; and also to show cause why you should not be committed to prison for such default.

(Signed)

One of Her Majesty's Justices of the Peace for the [county] of _____

Seal.

Amount of order, and costs _____

£ s. d.

Costs of distress against the goods, if any _____

£ s. d.

Deduct { Paid into Court Instalments which were not required to have been paid before the date of the summons . _____

£ s. d.

Sum payable

Costs of this summons

Amount upon the payment of which no further proceedings will be had until default in payment of next instalment

6.

ORDER OF COMMITMENT.

In the [county of . Petty Sessional
Division of].
Between . Plaintiff,
Address .
Description .
and
Defendant.

Address .
Description .
To each and all of the constables of
and to the keeper of Her Majesty's prison
at

The plaintiff (or) defendant obtained an
order against the defendant (or) plaintiff be-
fore the Court of Summary Jurisdiction
sitting at . on the . day of
18 . for the payment of £ .

And the defendant (or) plaintiff has made
default in payment of . payable in
pursuance of the said order :

And a summons was, at the instance of the
plaintiff (or) defendant duly issued, by which
the defendant (or) plaintiff was required to
appear personally before the Court of Sum-
mary Jurisdiction sitting at . on the
day of 18 . to be examined
on oath touching the means he had then or
had had since the date of the order to satisfy
the sum then due and payable in pursuance of
the order, and to shew cause why he should
not be committed to prison for such de-
fault.

And at the hearing of the said summons
the defendant (or) plaintiff appeared (or) the
summons was proved to have been personally
and duly served, and it has now been proved
that the defendant (or) plaintiff now has (or)
has had since the date of the order the means
to pay the sum then due and payable in pur-
suance of the order, and has refused (or)
neglected (or) then refused or neglected to
pay the same, and the defendant (or) plain-
tiff has shown no cause why he should not be
committed to prison.

Now, therefore, it is ordered that, for such
default, the defendant (or) plaintiff be com-
mitted to prison for . days, unless
he sooner pay the sum stated below as that
on the payment of which he is to be dis-
charged.

And you are hereby required, you the said
constables, to take the defendant (or) plain-
tiff and to deliver him to the keeper of Her
Majesty's prison at . and you the
said keeper to receive the defendant (or)
plaintiff, and keep him safely in the said
prison for . days from the arrest under

VOL. 49.—ORDERS AND RULES.

this order, or until he is sooner discharged
by due course of law.

Dated the . day of 18 .
(Signed)
One of Her Majesty's Jus-
tices of the Peace for the
[county] of



£ s. d.

Total sum payable at the time
of hearing of the judgment-
summons .
Hearing of summons, and cost of
order .

Total sum on payment of which
the prisoner will be discharged

7.

CERTIFICATE FOR DISCHARGE OF A PRISONER
FROM CUSTODY.

In the [county of . Petty Sessional
Division of].
Between A.B. Plaintiff, and C.D. De-
fendant.

To the keeper of Her Majesty's prison
at

I hereby certify that the defendant [or
plaintiff], who was committed to your custody
by virtue of an order of commitment dated
the . day of 18 ., has paid
and satisfied the sum of money for the non-
payment whereof he was so committed, toge-
ther with all costs due and payable by him in
respect thereof, and may in respect of that
order be forthwith discharged out of your
custody.

Dated the . day of 18 .
(Signed)

Clerk of the Court of Summary Juris-
diction for the [Petty Sessional Divi-
sion] of

.8.

DISTRESS WARRANT.

In the [county of . Petty Sessional
Division of].
Between . Plaintiff,
Address .
Description .
and

Defendant,

Address

Description

To each and all the constables of
On the . day of 18 ., it
was adjudged and ordered by the Court of
D

Summary Jurisdiction sitting at that the defendant [or plaintiff] should pay to the plaintiff [or defendant] for debt [or damages], and for costs, making together the sum of ; and it was ordered that the said sum should be paid on the day of [or as in judgment], and that if default should be made in payment according to the said adjudication and order, the sum due thereunder should be levied by distress and sale of the defendant's goods.

And default has been made in payment according to the said adjudication and order.

Therefore you are hereby commanded forthwith to make distress of the goods of the said defendant [or plaintiff] (except the wearing apparel and bedding of him and his family, and, to the value of five pounds, the tools and implements of his trade), and if within the space of * days next after the making of such distress the sum of

being the sum stated at the foot of this warrant to be due under the said adjudication and order, together with the reasonable charges of the making and keeping of the said distress be not paid, then to sell the said goods by you distrained, and pay the money arising thereby to the clerk of that Court, in order that it may be applied according to law, and that the overplus, if any, may be rendered on demand to the said defendant [or plaintiff], and if no such distress can be found to certify the same to that Court, in order that further proceedings may be had according to law.

Dated the day of 18 .

(Signed)
One of Her Majesty's Jus-
tices of the Peace for the
[county] of

Seal.

	£	s.	d.
Amount adjudged . . .			
Paid			
Remaining due			
Costs of issuing this warrant			
Total amount to be levied			

*N.B.—The goods are not to be sold until after the end of five clear days next following the day on which they were seized, unless the defendant otherwise consents in writing.

9.

ORAL OR WRITTEN ACKNOWLEDGMENT OF UNDERTAKING TO PAY CIVIL DEBT.

In the [county of] . Petty Sessional
Division of].
Between Plaintiff,
Address
Description
and Defendant,

Address
Description

It was this day [or on the day of
] adjudged by the Court of Sum-
mary Jurisdiction sitting at that
the plaintiff should recover against the de-
fendant the sum of for debt [or
damages] and for costs, amounting
together to the sum of

And it was ordered that the defendant
should pay the same to the plaintiff forth-
with [or on or before the day of
or by instalments of for

every days, the first instalment to
be paid on the day of],
and that the defendant should be at liberty
to give to the satisfaction of the Court [or
as in judgment] security in the sum of
with suret in the sum of
[each] for the payment of the sum
so ordered to be paid as thereby directed.

Now, therefore, I the defendant, as prin-
cipal, and we C.D. of and E.F. of
as sureties [or I C.D. of as
surety] hereby undertake that the defend-
ant will pay the sum so ordered to be paid
as thereby directed.

And I the said defendant and we [or I]
the said sureties [or surety] hereby severally
acknowledge ourselves bound to forfeit and
pay to the sum of in case
the defendant fails to perform this under-
taking.

(Signed) [where not taken orally]

A.B. Defendant.

C.D. } Sureties.

E.F. }

Taken [orally] before me, the day
of

(Signed)

One of Her Majesty's Justices of the
Peace for the [county] of

PART III.
GENERAL FORMS.

1. REGISTER.

In the [county of *Petty Sessional Division of*]
Register of the Court of Summary Jurisdiction sitting at

Number (1.)	Name of Informant or Com- plainant (2.)	Name of Defendant and Age, if under 16 (3.)	Nature of Offence, or of Matter of Complaint (4.)	Minute of Adjudication (5.)	Justices adjudicating (6.)

2.

Petty Sessional Division of

ACCOUNT of all FINES and FEES, and other Sums of Money Imposed
to the TREASURER for

A transcript to be forwarded to the

**Treasurer forthwith
for the amount**

[illegible]

2.

or Received, showing their Appropriation and the Portions payable
the ending 18 .

at the time prescribed by the proper authority, with a remittance payable to him.

[illegible]

3. REMITTED FEE BOOK.

Date (1.)	Nature of Business (2.)	Amount of Fees (3.)	Reasons for Remission (4.)	Signatures of Justices (5.)

4.
Borough ofCounty of
or Petty Sessional Division of

RETURN of EXCHEQUER FINES, PENALTIES, &c., imposed during the quarter ended 18 .

I certify that the following is a correct statement of all fines and penalties imposed during the quarter above stated at this Court, which are payable either wholly or in part to Her Majesty or the Exchequer, excepting Excise penalties, and also of all Forfeitures, the proceeds of which are similarly payable, the total amount being £

Clerk to the Justices of the Petty Sessional
Division at

Date 18 . (1.)	Name of Person Fined (2.)	Act under which the Fine was Inflicted (3.)	Amount of Fine (4.)	By whom received <i>In cases where the Fine has not been paid, and the person has been com- mitted to prison, state to what prison committed, and date of com- mittal</i> (5.)	If Fine has been already remitted to Exchequer, state to whom sent and Date (6.)	Particulars as to any Forfeiture (7.)	REMARKS (8.)

LAW JOURNAL REPORTS, 1880.

SUPREME COURT OF JUDICATURE.

RULES.

Dated April, 1880.

RULES.

1. These Rules may be cited as the Rules of the Supreme Court, April, 1880, or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Order and Rule mentioned in the margin.

2. These Rules shall come into operation on the sixth day of April, 1880.

ORDER II.

Writs of Summons and Procedure.

3. Order II., Rule 6, is hereby annulled, and no writ shall hereafter be issued under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67).

ORDER V.

Issue of Writs of Summons.

4. Every writ of summons not issued out of a district registry shall be issued out of the Central Office.

ORDER XII.

Appearance.

5. Appearances entered in London shall be entered in the Central Office.

In probate actions notice of appearances entered shall forthwith be given by the Central Office to the Probate Registry.

6. Order XII., Rule 6a of the Rules of the Supreme Court is hereby annulled and the following shall stand in lieu thereof:—

A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing dated on the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

VOL. 49.—ORDERS & RULES.

He shall at the same time deliver to the officer a duplicate of the memorandum, which the officer shall seal with the official seal, showing the date on which it is sealed, and then return to the person entering the appearance, and the duplicate memorandum so sealed shall be a certificate that the appearance was entered on the day indicated by the seal.

A defendant shall, on the day on which he enters an appearance to a writ of summons, give notice of his appearance to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing served in the ordinary way at the address for service, or by prepaid letter directed to that address and posted on the day of entering appearance in due course of post, and shall in either case be accompanied by the sealed duplicate memorandum.

ORDER XVI.

Parties.

7. Notice of a judgment or order pursuant to the Act 15 & 16 Vict. c. 86. s. 42. on an infant or person of unsound mind not so found by inquisition shall be served in the same manner as a writ of summons in an action.

8. In any cause for the administration of the estate of a deceased person, no party to the cause other than the executor or administrator shall, unless by leave of the Judge, be entitled to appear either in Court or in Chambers on the claim of any person not a party to the cause against the estate of the deceased in respect of any debt or liability. The Judge may direct any other party to the cause to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as he shall think fit.

E

ORDER XXXIV.

Questions of Law.

9. The parties to a special case may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, that on the judgment of the Court being given in the affirmative or negative of the question or questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the action, and the judgment of the Court may be entered for the sum so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal.

10. This Order shall apply to every special case stated in an action, or in any proceeding incidental to an action. No special case shall hereafter be stated under the Act 13 & 14 Vict. c. 35.

ORDER XXXV.

Proceedings in District Registries.

11. Where an action proceeds in a district registry, all proceedings relating to the following matters, namely,—

(a.) Leave to issue or renew writs of execution.

(b.) Examination of judgment debtors for garnishee purposes.

(c.) Garnishee orders.

(d.) Charging orders *nisi*.

shall, unless the Court or a Judge otherwise order, be taken in the district registry.

ORDER XXXVII.

Evidence generally.

12. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

13. Every affidavit shall state the description and true place of abode of the deponent.

14. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it

was sworn by both (or all) of the "above-named" deponents.

15. Every affidavit shall be filed in the Central Office. There shall be appended to every affidavit a note showing on whose behalf it is filed.

16. No affidavit having in the jurat or body thereof any interlineations, alteration, or erasure shall without leave of the Court or a Judge be read or made use of in any matter depending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialed in the margin of the affidavit by the officer taking it.

17. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his or her signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a Judge is otherwise satisfied that the affidavit was read over to and apparently perfectly understood by the deponent.

18. In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in Court or in Chambers, who shall send it to the Central Office. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed in the Central Office, and the copy duly authenticated with the seal of that office.

ORDER XLI.

Entry of Judgment.

19. All judgments in the Queen's Bench, Common Pleas, and Exchequer Divisions, shall, if entered in London, be entered in the Central Office.

ORDER XLII.

Execution.

20. Upon any judgment drawn up by the Chancery Registrars for the recovery of a sum of money and costs there may continue to be, at the election of the claimant, either one writ or separate writs of execution for

the recovery of the sum and for the recovery of the costs, but a second writ shall only be for costs and shall be issued not less than eight days after the first writ.

ORDER XLVI.

Charging of Stock or Shares and Distringas.

21. Order XLVI. Rule 2, is hereby annulled, and no writ of distringas shall hereafter be issued under the Act 5 Vict. c. 5. s. 5.

22. In the following rules of this order the expression "Company" includes the Governor and Company of the Bank of England and any other public company, whether incorporated or not, to which 5 Vict. c. 5. s. 5 applies, and the expression "stock" includes shares, securities, and money.

23. Any person claiming to be interested in any stock standing in the books of a Company may, on making an affidavit in or to the effect of the form B. 28 in the schedule hereto, and on filing the same in the Central Office with a notice in or to the effect of the form B. 23 in the same schedule annexed thereto, and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central office, serve the office copy and duplicate notice on the Company.

24. There shall be appended to the affidavit a note stating the person on whose behalf it is filed, and to what address notices (if any) for that person are to be sent. All such notices shall be deemed to have been duly sent if sent through the post by a prepaid letter directed to that person at the address so stated or at any such substituted address as hereinafter mentioned, whether the person to whom the notice is sent is living or not.

25. The address so stated may, from time to time, be altered by the person by or on whose behalf the affidavit is filed, but all notices sent by post before the alteration to the address originally given or for the time being substituted therefor shall not be affected by any subsequent alteration. Any such alteration of address may be made by service of a memorandum thereof on the Company in the manner required for service of a notice under this order.

26. The service of the office copy of the affidavit and of the duplicate of the filed notice shall for the period of five years from the day of service, but not longer (unless the notice is renewed as after mentioned), have the same force and effect as if these Rules had not been made and a writ of distringas in respect of the stock had been duly issued under the Act 5 Vict. c. 5. s. 5.

27. The original notice may be kept on

foot from time to time by a notice of renewal signed by the person by whom or on whose behalf the original notice was given, and served on the Company, provided the notice of renewal, if only one is given, is served before the expiration of five years from the day on which the original notice was served, or, if more than one is given, then before the expiration of five years from the day on which the last previous notice of renewal was served. Each such notice of renewal shall have the effect of continuing and keeping on foot the original notice for the period of five years from the day on which the first notice of renewal or the last previous notice of renewal (as the case may be) was served.

28. A notice filed under this Order may at any time be withdrawn by the person by whom or on whose behalf it was given on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice or by petition duly served by any other person claiming to be interested in the stock sought to be affected by the notice.

29. If, whilst a notice filed under this Order continues in force, the Company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the Company shall not by force or in consequence of the service or of any renewal of the notice, be authorised, without the order of the Court, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request.

30. If the person who files a notice under this Order desires to correct the description of the stock referred to in the filed notice he may file an amended notice and serve on the Company a duplicate thereof sealed with the seal of the Central Office, and in that case the service of the notice shall be deemed to have been made on the day on which the amended duplicate is so served.

ORDER XLVII.

Writs of Subpoena and Sequestration.

31. No subpoena for the payment of costs, and, unless by leave of the Court or a Judge, no sequestration to enforce such payment, shall be issued.

ORDER LII.

Interlocutory Orders as to Mandamus Injunction or Interim Preservation of Property, &c.

32. No writ of injunction shall be issued.

An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction previously had.

ORDER LIV.

Applications at Chambers.

33. The following Rules numbered 34 to 40, both inclusive, shall apply to all applications at Chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions.

34. A summons shall be in the form H 1 in the schedule hereto, with such variations as circumstances require. It shall be addressed to all the persons on whom it is to be served.

35. A summons shall be prepared by the applicant or his solicitor, and shall be sealed in the Central Office, and when so sealed shall be deemed to be issued. The person obtaining a summons shall leave a copy thereof at the Central Office.

36. Unless a Judge otherwise specially directs, summonses for time only shall be returnable at 10:30 in the forenoon, and be heard by the Masters in priority to other business. Unless as aforesaid, other summonses shall be returnable at successive hours, commencing at 11 in the forenoon, and summonses to be attended by counsel shall not be returnable before 2 in the afternoon. In settling the number of summonses returnable at each hour regard shall be had to the nature of the several applications.

37. Each summons, not being a summons for time only, shall, when issued, be entered by the proper officer in a list. The lists of summonses shall distinguish those which a Master has jurisdiction to hear from those which a Master has not jurisdiction to hear, and those which are to be attended by counsel from those which are not to be so attended.

38. The summonses in each list for hearing by a Judge or Master shall be called on in their order. If when a summons is called on neither party appears, the summons shall be passed over until the list for the hour has been gone through. The summonses passed over shall then be called on a second time in their order. If neither party appears to a summons so called on it shall be struck out. If one party only appears such order as seems just may, on an affidavit of service, be made *ex parte*. An affidavit of non-attendance shall not be required or allowed.

39. An order shall be in the form H. 2 in the schedule hereto, with such variations as circumstances require. It shall be sealed and shall be marked with the name of the Judge or Master by whom it is made.

40. Written consents to orders and adjournments shall be filed at the Central Office.

ORDER LV.

Costs.

41. Where a bond is to be given as security for costs, it shall, unless the Court or a Judge otherwise directs, be given to the party or person requiring the security, and not to an officer of the Court.

ORDER LVII.

Time.

42. The time for delivering or amending any pleading may be enlarged by consent in writing, without application to the Court or a Judge.

43. Service of pleadings, notices, summonses, orders, rules and other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any weekday except Saturday shall be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall be deemed to have been effected on the following Monday.

ORDER LIX.

Effect of Non-compliance and Amendment.

44. The Court or a Judge may at any time, and on such terms as to costs or otherwise as to the Court or Judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the purpose of determining the real question or issue raised by or depending on the proceedings.

ORDER LXA.

Central Office.

45. The official seals to be used in the Central Office shall be such as the Lord Chancellor from time to time directs.

All copies, certificates and other documents appearing to be sealed with a seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate or other document.

46. All deeds which by any statute or statutory rule are directed or permitted to be

enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice may be enrolled in the Enrolment Department of the Central Office.

47. The Registrar of Judgments shall not receive any memorandum of a judgment, execution, *lis pendens*, order, rule, annuity, Crown debt, or other incumbrance, or any memorandum of satisfaction relating to the same, for registration, after the hour of two in the afternoon.

48. The Clerk of Enrolments and each of the following Registrars, namely—

The Registrar of Bills of Sale,

The Registrar of Certificates of Acknowledgments of Deeds by Married Women, and

The Registrar of Judgments

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search.

A person shall not inspect nor take any extract from any of these registers or indexes or any document filed in connection therewith, until he has specified in writing to the officer in charge of the register or index the name against which he wishes to search, and has satisfied the officer as to the object of the search.

49. The Masters shall be the Registrar for the purposes of the Bills of Sale Act, 1878, and any one of the Masters may perform all or any of the duties of the Registrar.

50. A memorandum of satisfaction may be ordered to be written upon a registered copy of a bill of sale on a consent to the satisfaction, signed by the person entitled to the benefit of the bill of sale, and verified by affidavit, being produced to the Registrar, and filed in the Central Office.

Where this consent cannot be obtained the Registrar may, on application by summons, and on hearing the person entitled to the benefit of the bill of sale, or on affidavit of service of the summons on that person, and in either case on proof to the satisfaction of the Registrar that the debt (if any) for which the bill of sale was made has been satisfied or discharged, order a memorandum of satisfaction to be written upon a registered copy thereof.

51. No affidavit or record of the Court shall be taken out of the Central Office without the order of a Judge or Master, and no subpoena for the production of any such document shall be issued.

52. Such variations shall be made in the forms prescribed by or under the Supreme Court of Judicature Acts, 1873, 1875, and

1877 as are requisite for giving effect to these Rules.

The additional forms contained in the schedule hereto shall be used in or for the purposes of the Central Office, with such variations as circumstances require.

The Masters may from time to time prescribe the use in or for the purpose of the Central Office of such modified or additional forms as may be deemed expedient.

ORDER LXI.

Sittings and Vacations.

53. The office hours in the several offices of the Supreme Court, other than the Summons and Order, Crown Office, and Associates Departments of the Central Office, shall be from ten in the forenoon to four in the afternoon, except on Saturday and in vacation, when the offices shall close at two in the afternoon. In the excepted departments the hours shall be from eleven in the forenoon to five in the afternoon, except on Saturday and in vacation, when the hours shall be from eleven in the forenoon to three in the afternoon.

ORDER LXII.

Exceptions from the Rules.

54. Order LXII. is hereby annulled, and the following shall stand in lieu thereof.

Subject to the provisions of this Order, nothing in these rules shall affect the procedure or practice in any of the following causes or matters:—

1. Criminal proceedings.

2. Proceedings on the Crown side of the Queen's Bench Division.

3. Proceedings on the Revenue side of the Exchequer Division.

4. Proceedings for Divorce or other Matrimonial Causes.

55. The following rules of the Supreme Court shall, as far as they are applicable, apply to all civil proceedings on the Crown side of the Queen's Bench Division, and to all proceedings on the Revenue side of the Exchequer Division; namely,—

Order LV. (Costs).

Order LVI. (Notices and papers, &c.).

Order LVII. (Time).

Order LVIII. (Appeals).

56. The parties to any Civil proceeding on the Crown side of the Queen's Bench Division, or to any proceeding on the Revenue side of the Exchequer Division, may, at any time after the proceeding is commenced, concur in stating any question or questions of law arising in the proceeding in the form of a special case for the opinion

of the Court, and the provisions of Order XXXIV. shall, as far as they are applicable, apply to any special case so stated, as if it had been stated in an action.

57. The Court or a Judge may at any time, and on such terms as to costs or otherwise as to the Court or Judge may seem just, amend any defect or error in any civil proceeding on the Crown side of the Queen's Bench Division, or in any proceeding on the Revenue side of the Exchequer Division; and all such amendments may be made as may be necessary for the purpose of determining the real question or issue raised by or depending on the proceeding.

58. Non-compliance with any rule of practice or procedure for the time being in force with respect to civil proceedings on the Crown side of the Queen's Bench Division, or to proceedings on the Revenue side of the Exchequer Division, shall not render the proceedings void unless the Court or a Judge so direct; but the proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and on such terms as the Court or Judge may think fit.

59. For the purposes of this Order, proceedings in Mandamus, Quo Warranto, and Prohibition shall be deemed civil proceedings.

ORDER LXIII.

Interpretation of Terms.

60. In these Rules the expression "Central Office" means the Central Office of the Supreme Court of Judicature; and the expression "Master" means a Master of the Supreme Court of Judicature.

In the Supreme Court of Judicature (Officers) Act, 1879, and in Order LX., the expression "Officer of the Supreme Court" shall mean any officer paid wholly or partly out of public money who is attached to the Supreme Court, the High Court of Justice, or the Court of Appeal, or to any Judge of any of those Courts, and is not an officer

attached to the person of a Judge, and removable by him at pleasure.

The term "these Rules," as used in the Rules of the Supreme Court, shall include any Rules made in amendment of or in addition to those Rules.

ORDER LXIV.

Scheme under Railway Companies Act, 1867.

61. Rules 21 to 28, both inclusive, of the Order of Court made under the Railway Companies Act, 1867, are hereby annulled.

62. A scheme under the Railway Companies Act, 1867, shall be enrolled in the Enrolment Department of the Central Office.

63. A scheme under that Act shall not be enrolled unless notice of the order confirming it has at least once in every entire week, reckoned from Sunday morning to Saturday evening, which elapses between the pronouncing of the order and the expiration of thirty days from the pronouncing thereof, been inserted in such two newspapers as shall have been appointed by the Judge for the insertion of advertisements under the order made pursuant to that Act, nor unless the newspapers containing those notices are produced to the proper officer when the scheme is presented for enrolment.

Rules of the Supreme Court.

(Costs.)

64. Order IV. of the additional Rules of the Supreme Court (Costs) is hereby annulled.

65. Rule 22 in the schedule to the additional Rules of the Supreme Court (Costs) is hereby annulled.

The costs of an application to extend the time for taking any proceeding shall, in the absence of an order by a Court or a Judge directing by whom they are to be paid, be in the discretion of the taxing master.

SCHEDULE.

WRITS OF SUMMONS.

A 1a.

ESPECIALLY INDORSED WRIT, Order III.

Rule 6.

In the High Court of Justice.

Between Division 18 No. .
 and Plaintiff,
 Defendant.

Victoria, by the Grace of God of the
 United Kingdom of Great Britain and Ire-
 land, Queen, Defender of the Faith, to
 of

in the of
 We command you, that within eight days
 after the service of this writ on you, inclu-
 sive of the day of such service, you cause
 an appearance to be entered for you in an
 action at the suit of

And take notice, that in default of your so
 doing, the plaintiff may proceed therein,
 and judgment may be given in your absence.

Witness, HUGH MACCALMONT, EARL
 CAIRNS, Lord High Chancellor of Great Bri-
 tain, the day of in the year
 of Our Lord One Thousand Eight Hundred
 and .

N.B.—This writ is to be served within twelve
 calendar months from the date thereof, or, if re-
 newed, within six calendar months from the date
 of the last renewal, including the day of such
 date, and not afterwards.

Appearance is to be entered at the Central
 Office, Royal Courts of Justice, London.

The plaintiff's claim is
 The following are the particulars :—

And the sum of £ , [or such
 sum as may be allowed on taxation], for
 costs. If the amount claimed is paid to
 the plaintiff, or his solicitor or agent ,
 within four days from the service hereof,
 further proceedings will be stayed.

This writ was issued by
 of whose address for service is
 agent for of
 solicitor for the said plaintiff
 who reside at

This writ was served by me at
 on the defendant on the
 day of 18
 Indorsed the day of 18 .
 (Signed)
 (Address)

A 1 b.

WRIT FOR ISSUE FROM DISTRICT REGISTRY.

In the High Court of Justice.

Division 18 No. .
 (MANCHESTER) DISTRICT REGISTRY.

Between . and
 Plaintiff,
 Defendant.

Victoria, by the Grace of God of the
 United Kingdom of Great Britain and Ire-
 land, Queen, Defender of the Faith, to
 of

in the of
 We command you, that within eight days
 after the service of this writ on you, inclu-
 sive of the day of such service, you cause an
 appearance to be entered for you in an ac-
 tion at the suit of And take

notice, that in default of your so doing, the
 plaintiff may proceed therein, and judgment
 may be given in your absence.

Witness, HUGH MACCALMONT, EARL
 CAIRNS, Lord High Chancellor of Great
 Britain, the day of in the year
 of Our Lord One thousand eight hundred
 and

N.B.—This writ is to be served within twelve
 calendar months from the date thereof, or, if re-
 newed, within six calendar months from the date
 of the last renewal, and not afterwards.

A defendant who resides or carries on business
 within the above-named district must enter
 appearance at the office of the registrar of that
 district.*

A defendant who neither resides nor carries on
 business within the said district may enter ap-
 pearance either at the office of the said registrar
 or at the Central Office, Royal Courts of Justice,
 London.

The plaintiff's claim is
 This writ was issued by

* Insert address of office.

whose address for service † is
agent for
of
solicitor for the said plaintiff who reside at

—
This writ was served by me at
on the defendant
on day the day of 18 .
Indorsed the day of 18 .
(Signed)
(Address)

† This address must be within the district.

—
A. 1c.

SPECIALY INDORSED WRIT FOR ISSUE FROM
DISTRICT REGISTRY.

In the High Court of Justice.
Division. 18 No. .
(MANCHESTER) DISTRICT REGISTRY.
Between Plaintiff,
and

Defendant.

Victoria, by the Grace of God of the
United Kingdom of Great Britain and
Ireland Queen, Defender of the Faith, to
of

in the of
We command you, that within eight days
after the service of this writ on you, in-
clusive of the day of such service, you cause
an appearance to be entered for you in an
action at the suit of

And take notice, that in default of your so
doing the plaintiff may proceed therein, and
judgment may be given in your absence.

Witness HUGH MACCALMONT, EARL
CAIRNS, Lord High Chancellor of Great
Britain, the day of in the year of
Our Lord One thousand eight hundred and

—
N.B.—This writ is to be served within twelve
calendar months from the date thereof, or if re-
newed, within six calendar months from the date
of the last renewal, including the day of such date
and not afterwards.

A defendant who resides or carries on business
within the above-named district must enter ap-
pearance at the office of the registrar of that dis-
trict.*

A defendant who neither resides nor carries
on business within the said district may enter
appearance either at the office of the said registrar
or at the Central Office, Royal Courts of Justice,
London.

* Insert address of office.

The plaintiff's claim is
The following are the particulars :—
And the sum of £ , [or such
sum as may be allowed on taxation], for costs.
If the amount claimed is paid to the plaintiff
or h solicitor or agent within four days
from the service hereof, further proceedings
will be stayed.

—
This writ was issued by
of
whose address for service * is
agent for
of
solicitor for the said plaintiff , who re-
side at

—
This writ was served by me at
on the defendant
on the day of 18 .
Indorsed the day of 18 .
(Signed)
(Address)

* This address must be within the district.

—
A 2a.

SPECIALY INDORSED WRIT FOR SERVICE
OUT OF THE JURISDICTION.

In the High Court of Justice.
Division 18 No. .
Between Plaintiff,
and
Defendant.

Victoria, by the Grace of God of the
United Kingdom of Great Britain and
Ireland Queen, Defender of the Faith,
to
of
in the of

We command you, that within *
days after service † of this writ on you,
inclusive of the day of such service, you
cause an appearance to be entered for you in
an action at the suit of
And take notice, that in default of your so
doing the plaintiff may proceed therein, and
judgment may be given in your absence.

Witness, HUGH MACCALMONT, EARL
CAIRNS, Lord High Chancellor of Great

* Insert number of days directed by Court or
Judge.

† If notice of the writ is to be served, insert
here "of notice."

Britain, the day of , in the year
of Our Lord One thousand eight hundred
and .

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

Appearance is to be entered at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is

The following are the particulars :—

And £ [or such sum as may be
allowed on taxation] for costs. If the amount
claimed is paid to the plaintiff or his solicitor
or agent within * days from service †
hereof, further proceedings will be stayed.

* Insert number of days limited for appearance.

† If notice to be served, insert here "of notice."

This writ was issued by
of
whose address for service is
agent for
of
solicitor for the said plaintiff, who re-
side at

This writ [or notice of this writ] was served
by me at
on the defendant

on the day of 18 .
Indorsed the day of 18 .
(Signed)
(Address)

N.B.—This writ is to be used where the defendant, or all the defendants, or one or more defendant or defendants, is or are out of the jurisdiction. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ and not the writ itself is to be served upon him.

A. 2b.

WRIT FROM DISTRICT REGISTRY FOR SERVICE
OUT OF THE JURISDICTION.

In the High Court of Justice.

Division 18 No.

(MANCHESTER) DISTRICT REGISTRY.

Between Plaintiff,
and
Defendant.

VOL. 49.—ORDERS AND RULES.

Victoria, by the Grace of God of the
United Kingdom of Great Britain and Ire-
land, Queen, Defender of the Faith, to
of

We command you, that within *
days after service of † this writ on you, in-
clusive of the day of such service, you cause
an appearance to be entered for you in an
action at the suit of

And take notice, that in default of your so
doing the plaintiff may proceed therein,
and judgment may be given in your absence.

Witness, HUGH MACCALMONT, EARL
CAIRNS, Lord High Chancellor of Great
Britain, the day of in the year
of Our Lord One thousand eight hundred
and

* Insert number of days directed by Court or
Judge.

† If notice of writ is to be served, insert here,
"notice of."

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

A defendant who resides or carries on business within the above-named district, must enter appearance at the office of the registrar of that district.*

A defendant who neither resides nor carries on business within the said district may enter appearance either at the office of the said registrar or at the Central Office, Royal Courts of Justice, London.

* Insert address of office.

The plaintiff's claim is

This writ was issued by
of
whose address for service * is
agent for
solicitor for the said plaintiff who re-
side at

* This address must be within the district.

This writ [or notice of this writ] was served
by me at
on the defendant

on the day of 18 .
Indorsed the day of 18 .
(Signed)
(Address)

N.B.—This writ is to be used where the defendant, or all the defendants, or one or more defen-

f

dant or defendants, is or are out of the jurisdiction. Where the defendant to be served is not a British subject, and is not in British dominions, notice of the writ and not the writ itself is to be served upon him.

A. 2c.

SPECIALLY INDORSED WRIT FROM DISTRICT
REGISTRY FOR SERVICE OUT OF THE JURIS-
DICTION.

In the High Court of Justice.

Division

18

No.

(MANCHESTER) DISTRICT REGISTRY

Between

Plaintiff,

and

Defendants.

Victoria, by the Grace of God of the
United Kingdom of Great Britain and
Ireland Queen, Defender of the Faith, to
of
in the of

We command you, that within * days
after service of † this writ on you, inclusive
of the day of such service, you cause an
appearance to be entered for you in an
action at the suit of

And take notice, that in default of your so
doing the plaintiff may proceed therein, and
judgment may be given in your absence.

Witness, HUGH MACCORMACK, EARL
CAIRNS, Lord High Chancellor of Great
Britain, the day of in the year of
Our Lord One thousand eight hundred
and

* Insert number of days directed by Court or
Judge.

† If notice of writ is to be served, insert here,
"notice of."

N.B.—This writ is to be served within twelve
calendar months from the date thereof, or if re-
newed, within six calendar months from the date
of the last renewal, including the day of such
date, and not afterwards.

A defendant who resides or carries on business
within the above-named district must enter ap-
pearance at the office of the registrar of that dis-
trict.*

A defendant who neither resides nor carries on
business within the said district may enter ap-
pearance either at the office of the said registrar
or at the Central Office, Royal Courts of Justice,
London.

* Insert address of office.

The plaintiff's claim is

The following are the particulars: —

and £ , [or such sum as may be
allowed on taxation] for costs. If the amount
claimed be paid to the plaintiff or his soli-
citor or agent within days from
service † hereof, further proceedings will be
stayed.

* Insert number of days limited for appear-
ance.

† If notice of writ is to be served, insert here,
"of notice."

This writ was issued by

of
whose address for service * is
agent for
of
solicitor for the said plaintiff , who reside
at

* This address must be within the district.

This writ [or notice of this writ] was served
by me at

on the defendant

on the day of 18 .
Indorsed the day of 18 .

(Signed)
(Address)

N.B.—This writ is to be used where the defen-
dant or all the defendants, or one or more defen-
dant or defendants, is or are out of the jurisdiction.
Where the person to be served is not a British
subject, and is not in British dominions, notice of
the writ and not the writ itself is to be served
upon him.

A. 3a.

NOTICE OF WRIT IN LIEU OF SERVICE TO BE
GIVEN OUT OF THE JURISDICTION.

(DISTRICT REGISTRY FORM.)

In the High Court of Justice.

Division.

18

No.

(MANCHESTER) DISTRICT REGISTRY.

Between

Plaintiff,

and

Defendant.

To

of

Take notice, that of
has commenced an action against you
in the Division of Her Majesty's
High Court of Justice in England, by writ

of that Court, dated the day of
18 , which writ is indorsed as follows :—

And you are hereby required within
days after the receipt of this notice, inclusive
of the day of such receipt, to defend this
action by causing an appearance to be entered
for you thereto, and in default of your
so doing the said
may proceed therein, and judgment may be
given in your absence.

If you reside or carry on business within
the above-named district, appearance is to be
entered at the office of the registrar for that
district.*

If you do not either reside or carry on
business within that district, appearance is to
be entered either at the office of the said
registrar or at the Central Office, Royal
Courts of Justice, London.

(Signed)

This notice was served by me at
on the defendant

on the day of 18
Indorsed the day of 18 .

(Signed)
(Address)

N.B.—This notice is to be used where the person
to be served is not a British subject, and is
not in British dominions.

* Insert address of office.

A. 4b.

WRIT IN ADMIRALTY ACTIONS FOR ISSUE FROM DISTRICT REGISTRY.

In the High Court of Justice.

Division, 18 No.

(*MANCHESTER*) DISTRICT REGISTRY.

Between Plaintiff,

and
The Owners of the Defendants.

Victoria, by the Grace of God of the
United Kingdom of Great Britain and Ire-
land Queen, Defender of the Faith, to the
owners and parties interested in the ship or
vessel
of the port of

and

We command you, that within eight days
after the service of this writ, inclusive of the
day of such service, you cause an appearance
to be entered for you in an action at the suit
of

And take notice, that in default of your

so doing the plaintiff may proceed therein,
and judgment may be given in your absence.

Witness, HUGH MACCALMONT, EARL
CAIRNS, Lord High Chancellor of Great
Britain, this day of in the year
of Our Lord One Thousand Eight Hundred
and .

N.B.—This writ is to be served within twelve
calendar months from the date thereof, or if re-
newed, within six calendar months from the date
of the last renewal, including the day of such
date, and not afterwards.

A defendant who resides or carries on business
within the above-named district must enter ap-
pearance at the office of the registrar of that dis-
trict.*

A defendant who neither resides nor carries on
business within the said district may enter ap-
pearance either at the office of the said registrar
or at the Central Office, Royal Courts of Justice,
London.

* Insert address of office.

The plaintiff's claim is for
This writ was issued by

of
whose address for service* is

agent for

of

solicitor for the said plaintiff who reside
at

* This address must be within this district.

This writ was served by me *

on the day of 18 .
Indorsed the day of 18 .

(Signed)
(Address)

* State mode of service.

NOTICES.

B. 10a.

NOTICE TO PRODUCE (GENERAL FORM).

In the High Court of Justice.

Division. 18 No.
Between Plaintiff,

and

Defendant.

Take notice, that you are hereby required
to produce and show to the Court on the
trial of this action all books, papers, letters,
copies of letters, and other writings and do-

3. I was present and saw the said duly execute the said bill of sale on the said day of 18

4. The said resides at [state residence at time of swearing affidavit] and is [state occupation]

5. The name subscribed to the said bill of sale as that of the witness attesting the due execution thereof is in the proper handwriting of me this deponent.

6. I am a solicitor of the Supreme Court, and reside at

7. Before the execution of the said bill of sale by the said I fully explained to the nature and effect thereof
Sworn at the day of 18 {

Before me,
This affidavit is filed on behalf of

B. 26.

AFFIDAVIT IN SUPPORT OF GARNISHEE ORDER.

In the High Court of Justice.

Division. 18 No.

Between

Judgment Creditor.
and
Judgment Debtor.

I,
of the above-named judgment creditor [or solicitor for the above-named judgment creditor] make oath and say as follows:—

1. By a judgment of the Court given in this action, and dated the day of 18, it was adjudged that I [or the above-named judgment creditor] should recover against the above-named judgment debtor the sum of £, and costs to be taxed, and the said costs were by a master's certificate dated the day of 18 allowed at £

2. The said still remains unsatisfied to the extent of and interest amounting to £

3. * is indebted to the judgment debtor in the sum of £ or thereabouts.

4. The said is within the jurisdiction of this Court.

Sworn at the day of 18 {

Before me,
This affidavit is filed on behalf of the

* Name, address, and description of garnishee.

B. 27.

AFFIDAVIT ON INTERPLEADER.

In the High Court of Justice.

Division. 18 No.

Between Plaintiff,

and

Defendant.

I
of the defendant in the above action make oath and say as follows:—

1. The writ of summons herein was issued on the day of 18, and was served on me on the day of 18. I have not yet delivered a statement of defence herein.

2. The action is brought to recover The said * in my possession, but I claim no interest therein.

3. The right to the said subject matter of this action has been and is claimed † by one who ‡

4. I do not in any manner collude with the said or with the above-named plaintiff, but I am ready to bring into Court or to pay or dispose of the said in such manner as the Court may order or direct.

Sworn at the day of 18

Before me,
This affidavit is filed on behalf of the

* "Is" or "are."

† If claim in writing make the writing an exhibit.

‡ State expectation of suit, or that he has already sued.

B. 28.

AFFIDAVIT AS TO STOCK UNDER ORDER XLVI.

In the matter of [here state the nature of the document comprising the stock, and add the date and other particulars, so far as known to the deponent, sufficiently to identify the document];

and

In the matter of the Act of Parliament, 5 Vict. c. 5.

I of make oath and say that according to the best of my knowledge, information and belief, I am [or if the affidavit is made by the solicitor, A.B. of is] beneficially interested in the stock comprised in the [settlement, will, &c.] above mentioned, which stock, according to the best of my knowledge and belief,

now consists of the stock specified in the notice hereto annexed.

This affidavit is filed on behalf of A.B., whose address is [state address for service.]

JUDGMENTS.

D. 6a.

JUDGMENT AFTER TRIAL OF QUESTIONS OF ACCOUNT BY REFEREE.

In the High Court of Justice.

Division. 18 No.
Between Plaintiff,
and Defendant.

The day of 18

The questions of account in this action having been referred to and he having found that there is due from the to the sum of £ and directed that the do pay the costs of the reference

It is this day adjudged that the recover against the said £ and costs to be taxed.

The above costs have been taxed and allowed at £, as appears by a Master's Certificate dated the day of 18.

D. 8.

INTERLOCUTORY JUDGMENT IN DEFAULT OF APPEARANCE OR DEFENCE WHERE DEMAND UNLIQUIDATED.

In the High Court of Justice.

Division. 18 No.
Between Plaintiff,
and Defendant.

The day of 18 No*

herein.

It is this day adjudged that the plaintiff recover against the defendant† to be assessed.

* "Appearance having been entered to the writ of summons" or "statement of defence or demurrer having been delivered by the defendant."

† "The value of the goods," or "damages," or both, as the case may be.

D. 9.

JUDGMENT AFTER APPEARANCE AND ORDER UNDER ORDER XIV., Rule 1a.

In the High Court of Justice.

Division. 18 No.
Between Plaintiff,
and Defendant.

The day of 18

The defendant having appeared to the writ of summons herein, and the plaintiff having by the order of , dated the day of 18, obtained leave to sign judgment under the Rules of the Supreme Court, Order XIV., Rule 1a, for* It is this day adjudged that the plaintiff recover against the defendant £ and costs to be taxed.

* Recite order.

The above costs have been taxed and allowed at £, as appears by a Master's Certificate dated the day of 18.

D. 10.

JUDGMENT AFTER TRIAL BY COURT WITHOUT JURY.

In the High Court of Justice.

Division. 18 No.
Between Plaintiff,
and Defendant,

This action having on the day of 18 been tried before and the said on the day of 18 having ordered that judgment be entered for the for £

It is this day adjudged that the recover from the £ and costs to be taxed.

The above costs have been taxed and allowed at £, as appears by a Master's Certificate dated the day of 18. Judgment entered the day of 18.

D. 11.

JUDGMENT IN PURSUANCE OF ORDER.

In the High Court of Justice
Division. 18

Between

No. Plaintiff,
and
Defendant.

Pursuant to the Order of dated
18

whereby it was ordered
and default having been made

It is this day adjudged that the plaintiff
recover against the said defendant £
and costs to be taxed.

The above costs have been taxed and
allowed at £ , as appears by a Master's
Certificate dated the day of 18 .

D. 12.

JUDGMENT ON CERTIFICATE OF REGISTRAR
OF COUNTY COURT.

In the High Court of Justice.
Division. 18

Between

No. Plaintiff,
and
Defendant.

The day of 18

This action having been ordered under
section 26 of the County Court Act, 1856
(19 & 20 Vict. c. 108), to be tried in the
County Court of and the
Registrar of that Court having certified that
the result was

It is this day adjudged that recover
against £ and costs to be taxed.

The above costs have been taxed and
allowed at £ , as appears by a Master's
Certificate dated the day of 18 .

D. 13.

JUDGMENT FOR DEFENDANT'S COSTS ON
DISCONTINUANCE.

In the High Court of Justice
Division 18

Between

No. Plaintiff,
and
Defendant.

The day of 18 .

The plaintiff having by a notice in writing
dated the day of 18 ,

It is this day adjudged that the defendant
recover against the plaintiff costs to be taxed.

* " Wholly discontinued this action " or " with-
drawn his claim in this action for " or " withdrawn
so much of his claim in this action as relates to "
— or as the case may be.

The above costs have been taxed and
allowed at £ , as appears by a Master's
Certificate dated the day of 18 .

D. 14.

JUDGMENT FOR PLAINTIFF'S COSTS AFTER
CONFESSION OF DEFENCE.

In the High Court of Justice.

Division. 18

Between

No. Plaintiff,
and
Defendant.

The day of 18

The defendant in his statement of defence
herein having alleged a ground of defence
which arose after the commencement of this
action, and the plaintiff having on the
day of 18 delivered a confes-
sion of that defence,

It is this day adjudged that the plaintiff re-
cover against the defendant costs to be taxed.

The above costs have been taxed and
allowed at £ , as appears by a Master's
Certificate dated the day of 18 .

D. 15.

JUDGMENT FOR COSTS AFTER ACCEPTANCE
OF MONEY PAID INTO COURT.

In the High Court of Justice.

Division. 18

Between

No. Plaintiff,
and
Defendant.

The day of 18

The defendant having paid into Court in
this action the sum of £ in satisfaction
of the plaintiff's claim, and the plaintiff
having by his notice dated the day of
18 , accepted that sum in satis-
faction of his entire cause of action, and the
plaintiff's costs herein having been taxed,
and the defendant not having paid the same

within forty-eight hours after the said taxation ;

It is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at £ , as appears by a Master's Certificate dated the day of 18 .

D. 16.

JUDGMENT WHERE NO JUDGMENT ENTERED AT TRIAL BY JURY.

In the High Court of Justice.

Between Division. 18 No. Plaintiff,

and

Defendant.

*The day of 18 .
This action having on the 18
been tried before
and a jury of the of
and the jury having found
and the not having thought fit
to order any judgment to be entered,
Now on motion before the Court for judgment on behalf of the ,
the Court having

It is this day adjudged that the recover against the the sum
of £ and costs to be taxed.

* Date of Order of Court.

The above costs have been taxed and allowed at £ , as appears by a Master's Certificate dated the day of 18 .
Judgment entered the day of 18 .

D. 17.

JUDGMENT AFTER MOTION ON LEAVE RESERVED.

In the High Court of Justice

Between Division. 18 No. Plaintiff,

and

Defendant.

*The day of 18 .
This action having on the 18
been tried before
and a jury of the of
and the jury having found

* Date of Order of Court.

VOL. 49.—ORDERS AND RULES.

and having ordered that judgment be entered for

subject to leave to the to move
to set aside the judgment

Now on motion before the Court for judgment on behalf of the
the Court having

It is this day adjudged that the said judgment †

† "do stand" or "be set aside and that the recover against the the sum
of £ and costs to be taxed."

The above costs have been taxed and allowed at £ , as appears by a Master's Certificate dated the day of 18 .

Judgment entered the day of 18 .

D. 18.

JUDGMENT ON MOTION AFTER TRIAL OF ISSUE.

In the High Court of Justice.

Between Division. 18 No. Plaintiff,

and

Defendant.

*The day of 18 .
†The of fact arising in this
action by the order dated the day of
ordered to be tried before
having on the day of been
tried before , and the
having found , Now on motion
before the Court for judgment on behalf of the , the Court having
It is this day adjudged that the recover against the the sum
of £ and costs to be taxed.

* Date of Order of Court.

† "Issues" or "questions."

The above costs have been taxed and allowed at £ , as appears by a Master's Certificate dated the day of 18 .
Judgment entered the day of 18 .

D. 19.

JUDGMENT ON MOTION GENERALLY.

In the High Court of Justice.

Between Division. 18 No. Plaintiff,

and

Defendant.

G

‡ The day of 18 .
 This action having on the day of
 18 come on before the Court
 on motion for judgment on behalf of the
 , and the Court after hearing
 counsel for the
 having ordered that §

It is this day adjudged that the
 recover against the the sum of £
 and costs to be taxed.

‡ Date of Order of Court.

§ As in Order of Court.

The above costs have been taxed and
 allowed at £ , as appears by a Master's
 Certificate dated the day of 18 .
 Judgment entered the day of
 18 .

PRÆCIPES.

E. 10.

DISTRINGAS AGAINST EX-SHERIFF.

In the High Court of Justice.
 Division. 18 No.
 Between Plaintiff,
 and Defendant.

Seal a writ of distringas *nuper vicecomitem*
quod venditioni exponat, directed to the
 sheriff of , to sell the goods and
 of

 , taken under a writ of *feri*
facias in this action tested the
 day of 18 .

Dated the day of 18

(Signed)

(Address)

Solicitor for the

E. 11.

INQUIRY.

In the High Court of Justice.
 Division. 18 No.
 Between Plaintiff,
 and Defendant.

Seal a writ of inquiry directed to the
 sheriff of to assess the damages in
 this action.

Judgment dated

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

E. 12.

CERTIORARI.

In the High Court of Justice.
 Division. 18 No.
 Between Plaintiff,
 and Defendant.

Seal in pursuance of order dated
 a writ of *certiorari* directed to
 Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

E. 13.

PROHIBITION.

In the High Court of Justice.
 Division. 18 No.
 In the matter of a certain now de-
 pending in the Court. Plaintiff,
 Between and Defendant.

Seal a writ of prohibition directed to the
 Judge of the above-named Court and to the
 above-named plaintiff to prohibit them from
 further proceeding in the said

18

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

E. 14.

MANDAMUS.

In the High Court of Justice.
 Division 18 No.
 Between Plaintiff,
 and Defendant.

Seal in pursuance of order dated
 a writ of *mandamus* directed to
 commanding to ,
 returnable

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

E. 15.

HABEAS CORPUS AD TESTIFICANDUM.

In the High Court of Justice.

Division. 18

No.

Between

Plaintiff,

and

Defendant.

Seal in pursuance of order dated
a writ of habeas corpus *ad testificandum*
directed to the to bring
before

Dated the day of 18

(Signed)

(Address)

Solicitor for the

E. 18.

AMENDED SUMMONS.

In the High Court of Justice.

Division. 18

No.

Between

Plaintiff,

and

Defendant.

Amend in pursuance of order [or fiat]
dated the writ of summons in
this action by *

Dated the day of 18

(Signed)

(Address)

Solicitor for the

* Set out amendments when required.

E. 16.

COMMISSION TO EXAMINE WITNESSES.

In the High Court of Justice.

Division 18

No.

Between

Plaintiff,

and

Defendant.

Seal in pursuance of order dated
a writ in the nature of a mandamus or
commission to examine witnesses directed
to

Dated the day of 18

(Signed)

(Address)

Solicitor for the

E. 19.

RENEWED SUMMONS.

In the High Court of Justice.

Division. 18

No.

Between

Plaintiff,

and

Defendant.

Seal in pursuance of order dated
a renewed writ of summons in this action,
indorsed as follows

Dated the day of 18

(Signed)

(Address)

Solicitor for the

E. 17.

COMMISSION OF PARTITION.

In the High Court of Justice.

Division 18

No.

Between

Plaintiff

and

Defendant.

Seal in pursuance of order dated
a commission of partition directed to
Returnable

Dated the day of 18

(Signed)

(Address)

Solicitor for the

E. 20.

SUBPENA.

In the High Court of Justice.

Division. 18

No.

Between

Plaintiff,

and

Defendant.

Seal writ of subpoena
on behalf of the
directed to
returnable

Dated the day of 18

(Signed)

(Address)

Solicitor for the

E. 21.

ENTRY OF APPEARANCE.

In the High Court of Justice.

Division. 18

Between

and

No. Plaintiff,

Defendant.

Enter an appearance for

Dated the day of 18 .

(Signed)

of *

Agent for

of

The said defendant require a statement of claim to be delivered.

* If this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.

E. 22.

ENTRY OF APPEARANCE LIMITING DEFENCE.

In the High Court of Justice.

Division. 18

Between

and

No. Plaintiff,

Defendant.

Enter an appearance for the defendant in this action. The said defendant limits his defence to part only of the property mentioned in the writ of summons, namely, to

The address of is

Dated the day of 18 .

(Signed)

of *

Agent for

of

The said defendant require a statement of claim to be delivered.

* If this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.

E. 23.

ENTRY OF APPEARANCE, Order L., Rule 4.

In the High Court of Justice.

Division. 18

Between

and

No. Plaintiff,

Defendant,

Enter an appearance for , who has been served with an order dated the

day of to carry on and prosecute the proceedings in this action.

Dated the day of 18 .

(Signed)

of *

Agent for

of

* If this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.

E. 24.

ENTRY OF APPEARANCE, Order XVI.

Rule 18.

In the High Court of Justice.

Division. 18

Between

and

No. Plaintiff,

Defendant.

Enter an appearance for to the notice issued in this action on the day of 18 by the defendant under the Rules of the Supreme Court, Order XVI. Rule 18.

Dated the day of 18

(Signed)

of *

Agent for

of

The said defendant require a statement of claim to be delivered.

* If this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.

E. 25.

ENTRY OF APPEARANCE TO COUNTER-CLAIM.

In the High Court of Justice.

Division. 18

Between

and

No. Plaintiff,

Defendant.

Enter an appearance for to the counter-claim of the above-named defendant in this action.

Dated the day of 18

(Signed)

of †

Agent for

of

† If this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.

E. 26.

ENTRY OF ACTION FOR TRIAL.

In the High Court of Justice.
Division.

Between

and

18 No.
Plaintiff,

Defendant.

Enter this action for trial.

Dated the day of 18

(Signed)
(Address)

E. 27.

ENTRY OF APPEAL.

In the High Court of Justice.
Division.

Between

and

18 No.
Plaintiff,

Defendant.

Enter this appeal from the order [or judgment] of dated the day of 18

(Signed)
(Address)

E. 28.

ENTRY OF DEMURRER FOR ARGUMENT.

In the High Court of Justice.
Division.

Between

and

18 No.
Plaintiff,

Defendant.

Enter for argument the demurrer of in this action.

Dated the day of 18

(Signed)
(Address)

E. 29.

ENTRY FOR ARGUMENT GENERALLY.

In the High Court of Justice.
Division.

Between

and

18 No.
Plaintiff,

Defendant.

Set down for argument the

Dated the day of 18

(Signed)
(Address)

E. 30.

ENTRY OF SPECIAL CASE.

In the High Court of Justice.
Division.

Between

and

18 No.
Plaintiff.

Defendant.

Set down the dated the day of 18 of Mr. the referee in this for hearing as a special case.

Dated the day of 18
(Signed)
(Address)

E. 31.

MEMORANDUM OF SERVICE OF NOTICE OF JUDGMENT.

In the High Court of Justice.

Division.

Between

and

18 No.
Plaintiff,

Defendant.

Enter memorandum of service of notice of judgment made in this action, and dated the day of 18, on the under-mentioned persons, viz. :-

Name of Party served	Date of Service

Dated the day of 18

(Signed)
(Address)

E. 32.

SEARCH.

In the High Court of Justice.
Division.

18 No.

v.

Search for

Dated the day of 18

(Signed)
(Address)

Agent for
Solicitor for

WRITS.

F. 1a.

FIERI FACIAS ON ORDER FOR COSTS.

In the High Court of Justice.

Division.

18 No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the sheriff of greeting: We command you, that of the goods and chattels of in your bailiwick you cause to be made the sum of for certain costs which by an order of Our High Court of Justice, dated the day of 18 were ordered to be paid by the said to and which have been taxed and allowed at the said sum, and interest on the said sum at the rate of £4 per centum per annum from the day of 18, and that you have the said sum and interest before us in our said Court, immediately after the execution hereof, to be rendered to the said And in what manner you shall have executed this our writ make appear to us immediately after the execution hereof. And have there then this writ.

Witness, HUGH MACCARMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of 18 Levy £ and £ for costs of execution, &c., and also interest on £ at 4l. per centum per annum from the day of 18, until payment; besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

This writ was issued by of agent for of solicitor for the

The is a and resides at in your bailiwick.

F. 11.

DELIVERY OR ASSESSED VALUE.

In the High Court of Justice.

Division.

18

No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the sheriff of

greeting.

We command you that without delay you cause to be returned to the following chattels, namely * which the said

lately +

in an action in our High Court of Justice.

And we further command you that if the said chattels cannot be found in your bailiwick, then of the goods and chattels of the said in your bailiwick you cause to be made £ †. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof. And have there then this writ.

Witness, HUGH MACCARMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

If the chattels cannot be found in your bailiwick, levy £ the assessed value thereof, and interest thereon at 4l. per centum per annum, from the day of 18 until payment, besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

* Enumerate chattels recovered by judgment for the return of which execution has been ordered to issue.

† "Recovered against" or "was ordered to deliver to the said."

‡ The assessed value of the chattels.

This writ was issued by of agent for of solicitor to the who reside at

The defendant is a and reside at in your bailiwick.

F. 12.

DISTINGAS AGAINST EX-SHERIFF.

In the High Court of Justice.

Division.

18

No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ire-

land, Queen, Defender of the Faith, to the sheriff of

greeting.

We command you that you distrain late sheriff of your county aforesaid by all his land and chattels in your bailiwick, so that neither he nor anyone by him do lay hands on the same until you shall have another command from us in that behalf, and that you answer to us for the issues of the same, so that the said expose for sale and sell or cause to be sold for the best price that can be gotten for the same, those goods and chattels which were of in your bailiwick, to the value of £

the sum of £ which lately before us in Our High Court of Justice in a certain action wherein plaintiff and defendant, by a † of our said Court bearing date the day of , was †

to be paid by the said to the said , and of the sum of £ , the amount at which the costs in the said † mentioned have been taxed and allowed, and of interest on the said sum of £ at the rate of 4l. per centum per annum from the day of , and on the said sum of £ at the same rate from the day of , which goods and chattels he lately took by virtue of our writ, and which remain in his hands for want of buyers, as the said late sheriff hath lately returned to us in our said Court. And have the money arising from such sale before us in our said Court immediately after the execution hereof, to be paid to the said . And have there then this writ.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

* "The amount of," or "part of."

† "Judgment," or "order."

‡ "Adjudged," or "ordered."

This writ was issued by of agent for of solicitor for the at who reside at

The defendant is a and resides at in your bailiwick.

F. 13.

Fieri Facias on Judgment Removed from LORD MAYOR'S COURT.

In the High Court of Justice.

Division.

18

No.

Between

and

Plaintiff,

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the sheriff of greeting:

Whereas by the judgment of the Mayor's Court, London, it has been adjudged that the said recover against the said the sum of *

And whereas this judgment has been removed into our High Court of Justice, and has become of the same effect as a judgment recovered in that Court:

And whereas the costs attendant on the removal of the said judgment were on the † day of 18 , taxed and allowed at †

Therefore we command you, that of the goods and chattels of the said in your bailiwick, you cause to be made the said sums of £ * and £ † with interest thereon at the rate of 4l. per centum per annum from the said † day of 18 , and that you have that money and interest before us in our said Court immediately after the execution hereof, to be rendered to the said . And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof. And have then there this writ.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

Levy £ , and £ for costs of execution, and also interest on £ at 4l. per centum per annum, from the day of 18 , until payment; besides sheriff's poundage, officer's fees, costs of levying, and all other legal incidental expenses.

* Debt and Costs.

† Day of removal.

‡ Costs of removal.

This writ was issued by of agent for of solicitor for the said plaintiff.

The defendant is a and resides at in your bailiwick.

G. 1.

SUBPENA AD TESTIFICANDUM (GENERAL FORM).

In the High Court of Justice.

Between Division. 18 No. Plaintiff,
and Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to*

greeting: We command you to attend before at
on day the day of 18,
at the hour of in the noon, and
so from day to day until the above cause is tried, to give evidence on behalf of the†

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

* The names of three witnesses may be inserted.

† "Plaintiff" or "Defendant."

G. 2.

SUBPENA DUCES TECUM (GENERAL FORM).

In the High Court of Justice.

Between Division. 18 No. Plaintiff,
and Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to*

greeting: We command you to attend before at
on day the day of 18,
at the hour of in the noon, and
so from day to day until the above cause is tried, to give evidence on behalf of the
and also to bring with you and produce at the time and place aforesaid†

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

* The names of three witnesses may be inserted.

† Specify documents to be produced.

G. 3.

SUBPENA AD TESTIFICANDUM AT ASSIZES.

In the High Court of Justice.

Division. 18 No. Plaintiff,
Between and Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to*

greeting: We command you to attend before our justices assigned to take the assizes in and for the county of
to be holden at

on day the day of 18,
at the hour of in the noon, and
so from day to day during the said assizes, until the above cause is tried, to give evidence on behalf of the

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

* The names of three witnesses may be inserted.

G. 4.

SUBPENA DUCES TECUM AT ASSIZES.

In the High Court of Justice.

Division. 18 No. Plaintiff,
Between and Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to*

greeting: We command you to attend before our justices assigned to take the assizes in and for the county of
to be holden at

on day the day of 18, at the hour of in the noon, and so from day to day during the said assizes, until the above cause is tried, to give evidence on behalf of the, and also to bring with you and produce at the time and place aforesaid†

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

* The names of three witnesses may be inserted.

† Specify documents to be produced.

G. 5.

SUBPENA AD TESTIFICANDUM AT SITTINGS
OF HIGH COURT.

In the High Court of Justice.

Division. 18

No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to* greeting: We command you to attend at the sittings of the Division of our High Court of Justice, for † to be holden at on day the day of 18, at the hour of in the noon, and so from day to day during the said sittings, until the above cause is tried, to give evidence on behalf of the

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

* The names of three witnesses may be inserted.

† London or Westminster.

G. 6.

SUBPENA DUCES TECUM AT SITTINGS OF
HIGH COURT.

In the High Court of Justice.

Division. 18

No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to* We command you to attend at the sittings of the Division of our High Court of Justice for †, to be holden at on day the day of 18, at the hour of o'clock in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the and also to bring with you and produce at the time and place aforesaid ‡

* The names of three witnesses may be inserted.

† London or Westminster.

‡ Specify documents to be produced.

VOL. 49.—ORDERS AND RULES.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of our Lord One Thousand Eight Hundred and

G. 7.

WRIT OF INQUIRY FOR ASSESSMENT OF
DAMAGES.

In the High Court of Justice.

Division. 18

No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the sheriff of greeting.

Whereas it has been adjudged that the plaintiff recover against the defendant damages to be assessed

Therefore we command you, that by the oaths of twelve good and lawful men of your bailiwick you inquire what damages the plaintiff is entitled to recover under the said judgment, and that forthwith thereafter you send the inquisition which you shall take thereupon to our said Court, under your seal, and the seals of those by whose oaths you take the inquisition, together with this writ.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

This writ was issued by
of agent for
of solicitor for the
who reside at

The defendant is a and
reside at in your bailiwick.

G. 8.

CERTIORARI TO COUNTY COURT.

In the High Court of Justice.

Division. 18

No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ire-

H

land, Queen, Defender of the Faith, to the Judge of the County Court holden at greeting.

We, willing for certain causes to be certified of a plaint levied in our Court before you against _____ at the suit of _____ command you that you send to us forthwith in the Division of our High Court of Justice the said plaint with all things touching the same, as fully and entirely as the same remain in our said Court before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the _____ day of _____, in the year of Our Lord One Thousand Eight Hundred and _____

This writ was issued by _____ of _____ agent for _____ of _____ solicitor for the _____ who reside at _____

G. 9.

CERTIORARI (GENERAL).

In the High Court of Justice.

Division. 18 No. _____
Between _____ Plaintiff,
and _____ Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the _____ greeting.

We, willing for certain causes to be certified of _____ command you that you send to us in our High Court of Justice on the _____ day of _____ aforesaid, with all things touching the same, as fully and entirely as they remain in _____, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the _____ day of _____, in the year of Our Lord One Thousand Eight Hundred and _____

This writ was issued by _____ of _____ agent for _____ of _____ solicitor for the _____ who reside at _____

G. 10.

PROHIBITION.

In the High Court of Justice.

Division. 18 No. _____
Between _____ Plaintiff,
and _____ Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the [Judge of the County Court holden at] and to [name of plaintiff] of _____ greeting.

Whereas we have been given to understand that you the said _____ have [entered a plaint against] C.D. in the said Court, and that the said Court has no jurisdiction in the said [cause] or to hear and determine the said [plaint] by reason that [state facts showing want of jurisdiction].

We therefore hereby prohibit you from further proceeding in the said [action] in the said Court.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the _____ day of _____ in the year of Our Lord One Thousand Eight Hundred and _____

This writ was issued by _____ of _____ agent for _____ of _____ solicitor for the _____ who reside at _____

G. 11.

COMMISSION TO EXAMINE WITNESSES.

In the High Court of Justice.

Division. 18 No. _____
Between _____ Plaintiff,
and _____ Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to _____ of _____ and _____ of _____

Commissioners named by and on behalf of the _____ and to _____ of _____ and _____ of _____

Commissioners named by and on behalf of the _____ greeting : Know ye that we in confidence of _____

your prudence and fidelity have appointed you and by these presents give you power and authority to examine on interrogatories and *vid voce* as hereinafter mentioned witnesses on behalf of the said and respectively at before you or any two of you, so that one Commissioner only on each side be present and act at the examination.—And we command you as follows:—

1. Both the said and the said shall be at liberty to examine on interrogatories and *vid voce* on the subject matter thereof or arising out of the answers thereto such witnesses as shall be produced on their behalf, with liberty to the other party to cross-examine the said witnesses on cross-interrogatories and *vid voce* on the subject matters thereof or arising out of the answers thereto, the party producing any witness for examination being at liberty to re-examine him *vid voce*; and all such additional *vid voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing; and with the answers thereto shall be returned with the said Commission.

2 Not less than days before the examination of any witness on behalf of either of the said parties, notice in writing, signed by any one of you, the Commissioners of the party on whose behalf the witness is to be examined, and stating the time and place of the intended examination and the names of the witnesses to be examined, shall be given to the Commissioners of the other party by delivering the notice to them, or by leaving it at their usual place of abode or business, and if the Commissioners or Commissioner of that party neglect to attend pursuant to the notice, then one of you, the Commissioners of the party on whose behalf the notice is given, shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition to part with the original thereof, then a copy thereof, or extract therefrom, certified by the Commissioners or Commissioner present and acting to be a true and correct copy or extract, shall be annexed to the witness's deposition.

4. Each witness to be examined under this Commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the Commissioners or Commissioner present at the examination.

5. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *vid voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the Commissioners or Commissioner present at the examination, and to be previously sworn according to his or their several religions by or before the said Commissioners or Commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this Commission shall be subscribed by the witness or witnesses, and by the Commissioners or Commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Senior Master of the Supreme Court of Judicature on or before the day of enclosed in a cover under the seals or seal of the Commissioners or Commissioner.

8. Before you or any of you, in any manner act in the execution hereof you shall severally take the oath hereon indorsed on the Holy Evangelists or otherwise in such other manner as is sanctioned by the form of your several religions and is considered by you respectively to be binding on your respective consciences.

And we give you or any one of you authority to administer such oath to the other or others of you.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of , in the year of Our Lord One Thousand Eight Hundred and

This writ was issued by
of
agent for
of
solicitor for the
who reside at

WITNESSES' OATH.

You are true answer to make to all such questions as shall be asked you, without

favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth.

So help you God.

COMMISSIONERS' OATH.

You shall, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the Commission within written. So help you God.

INTERPRETER'S OATH.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which he shall administer to, and all and every the questions which shall be exhibited or put to, all and every witness and witnesses produced before and examined by the Commissioners named in the Commission within written, as far forth as you are directed and employed by the said Commissioners, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

CLERK'S OATH.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said Commissioners named in the Commission within written, as far forth as you are directed and employed by the Commissioners to take, write down, transcribe or engross the said questions and depositions. So help you God.

Direction of Interrogatories, &c., when returned by the Commissioners.

THE SENIOR MASTER OF THE SUPREME COURT OF JUDICATURE, ROYAL COURTS OF JUSTICE, LONDON.

G. 12.

HABEAS CORPUS AD TESTIFICANDUM.

In the High Court of Justice.

Division.

18

No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the [keeper of our prison at]

We command you that you bring , who it is said is detained in our prison under your custody , before

at on day the

day of at the hour of in the noon, and so from day to day until the above action is tried, to give evidence on behalf of the And that immediately after the said shall have so given his evidence you safely conduct him to the prison from which he shall have been brought.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One Thousand Eight Hundred and

This writ was issued by

of

agent for

of

solicitor for the

who reside at

SUMMONSES AND ORDERS.

H. 1.

SUMMONS (GENERAL FORM).

In the High Court of Justice.

Division.

18

No.

Between

Plaintiff,

and

Defendant.

Let all parties concerned attend the Judge [or Master] in Chambers on day the day of 18 , at o'clock in the noon, on the hearing of an application on the part of

Dated the day of 18 .

This summons was taken out by of solicitor for

To

H. 2.

ORDER (GENERAL FORM).

In the High Court of Justice.

Division. 18 No.

*Judge [or Master] in Chambers.

Between Plaintiff,
and Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and
It is ordered
and that the costs of this application
be

Dated the day of 18 .

* Insert name of Judge or Master.

H. 3.

ORDER FOR TIME.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and
It is ordered that the
time, and that the costs of this
application be

Dated the day of 18 .

H. 4.

ORDER UNDER ORDER XIV., No. 1.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and
It is ordered that the plaintiff may sign
final judgment in this action for the amount
indorsed on the writ, with interest, if any,
and costs to be taxed, and that the costs of
this application be

Dated the day of 18 .

H. 5.

ORDER UNDER ORDER XIV., No. 2.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and
It is ordered that the defendant be at
liberty to defend this action by delivering a
statement of defence within days after
delivery of the plaintiff's statement of claim,
and that the costs of this application be

Dated the day of 18 .

H. 6.

ORDER UNDER ORDER XIV., No. 3.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and
It is ordered that if the defendant
pay into Court within a week from the date
of this order the sum of £ , he be at
liberty to defend this action by delivering a
statement of defence within days
after delivery of the plaintiff's statement of
claim, but that if that sum be not so paid the
plaintiff be at liberty to sign final judgment
for the amount indorsed on the writ of
summons, with interest, if any, and costs,
and that in either event the costs of this
application be

Dated the day of 18 .

H. 7.

ORDER UNDER ORDER XIV., No. 4.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and

It is ordered that if the defendant pay into Court within a week from the date of this order the sum of £ , he be at liberty to defend this action as to the whole of the plaintiff's claim.

And it is ordered that if that sum be not so paid the plaintiff be at liberty to sign judgment for that sum and the defendant be at liberty to defend this action as to the residue of the plaintiff's claim.

And it is ordered that in either event the statement of defence be delivered within days after delivery of the plaintiff's statement of claim, and that the costs of this application be

Dated the day of 18 .

H. 8.

ORDER TO AMEND.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and

It is ordered that the plaintiff be at liberty to amend the writ of summons in this action by and that the costs of this application be

Dated the day of 18 .

H. 9.

ORDER FOR PARTICULARS (PARTNERSHIP).

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
upon reading the affidavit of
filed the day of

18 , and

It is ordered that the furnish the with a statement in writing, verified by affidavit, setting forth the names of the persons constituting the members or co-partners of their firm, pursuant to the Rules of the Supreme Court, Order XVI. Rule 10, and that the costs of this application be

Dated the day of 18 .

H. 10.

ORDER FOR PARTICULARS (GENERAL).

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
upon reading the affidavit of
filed the day of

18 , and

It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the plaintiff's claim in this action, and that unless such particulars be delivered within days from the date of such order, all further proceedings be stayed until the delivery thereof, and that the costs of this application be

Dated the day of 18 .

H. 11.

ORDER FOR PARTICULARS (ACCIDENT CASE).

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the injuries and expenses mentioned in the statement of claim, together with the time and place of the accident, number of the , and the particular acts of negligence complained of, and that unless such particulars be delivered within days from the date of this order, all further proceedings in this action be stayed until the delivery thereof, and that the costs of this application be

Dated the day of 18 .

H. 12.

ORDER TO DISCHARGE OR VARY ON APPLICATION BY THIRD PARTY.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing
upon reading the affidavit of
, filed the day of

18 , and

It is ordered that the order of
in this action, dated the
day of 18 be discharged [or varied
by], and that the costs of this
application be
Dated the day of 18 .

H. 13.

ORDER TO DISMISS FOR WANT OF PROSECUTION.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing
upon reading the affidavit of
filed the day of

18 , and

It is ordered that this action be, for want
of prosecution, dismissed with costs to be
taxed and paid to the defendant by the
plaintiff, and that the costs of this applica-
tion be

Dated the day of 18 .

H. 14.

ORDER FOR DELIVERY OF INTERROGATORIES.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing
upon reading the affidavit of
, filed the day of

18 , and

It is ordered that the be at
liberty to deliver to the inter-
rogatories in writing, and that the said
do, within days from
the date of this order, answer the interro-
gatories in writing by affidavit, and that the
costs of this application be
Dated the day of 18 .

H. 15.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing

It is ordered that the do within
days from the date of this order,
answer on affidavit stating what documents
are or have been in possession or
power relating to the matters in question in
this action, and that the costs of this applica-
tion be

Dated the day of 18 .

H. 16.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing
and upon reading the affidavit of
, filed the day of

18 , and

It is ordered that the do, at all
seasonable times, on reasonable notice, pro-
duce at the office of solicitor,
situate at , the following do-
cuments, namely,

and that the be at liberty to
inspect and peruse the documents so pro-
duced, and to take copies and abstracts
thereof and extracts therefrom, at
expense, and that in the meantime all fur-
ther proceedings be stayed, and that the
costs of this application be

Dated the day of 18 .

H. 17.

ORDER FOR PRODUCTION (UNDERWRITERS).

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that the do produce and show to the upon oath all insurance slips, policies, letters of instruction, or other orders for effecting such slips or policies, or relating to the insurance or the subject matter of the insurance on the ship or the cargo on board thereof, or the freight thereby, and also all documents relating to the sailing or alleged loss of the said ship the cargo on board thereof and the freight thereby, and all letters and correspondence with any person or persons in any manner relating to the effecting the insurance on the said ship, the cargo on board thereof, or the freight thereby, or any other insurance whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the voyage insured by, or relating to the policy sued upon in this action, or any other policy whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the same voyage. Also all correspondence between the captain or agent of the vessel and any other person, with the owner or any person or persons previous to the commencement of or during the voyage upon which the alleged loss happened. Also all protests, surveys, log books, charter-parties, tradesmen's bills for repairs, average statements, letters, invoices, bills of parcels, bills of lading, manifests, accounts, accounts-current, accounts-sales, bills of exchange, receipts, vouchers, books, documents, correspondence papers, and writings (whether originals, duplicates, or copies respectively), which now are in the custody, possession, or power, of the his brokers, solicitors, or agents, in any way relating or referring to the matters in question in this action, with liberty for the to inspect and take copies of or extracts from the same or any of them, and that in the meantime all further proceedings be stayed, and that the costs of this application be

Dated the day of 18

H. 18.

ORDER FOR SERVICE OUT OF JURISDICTION.

In the High Court of Justice.

Division. 18 No.

Judge in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that the plaintiff be at liberty to issue a writ for service out of the jurisdiction against

And it is further ordered that the time for appearance to the said writ be within days after the service thereof, and that the costs of this application be

Dated the day of 18 .

H. 19.

ORDER FOR SUBSTITUTED SERVICE.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that service of a copy of this order, and of a copy of the writ of summons in this action, by sending the same by a pre-paid post letter addressed to the defendant at shall be good and sufficient service of the writ.

Dated the day of 18 .

H. 20.

ORDER FOR RENEWAL OF WRIT.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 .
and

It is ordered that the writ in this action be renewed for six months from the date of its renewal, pursuant to the Rules of the Supreme Court, Order VIII., Rule 1.

Dated the day of 18 .

H. 21.

ORDER FOR ISSUE OF NOTICE CLAIMING CONTRIBUTION.

In the High Court of Justice.
 Division. 18 No.
 Master in Chambers.
 Between Plaintiff,
 and
 Defendant.

Upon hearing
 and upon reading the affidavit of
 filed the day of 18 ,
 and

It is ordered that the defendant be at liberty to issue a notice claiming over against , pursuant to the Rules of the Supreme Court, Order XVI., Rule 18.

Dated the day of 18 .

H. 22.

ORDER OF REFERENCE.

In the High Court of Justice.
 Division. 18 No.
 Master in Chambers.
 Between Plaintiff,
 and
 Defendant,

Upon hearing
 and by consent

It is ordered as follows :

1. [*State matters to be referred*] shall be referred to the award of

2. The arbitrator shall have all the powers as to certifying and amending of a Judge of the High Court of Justice.

3. The arbitrator shall make and publish his award in writing of and concerning the matters referred, ready to be delivered to the parties in difference, or such of them as require the same (or their respective personal representatives, if either of the said parties die before the making of the award) on or before the next, or on or before such further day as the arbitrator may from time to time appoint and signify in writing signed by him and indorsed on this order.

VOL. 49.—ORDERS AND RULES.

4. The said parties shall in all things abide by and obey the award so to be made.

5. The costs of the said cause and the costs of the reference and award shall be

6. The arbitrator may (if he think fit) examine the said parties to this action, and their respective witnesses upon oath or affirmation.

7. The said parties shall produce before the arbitrator all books, deeds, papers, and writings in their or either of their custody or power relating to the matters in difference.

8. Neither the plaintiff nor the defendant shall bring or prosecute any action against the arbitrator of or concerning the matters so to be referred.

9. If either party by affected delay or otherwise wilfully prevent the said arbitrator from making an award, he or they shall pay such costs to the other as may think reasonable and just.

10. In the event of either of the said parties disputing the validity of the said award, or moving the to set it aside, the said shall have power to remit the matters hereby referred or any or either of them to the reconsideration of the arbitrator.

11. In the event of the arbitrator declining to act or dying before he has made his award, the said parties may, or if they cannot agree, one of the Masters of the Supreme Court of Judicature may, on application by either side, appoint a new arbitrator.

12. Unless restrained by any order of the High Court of Justice, or of any Judge thereof, the party or parties in whose favour the award shall be made shall be at liberty within days after service of a copy of the award on the solicitor or agent of the other party to sign final judgment in accordance with the award, and for all costs that he or they may be entitled to under this order, and under the award, together with the costs of the said judgment.

Dated the day of 18

H. 23.

ORDER FOR EXAMINATION OF WITNESSES BEFORE ARBITRATOR.

In the High Court of Justice.
 Division. 18 No.
 Master in Chambers.
 Between Plaintiff,
 and
 Defendant.

Upon hearing ,

I

and upon reading the affidavit of
filed the day of 18 , and

It is ordered that
attend before
the arbitrator herein on
the days of 18 , at
and then and there submit to be examined on
oath or affirmation on behalf of the
touching the matters referred to the
said arbitrator.

Dated the day of 18

H. 24.

ORDER FOR EXAMINATION OF WITNESSES
AND PRODUCTION OF DOCUMENTS.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed day of 18 , and

It is ordered that
attend before
the arbitrator herein on
the days of 18 , at
, and then and there submit to be
examined on oath or affirmation on behalf of
the touching the matters referred
to the said arbitrator.

And it is further ordered that the said
do at the time and place aforesaid pro-
duce and deliver to the said arbitrator the
papers, documents, and writings hereafter
mentioned, that is to say,*

Dated the day of 18 .

* Specify documents to be produced.

H. 25.

ORDER CHARGING STOCK—NISI.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
whereby it appears

It is ordered that unless sufficient cause be

shown to the contrary before on
day the day of 18 , at
o'clock in the forenoon, the defendant's
interest in the
so-standing as aforesaid shall, and that it in
the meantime do, stand charged with the
payment of the above-mentioned amount
due on the said judgment.

Dated the day of 18 .

H. 26.

ORDER CHARGING STOCK—ABSOLUTE.

In the High Court of Justice.

Division. 18 No.

Judge in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and an order nisi made herein on the
day of 18 ,
reciting the affidavit of
whereby it appeared

It is ordered that the defendant's interest
in the
so standing as aforesaid stand charged with
the payment of the above-mentioned amount
due on the said judgment.

Dated the day of 18 .

H. 27.

CHARGING ORDER. SOLICITOR'S COSTS.

In the High Court of Justice.

Division. 18 No.

Judge in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and

It is ordered that the said
the solicitor for the
in this action shall have a charge upon
for his costs, charges, and expenses of and in
reference to this action.

Dated the day of 18 .

H. 28.

ORDER TO REMOVE JUDGMENT FROM
COUNTY COURT.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

In the matter of a plaint in the County
Court of
holden at
wherein

Plaintiff,
and

Defendant.

Upon reading the affidavit of
filed the day of 18 , and
and the certified copy of the judgment in the
plaint above mentioned,

It is ordered that a writ of *certiorari* issue
to remove the said judgment from the
above-named County Court into the
Division of the High Court of Justice.
Dated the day of 18 .

H. 29.

ORDER FOR ARREST (CAPIAS) UNDER
DEBTORS ACT.

In the High Court of Justice.

Division. 18 No.

Judge in Chambers.

Between Plaintiff,
and

Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and

It is ordered that the defendant
be arrested and imprisoned for the term of
from the date of his arrest, in-
cluding the day of such date, unless and
until he shall sooner deposit in Court the
sum of £ , or give to the plaintiff a
bond executed by him and two sufficient
sureties in the penalty of £ , or some
other security satisfactory to the plaintiff,
that

And it is further ordered that the sheriff
of do within one calendar month
from the date hereof, including the day of
such date, and not afterwards, take the de-
fendant for the purpose aforesaid, if he shall
be found in the said sheriff's bailiwick.

Dated the day of 18 .

H. 30.

COMMISSION TO EXAMINE WITNESSES.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and

It is ordered as follows :

1. A commission may issue directed
to
of
commissioners named by and on behalf of
the and to
of and
of commissioners named by and
on behalf of the for the exami-
nation upon interrogatories and *viva voce*
of witnesses on behalf of the said
and respectively at
aforesaid before the said commissioners, or
any two of them, so that one commissioner
only on each side be present and act at the
examination.

2. Both the said
and
shall be at liberty to examine upon inter-
rogatories and *viva voce* upon the subject
matter thereof or arising out of the answers
thereto such witnesses as may be produced
on their behalf, with liberty to the other
party to cross-examine the said witnesses
upon cross interrogatories and *viva voce* on
the subject matters thereof or arising out of
the answers thereto, the party producing the
witness for examination being at liberty to
re-examine him *viva voce*; and all such addi-
tional *viva voce* questions, whether on exami-
nation, cross-examination, or re-examination,
shall be reduced into writing, and, with the
answers thereto, returned with the said com-
mission.

3. Within days from the date of
this order, the solicitors or agents of the
said and shall exchange
the interrogatories they propose to ad-
minister to their respective witnesses, and
shall also within days from the ex-
change of such interrogatories, exchange
copies of the cross-interrogatories intended
to be administered to the said witnesses.

4. days previously to the sending
out of the said commission, the solicitor
of the said shall give to the
solicitor of the said notice in
writing of the mail or other conveyance by
which the commission is to be sent out.

5. days previously to the exami-

nation of any witness on behalf of the said or respectively, notice in writing signed by any one of the commissioners of the party on whose behalf the witness is to be examined and stating the time and place of the intended examination, and the names of the witnesses intended to be examined, shall be given to the commissioners of the other party by delivering the notice to them personally, or by leaving it at their usual place of abode or business, and if the commissioners of that party neglect to attend pursuant to the notice, then one of the commissioners of the party on whose behalf the notice is given shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same, from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

6. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition, to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present to be a true and correct copy or extract, shall be annexed to the witnesses' deposition.

7. Each witness to be examined under the commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the said commissioners or commissioner.

8. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *voir dire* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto.

9. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions.

10. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified

copies thereof or extracts therefrom, shall be sent to the Senior Master of the Supreme Court of Judicature on or before the day of _____, or such further or other day as may be ordered, enclosed in a cover under the seal or seals of the said commissioners or commissioner, and office copies thereof may be given in evidence on the trial of this action by and on behalf of the said _____

and _____ respectively, saving all just exceptions, without any other proof of the absence from this country of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the said

or
to his belief of the

11. The trial of this cause is to be stayed until the return of the said commission.

12. The costs of this order, and of the commission to be issued in pursuance hereof, and of the interrogatories, cross-interrogatories, and depositions to be taken thereunder, together with any such document, copy, or extract as aforesaid, and official copies thereof, and all other costs incidental thereto, shall be

Dated the day of 18 .

Н. 31.

ORDER OF REFERENCE UNDER S. 56 OF THE
JUDICATURE ACT, 1873.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between **Plaintiff,**

and

Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that the following question arising in this action, namely, be referred for inquiry and report to under section 56 of the Judicature Act, 1873, and that the costs of this application be

Dated the day of 18 .

H. 32.

ORDER OF REFERENCE UNDER S. 57 OF THE
JUDICATURE ACT, 1873.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that the [state whether all or
some, and if so which, of the questions are to
be tried] in this action be tried by
who shall have all the powers as to certifying
and amending of a Judge of the High Court
of Justice, and shall make his report of and
concerning the matters ordered to be tried as
aforesaid pursuant to the statute.

And it is further ordered that the said
referee may, if he think fit, examine the
parties to this action, and their respective
witnesses, upon oath or affirmation, and that
the said parties shall produce before the said
referee all books, deeds, papers and writings in
their or either of their custody or power
relating to the matters so ordered to be tried.

And it is further ordered that neither the
plaintiff nor the defendant shall bring or
prosecute any action against the said referee,
or against each other, of or concerning the
matters so ordered to be tried, and that if
either party by affected delay or otherwise
wilfully prevent the said referee from making
his report, he or they shall pay such costs to
the other as the High Court, or any Judge
thereof, may think reasonable and just.

And it is further ordered, that in the event
of the said referee declining to act, or dying
before he has made his report, the said
parties may, or if they cannot agree, one of
the Judges of the High Court may, upon ap-
plication by either party, appoint a new
referee.

And it is ordered that the costs of this
application be

Dated the day of 18 .

H. 33.

ORDER OF REFERENCE TO MASTER.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that this action [or the mat-
ters of account in this action, or the follow-
ing questions in this action being matters of
account, namely, *stating them*] be referred to
the certificate of one of the Masters of the
Supreme Court of Judicature, with all the
powers as to certifying and amending of a
Judge of the High Court of Justice, and
that the costs of the
and of the reference be in the discretion of
the Master, and that the costs of this ap-
plication be

Dated the day of 18 .

H. 34.

ORDER FOR EXAMINATION OF WITNESSES
BEFORE TRIAL.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that a witness
on behalf of the be examined
visd voce (on oath or affirmation) before one
of the Masters of the Supreme Court of
Judicature [or before
esquire, special examiner], the
solicitor or agent giving to the
solicitor or agent notice
in writing of the time and place where the
examination is to take place.

And it is further ordered that the exami-
nation so taken be filed in the Central Office
of the Supreme Court of Judicature, and
that an office copy or copies thereof may be
read and given in evidence on the trial of
this cause, saving all just exceptions, with-
out any further proof of the absence of the
said witness than the affidavit of the solicitor
or agent of the as to his
belief, and that the costs of this application
be

Dated the day of 18 .

day of 18 , for the sum of £
on which judgment the said sum of £
remained due and unpaid.

It is ordered that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor (or so much thereof as may be sufficient to satisfy the judgment debt), and that in default thereof execution may issue for the same, and that the costs of this application be

Dated the day of 18 .

H. 39.

ORDER ON CLIENT'S APPLICATION TO TAX SOLICITOR'S BILL OF COSTS.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

In the matter of

Gentleman,

One of the Solicitors of the Supreme Court.

Upon the application of

[hereinafter called "the applicant"]

It is ordered that the bill of fees, charges, and disbursements delivered to the applicant by the above-named solicitor be referred to the Master to be taxed, and that the said solicitor give credit for all sums of money by him received of or on account of the applicant, and that he refund what, if anything, he may on such taxation appear to have been overpaid.

And it is further ordered that if the said solicitor attends on the taxation, the Master tax the costs of the reference, and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be charged (if payable) according to the event of the taxation, pursuant to the statute.

And it is further ordered that the said solicitor do not commence or prosecute any action or suit touching the demand pending the reference.

And it is further ordered that upon payment by the applicant of what (if anything) may appear to be due to the said solicitor, the said solicitor do (if required) deliver up to the applicant, or as he may direct, all deeds, books, papers and writings in the said solicitor's possession, custody or power, belonging to the applicant.

And it is ordered that the costs of this application be

Dated the day of 18 .

H. 40.

ORDER OF SOLICITOR'S APPLICATION TO TAX BILL OF COSTS.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

In the Matter of

Gentleman,

One of the Solicitors of the Supreme Court.

Upon hearing

and upon reading the affidavit of
, filed the day of

18 , and

It is ordered that the above-named solicitor's bill of fees, charges and disbursements, delivered to (hereinafter called the said client) be referred to the Master to be taxed, and that the said solicitor give credit for all sums of money by him received from or on account of the said client, and that he refund what, if anything, he may on such taxation appear to have been overpaid.

And it is further ordered that the Master tax the costs of the reference, and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be paid according to the event of the taxation, pursuant to the statute.

And it is further ordered that the said solicitor do not commence or prosecute any action or suit touching the demand pending the reference.

And it is further ordered that upon payment by the said client of what (if anything) may appear to be due to the said solicitor, the said solicitor do (if required) deliver to the said client, or as he may direct, all deeds, books, papers and writings in the said solicitor's possession, custody or power, belonging to the said client.

And it is ordered that the costs of this application be

Dated the day of 18 .

H. 41.

ORDER TO TAX AFTER ACTION BROUGHT.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing

and

upon reading the affidavit of
, filed the day of

18 , and

It is ordered that the plaintiff's bill of costs, charges and disbursements delivered to the defendant, for the recovery of which this action is brought, be referred to the Master to be taxed, and that the plaintiff give credit at the time of taxation for all sums of money by him received from or on account of the defendant.

And it is further ordered that the Master tax the costs of the reference, and certify what upon such reference shall be found due to or from either party in respect of the bill and demand, and of the costs of the reference, pursuant to the statute.

And it is further ordered that the plaintiff do not prosecute this action touching the demand pending the reference.

And it is further ordered that upon payment of what (if anything) may appear to be due to the plaintiff, together with the costs of this action (which are to be also taxed and paid), all further proceedings therein be stayed, and that the costs of this application be

Dated the day of 18 .

H. 42.

ORDER TO TRY ACTION IN COUNTY COURT.

In the High Court of Justice.

Division 18 No.

Master in Chambers.

Between Plaintiff,

and

Defendant.

Upon hearing and
upon reading the affidavit of

18 , and , filed the day of

It is ordered that this action be tried before the County Court of

holden at , and that
the costs of this application be

Dated the day of 18 .

H. 43.

ORDER TO GIVE SECURITY OR TRY ACTION IN COUNTY COURT.

In the High Court of Justice.

Division 18 No.

Master in Chambers.

Between Plaintiff,

and

Defendant.

Upon hearing , and
upon reading the affidavit of

18 , and , filed the day of

It is ordered that unless the plaintiff within give full security for the defendant's costs to the satisfaction of one of the Masters of the Supreme Court of Judicature, this cause be remitted for trial before the County Court of

holden at , and that the costs of this application be

Dated the day of 18 .

H. 44.

ORDER FOR EXAMINATION TOUCHING MEANS.

In the High Court of Justice.

Division.

Judge in Chambers.

Between

Judgment Creditor,

and

Judgment Debtor.

Upon hearing and
upon reading the affidavit of
18 , and , filed the day of

It is ordered that the above-named do attend before the Judge in Chambers on the day of next, at in the noon, to be examined upon oath touching his means of paying the judgment debt, and that the costs of this application be

Dated the day of 18 .

H. 45.

ORDER FOR PAYMENT OF JUDGMENT DEBT BY INSTALMENTS.

In the High Court of Justice.

Division.

Judge in Chambers.

Between

Judgment Creditor,

and

Judgment Debtor.

Upon hearing and
upon reading the affidavit of
18 , and , filed the day of

It is ordered that the above-named judgment debtor do pay to the above-named judgment creditor the sum of £ , together with interest thereon at the rate of £4 per centum per annum from the day of 18 , the date of the judgment, and also £ , the costs of this application, in manner following, namely [here describe the mode in which the payment is to be made].

Dated the day of 18 .

H. 46.

ORDER FOR COMMITTAL OF JUDGMENT
DEBTOR.

In the High Court of Justice.

Division.

Judge in Chambers.

Between Judgment Creditor,
and Judgment Debtor.

Upon hearing
and upon reading the affidavit of
filed the day of 18
and

It is ordered that the abovenamed judgment debtor be, for default in payment of the debt herein-after mentioned, committed to prison for the term of from the date of his arrest, including the day of such date, or until he shall pay £ , being the amount due from him in pursuance of a judgment [or order] of the High Court of Justice, bearing date the day of 18 , together, with interest thereon at 4l. per cent. per annum from the aforesaid date, and 1l. 6s. 8d. for costs of this order, and sheriff's fees for the execution thereof.

And it is further ordered that the sheriff take the said debtor for the purpose aforesaid if he is found within his bailiwick.

And it is ordered that the costs of this application be

Dated the day of 18 .

H. 47.

ORDER FOR COMMITTAL OF JUDGMENT DEBTOR ON NON-PAYMENT OF INSTALMENT.

In the High Court of Justice.

Division.

Judge in Chambers.

Between Judgment Creditor,
and Judgment Debtor.

Upon hearing
and upon reading the affidavit of
filed the day of 18
and

It is ordered that the above-named judgment debtor be for default in payment of £ , being the amount of the [first] instalment of the judgment debt of £ in this action directed to be paid pursuant to the order of bearing date the day of 18 , committed to prison for the term of from the date of his arrest, including the day of such date, or until he shall pay the said instalment together with 13s. 4d. the

VOL. 49.—ORDERS AND RULES.

costs of this order, and sheriff's fees for the execution thereof. And it is further ordered that the sheriff of take the said debtor for the purpose aforesaid if he is found in his bailiwick.

And it is ordered that the costs of this application be

Dated the day of 18

H. 48.

INTERPLEADER ORDER, No. 1.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and Defendant,
and between Claimant,
and

Respondent.

Upon hearing
and upon reading the affidavit of
filed the day of 18
and

It is ordered that the claimant be barred, that no action be brought against the abovenamed [sheriff] , and that the costs of this application be

Dated the day of 18 .

H. 49.

INTERPLEADER ORDER, No. 2.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and Defendant,
and Claimant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and

It is ordered that the above-named claimant be substituted as defendant in this action in lieu of the present defendant, and that the costs of this application be

Dated the day of 18 .

K

H. 50.

INTERPLEADER ORDER, No. 3.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor, and
the sheriff of

Respondents.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that the said sheriff proceed
to sell the goods seized by him under the
writ of *fiert facias* issued herein, and pay the
net proceeds of the sale, after deducting the
expenses thereof, into Court in this cause,
to abide further order herein.

And it is further ordered that the parties
proceed to the trial of an issue in the High
Court of Justice, in which the said claimant
shall be the plaintiff and the said execution
creditor shall be the defendant, and that the
question to be tried shall be whether at the
time of the seizure by the sheriff the goods
seized were the property of the claimant as
against the execution creditor.

And it is further ordered that this issue be
prepared and delivered by the plaintiff
therein within from this
date, and be returned by the defendant
therein within days, and be
tried at

And it is further ordered that the question
of costs and all further questions be reserved
until after the trial of the said issue, and that
no action shall be brought against the said
sheriff for the seizure of the said goods.

Dated the day of 18

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that upon payment of the
sum of £ into Court by the said claimant
within from this date, or upon
his giving within the same time security to
the satisfaction of one of the Masters of the
Supreme Court for the payment of the same
amount by the said claimant according to the
directions of any order to be made herein,
and upon payment to the above-named
sheriff of the possession money from this
date, the said sheriff do withdraw from the
possession of the goods seized by him under
the writ of *fiert facias* herein.

And it is further ordered that unless such
payment be made or security given within
the time aforesaid the said sheriff proceed to
sell the said goods, and pay the proceeds of
the sale, after deducting the expenses thereof
and the possession money from this date,
into Court in the cause, to abide further
order herein.

And it is further ordered that the parties
proceed to the trial of an issue in the High
Court of Justice, in which the claimant shall
be plaintiff and the execution creditor shall
be defendant, and that the question to be
tried shall be whether at the time of the
seizure by the sheriff the goods seized were
the property of the claimant as against the
execution creditor.

And it is further ordered that this issue
be prepared and delivered by the plaintiff
therein within from this date,
and be returned by the defendant therein
within days, and be tried
at

And it is further ordered that the question
of costs and all further questions be reserved
until after the trial of the said issue, and
that no action shall be brought against the
sheriff for the seizure of the said goods.

Dated the day of 18 .

H. 51.

INTERPLEADER ORDER, No. 4.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor,
and the sheriff of

Respondents.

H. 52.

INTERPLEADER ORDER, No. 5.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor, and
the sheriff of Respondents.

Upon hearing
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered upon payment of the sum
of £ into Court by the said
claimant, or upon his giving security to the
satisfaction of one of the Masters of the
Supreme Court for the payment of the same
amount by the claimant according to the
directions of any order to be made herein,
the above-named sheriff withdraw from the
possession of the goods seized by him under
the writ of *feri facias* issued herein.

And it is further ordered that in the mean-
time, and until such payment made or secu-
rity given, the sheriff continue in possession
of the goods, and the claimant pay possession
money for the time he so continues, unless
the claimant desire the goods to be sold by
the sheriff, in which case the sheriff is to sell
them and pay the proceeds of the sale, after
deducting the expenses thereof and the pos-
session money from this date, into Court in
the cause, to abide further order herein.

And it is further ordered that the parties
proceed to the trial of an issue in the High
Court of Justice, in which the claimant shall
be plaintiff and the execution creditor shall
be defendant, and that the question to be
tried shall be whether at the time of the
seizure by the sheriff the goods seized were
the property of the claimant as against the
execution creditor.

And it is further ordered that this issue be
prepared and delivered by the plaintiff there-
in within from this date,
and be returned by the defendant therein
within days, and be tried
at

And it is further ordered that the question
of costs and all further questions be reserved
until after the trial of the said issue, and
that no action shall be brought against the
sheriff for the seizure of the said goods.

Dated the day of 18 .

H. 53.

INTERPLEADER ORDER, No. 6.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor, and
the sheriff of Respondents.

The claimant and the execution creditor
having requested and consented that the
merits of the claim made by the claimant be
disposed of and determined in a summary
manner, now upon hearing ,
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that

And that the costs of this application
be

Dated day of 18 .

H. 54.

INTERPLEADER ORDER, No. 7.

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor and
the sheriff of Respondents.

Upon hearing ,
and upon reading the affidavit of
filed the day of 18 ,
and

It is ordered that the above-named sheriff
proceed to sell enough of the goods seized
under the writ of *feri facias* issued in this
action to satisfy the expenses of the said
sale, the rent (if any) due, the claim of the
claimant, and this execution.

And it is further ordered that out of the
proceeds of the said sale, (after deducting the
expenses thereof, and rent, if any,) the said
sheriff pay to the claimant the amount of his
said claim, and to the execution creditor the
amount of his execution, and the residue, if
any, to the defendant.

And it is further ordered that no action be
brought against the said sheriff, and that the
costs of this application be

Dated the day of 18 .

H. 55.

ORDER DISMISSING SUMMONS (GENERALLY).

In the High Court of Justice.

Division. 18 No.

Master in Chambers.

Between Plaintiff,
and
Defendant.

Upon hearing
and upon reading the affidavit of
filed the day of 18 , and

It is ordered that the application of
be dismissed * with costs to be taxed and
paid by the
to the

Dated the day of 18 .

* If the dismissal is with costs add these words.

H. 56.

**SUMMONS FOR ENTRY OF SATISFACTION ON A
REGISTERED BILL OF SALE.**

In the High Court of Justice.

In the matter of a bill of sale by

to
dated the day of 18 , and re-
gistered on the day of 18 .

Let all parties concerned attend the Registrar of Bills of Sale at the Central Office, Royal Courts of Justice, London, on the _____ day of _____ 18____, at _____ o'clock in the _____ noon, on the hearing of an application on the part of _____ that satisfaction be entered on the above-mentioned bill of sale.

Dated the day of 18 .

This summons was taken out by

of
To

SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN THE

DIVISIONAL COURTS

OF THE

Queen's Bench, Common Pleas & Exchequer Divisions

OF

THE HIGH COURT OF JUSTICE,

AND ON APPEAL THEREFROM

IN THE

COURT OF APPEAL AND HOUSE OF LORDS.

LAW JOURNAL REPORTS, VOL. XLIX.

MICHAELMAS, 1879, TO MICHAELMAS, 1880.

43 Victoria.

Canad. Jurist 57 & 58 189.

[IN THE COURT OF APPEAL.]

m (Appeal from the Divisional Court for the
Q.B., C.P. and Exch. Divisions.)

1879. }
Nov. 12, 13. } WOODGATE v. GODFREY.*

Bill of Sale—Registration—Sale of Goods by Sheriff under Execution—Receipt and Inventory given by Sheriff's Officer—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), ss. 1, 7.

A sheriff's officer seized goods of the judgment debtor at his house under a fi. fa., and sold them to the debtor's father-in-law, to whom he gave a receipt for the purchase-money, with an inventory of the goods written under it. On the same day the purchaser let the goods to the debtor, who kept possession of them until they were again seized in execution:—

Held (affirming the judgment of a Divisional Court)—COCKBURN, C.J., and POLLOCK, B., that the receipt did not re-

* *Coram Jessel, M.R.; Bramwell, L.J.; and Brett, L.J.*

VOL. 49.—Q.B., C.P. & EXCH.

quire registration as a bill of sale within ss. 1 and 7 of the Bills of Sale Act, 1854, because the sale by the sheriff's officer was a transaction complete and effectual in itself, and the receipt was not the medium of transfer of the goods.

Cause shewn against a rule nisi granted on appeal from the refusal to grant a rule of a Divisional Court sitting for the Q.B., C.P. and Exch. Divisions.

The facts, which are fully set out in the report of the case in the Court below—48 Law J. Rep. Exch. 271—were shortly as follows:—

In 1875 the Sheriff of Surrey seized some household furniture under a fi. fa. issued on a judgment obtained against one Watson by a creditor. The plaintiff Woodgate was Watson's father-in-law, and bought the goods from the sheriff's officer, who gave him a receipt for the purchase-money, together with an inventory of the goods; the plaintiff did not remove the goods, but let them to Watson, in whose possession they re-

B

Woodgate v. Godfrey (App.), Q.B.

mained until 1878. In 1878 the goods were again seized by the sheriff under a *fi. fa.*, in execution of a judgment recovered by the defendant Godfrey against Watson. On the trial, in the Hilary Sittings, 1879, at Middlesex, of an interpleader issue, directed to try the right to the goods as between the plaintiff and Godfrey, Pollock, B., directed the jury that the receipt and inventory given by the sheriff's officer in 1875 did not constitute such an assurance as to require registration under the Bills of Sale Act, 1854, and the verdict was accordingly found for the plaintiff. The defendant moved for a new trial before a Divisional Court sitting for the Q.B., C.P. and Exch. Divisions, on the ground of misdirection (reported 48 Law J. Rep. Exch. 271), but the Court refused to grant a rule. On appeal the defendant obtained a rule *nisi* for a new trial in the Court of Appeal.

Mc Crae, for the plaintiff, shewed cause.

—The receipt and inventory did not constitute a bill of sale within section 7 of the Act of 1854 (1). Before the case of *Ex parte Odell; re Walden* (2) it had been always held that a mere receipt, even if it specified the goods, was not a bill of sale. In *Ex parte Odell; re Walden* (2) that doctrine was disputed for the first time. But that case is dis-

(1) Section 1 of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), provides that every bill of sale of personal chattels made after the passing of the Act "whereby the grantee or holder shall have power either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property or effects comprised in . . . such bill of sale," shall be null and void to all intents and purposes unless registered in the manner provided for in the section.

By Section 7, "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels."

Note. By the recent Act—The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), "Inventories of goods with receipts thereto attached or receipts for purchase moneys of goods" are included in the meaning of the expression "bill of sale."

(2) 48 Law J. Rep. Bankr. 1; Law Rep. 10 Ch. D. 76.

tinguishable from this. The decision was put upon the ground that the documents were in fact a mortgage, by means of which the parties intended to elude the Act. *Ex parte Cooper; re Baum* (3) is a much stronger case, but it is also distinguishable, because there the receipt was an essential ingredient of the contract between the parties. It formed part of the contract itself. Here the sale was by the sheriff—not by the parties—and was of itself a perfectly valid transaction. The receipt forms no part of the contract. If the receipt had been given six months after the contract was made, the contract would have been as good.

[BRETT, L.J.—How can the receipt be said to be a bill of sale or an "assurance?" A perfect sale and transfer of possession had taken place before the receipt was given. When this rule was granted Lord Justice Thesiger said that the Court in *Ex parte Cooper; re Baum* (3) came to the conclusion that the receipt and sale were one transaction.]

Gye, for the defendant, supported the rule.—This case is within the authority of *Ex parte Cooper; re Baum* (3). The decision there was that a receipt and inventory of goods given on sale constituted a bill of sale within the Act. Here the sale and the giving of the receipt and inventory occurred at the same time and place, and formed one whole transaction. The Act clearly contemplates that a bill of sale may be given by the sheriff, for section 1 provides for the case of a bill of sale being made or given "under or in the execution of any process."

Mc Crae did not reply.

JESSEL, M.R.—The only difficulty in this case arises entirely from the judgment of the Court of Appeal in *Ex parte Cooper; re Baum* (3). Of course we are bound by that decision if it lays down any principle. It is difficult to discover any principle from the report, but we have had the advantage of a statement by Lord Justice Thesiger, and he states a principle which is intelligible. He says that the Court came to the conclusion in

(3) 48 Law J. Rep. Bankr. 40.

Woodgate v. Godfrey (App.), Q.B.

that case that there was no sale independently of the receipt or assurance. The whole thing was a single transaction depending upon that document, and if that document was out of the way the transaction failed. The Court therefore held that the receipt was an assurance within the Bills of Sale Act—an assurance whereby the grantee should have power without giving any notice to seize and take possession of the goods. It is manifestly not so here. The sheriff may sell, and usually does sell, without giving any receipt at all. It cannot be contended that if he sold the goods by auction in 100 lots, and the auctioneer chose to give 100 receipts to the purchasers, every one of those receipts is a bill of sale. How can the receipts possibly become a bill of sale under which the holder or grantee can obtain possession of the goods? Here there was a sale by the sheriff, and on the same day a receipt and inventory of the goods were given to the purchasers. But his title does not in any way depend upon the receipt and inventory. If the receipt, or even an effectual bill of sale, had been given twelve months after the sale, the purchaser's title would still have been good under the parol sale. I think the judgment of the Divisional Court was right, and that this rule should be refused.

BRAMWELL, L.J.—I am of the same opinion. The reasoning in the case of *Ex parte Cooper; re Baum* (3) seems to shew that the Court thought that whether there was an inventory with the receipt or not, the receipt was still a document which, under the Act, ought to be registered, because Lord Justice James, in delivering their judgment, says, "It is a document which does assure the goods, and does transfer them from one person to the other." If the learned Judges meant that a mere receipt without more could be held to be an assurance within section 7 of the Act, I cannot agree with that view. If it was so held, a curious question might arise under the new Act, which provides that a receipt with an inventory attached shall be a bill of sale. I entirely agree with every word of the

judgment of the Lord Chief Justice in the Court below. I think the grounds for our decision cannot be better put than he puts them. Suppose the receipt had no stamp, and so was not admissible in evidence, might not the plaintiff say and prove, "I bought and paid for those goods?" Strictly speaking, the receipt is not evidence at all. It is a mere declaration by the vendor that he has been paid, and like other declarations, not admissible. The fact must be proved.

BRETT, L.J.—It seems to me that *Ex parte Cooper; re Baum* (3) was not intended to decide and does not decide that every receipt and inventory given on a sale of goods is a bill of sale which requires registration under that Act. It only decides that the receipt and inventory given under the particular circumstances of that case was a bill of sale or assurance within the Act. The Judges thought that the receipt and inventory were given as part of the very transaction by which the property passed, and were, in fact, the medium of the transfer. Here the receipt and inventory were not the medium of the transfer between the sheriff and the purchaser of the goods, which was complete before the receipt and inventory were given. In that respect, as Lord Justice Thesiger pointed out during the argument of the rule *nisi*, the case differs entirely from that of *Ex parte Cooper; re Baum* (3).

I think the case does not come within the terms of the Act of Parliament, and that the rule should be discharged.

Rule discharged.

Solicitors—Walker and Mewburn-Walker, for plaintiff; J. W. Heritage, for defendant.

[IN THE COURT OF APPEAL.]

1879. { THE PRESIDENT AND SCHOLARS OF
Nov. 14. { CORPUS CHRISTI COLLEGE, OXFORD, v. ROGERS.*

Statute of Limitations (3 & 4 Will. 4. c. 27. ss. 3 and 5)—Renewable Leaseholds—Surrender by Operation of Law—Estate in Reversion—When Time begins to run against Reversioner.

Sections 3 and 5 of the Statute of Limitations, 3 & 4 Will. 4. c. 27, enact that the right to bring an action to recover any land shall be deemed to have first accrued with respect to estates or interests in reversion, "at the time when such estate or interest became an estate or interest in possession."

During the continuance of a lease for years the reversioner in fee granted a new lease of the premises for years to his tenant:—

Held, that, although the first lease became surrendered by operation of law on the granting of the second, the reversioner's estate did not thereby become an "estate in possession" within the meaning of sections 3 and 5, and therefore that time did not begin to run against him under the Act.

Appeal from a judgment of Pollock, B., upon further consideration, after trial without a jury.

The action was brought to recover possession of a cottage and garden in the occupation of the defendant.

The following facts were proved in evidence or admitted at the trial:—

For more than two centuries the President and scholars of Corpus Christi College had been seised in fee of a house and land called Milton House at Egham, in the county of Surrey, and for more than two centuries this property had been held by the Edgell family as tenants to the college under long renewable leases.

In 1817 a piece of the waste of the freehold manor of Egham, comprising the cottage and garden, the subject matter of the action, was, under the Egham Inclosure Award, allotted to the college in respect of Milton House.

In 1818 Wyatt Edgell, the tenant to the college then in possession of Milton

* *Coram* Lord Coleridge, C.J.; Bramwell, L.J.; and Brett, L.J.

House, let the cottage and garden to one Pickett under a written agreement for a yearly tenancy at 7s. 6d. a year.

Rent was paid by Pickett under this agreement up to 1853, but after that year no rent was ever paid by Pickett, or by the defendant, who, upon her father's death, continued in occupation of the premises.

In 1851 the college renewed Wyatt Edgell's existing lease of the premises by granting him a fresh lease for twenty years from the 10th of October, 1850.

In 1857 the college granted to Wyatt Edgell a new lease of the premises for twenty years from the 10th of October, 1857.

The writ in the present action was issued on the 10th of May, 1878.

Upon these facts Pollock, B., gave judgment for the plaintiffs. The defendant appealed.

Woolf and Shafio, for the defendant.—The defendant is entitled to the premises under section 8 of the 3 & 4 Will. 4. c. 27 (1). She has been in possession more

(1) Section 2 of the 3 & 4 Will. 4. c. 27, enacts, "that after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

By section 3, "the right to make an entry or distress or bring an action shall be deemed to have first accrued . . . when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time when such estate or interest became an estate or interest in possession."

By section 5, "a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time when the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such

President, &c., Corpus Christi College v. Rogers (App.), Exch.

than twenty years as a yearly tenant without a lease and without having paid any rent. The period of twenty years within which, under section 2 of the 3 & 4 Will. 4. c. 27 (1), this action could be brought, began to run against the plaintiffs from October 10, 1857, when the second lease was granted. The lease of 1851 thereupon became surrendered by operation of law, *Lyon v. Reed* (2), and the plaintiffs acquired an "estate in possession" in the premises within the meaning of sections 3 and 5 (1). The question is discussed in Darby and Bosanquet, *Statutes of Limitations*, pp. 243, 244, where the authors take the view now contended for on behalf of the defendant. There must be a moment of time in which the right to possession of the premises became vested in the plaintiffs. The reversioner by granting a new lease adopts the position and exercises the act of an owner in possession. He is estopped from saying that he did not obtain possession. If he were allowed to recover after any length of time and any number of renewals, great opportunity would be afforded for the existence of the very evils against which the Act was intended to provide. If the first lease had been surrendered by the lessee before

rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined have been in possession or receipt of the profits of such land or in receipt of such rent."

By section 8, "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

Note.—Sections 2 and 5 are repealed by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which came into force on the 1st of January, 1879. Section 5 is re-enacted in the last-mentioned Act, and section 1 of the same Act is substituted for section 2 of 3 & 4 Will. 4. c. 27.

(2) 13 Mee. & W. 285; 13 Law J. Rep. Exch. 377.

the second one was granted, there can be no question that sections 3 and 5 (1) would have applied, and that the plaintiffs could have gained an estate in possession so that time began to run against them. That which occurred here is really the same transaction. It cannot make any difference in the legal position of the parties that the order of events was slightly different.

They also referred to *Hutchin v. Martin* (3).

Day and *E. Robertson*, for the plaintiffs, were not required to argue.

LORD COLERIDGE, C.J.—I think there is no ground for the appellant's contention. It is admitted that the only point in the case is whether, when the lease granted to Mr. Wyatt Edgell in 1851 by the college, was surrendered by operation of law in 1857, the college could have done anything in the way of entering upon the premises, or asserting their right to them. In my opinion they could not. There was no mode in which the college could exercise any such right, and to construe the Act in the way suggested for the appellants would be to legalise spoliation.

Supposing the college, just before 1857, had known that this defendant had no title to the premises, and was paying no rent to Mr. Edgell, then, according to the view presented to us, because the tenant does not pay his immediate landlord the superior landlord is to lose his property. Mr. Woolf contends for a similar proposition, because he says that where there is a surrender of a lease by the act and operation of law, on a new lease being granted, then there is some invisible moment of time in which the superior landlord loses his right.

No case has been cited before us to support that proposition. I am of opinion that there is no point of time at which the superior landlord could enter upon or assert his right to the premises, and I think this appeal must be dismissed.

BRAMWELL, L.J.—I am of the same opinion. It is a somewhat striking consideration that, if a month had elapsed

(3) Cro. Eliz. 605.

President, &c., Corpus Christi College v. Rogers (App.), Excu.

between the surrender of the first lease and the granting of the second, or a week, or a day, or a minute, the appellant would have been in the right. Now she is in the wrong because no moment of time elapsed. It would really seem that the words of section 3 bar the plaintiff's right to recover if there had been an appreciable moment of time between the grant and the surrender.

BRETT, L.J.—I am of the same opinion. The law is not ridiculous, and I think it must be ridiculous in order to support the appellant's contention.

Solicitors—Lewis & Indermaur, agents for W. Marratt, Staines, for appellant; Williams, James & Wason, for respondents.

[IN THE COMMON PLEAS DIVISION.]
1879. } CASTLE v. DOWNTON; BRADLEY
Nov. 21. } (claimant).

Bill of Sale—17 & 18 Vict. c. 36—*Affidavit*—Description of Occupation of Grantor.

In the affidavit filed with a bill of sale, pursuant to 17 & 18 Vict. c. 36. s. 1, the occupation of the grantor was described thus: "was until lately a commercial town traveller or agent":—

Held, an insufficient description.

Appeal by motion under 38 & 39 Vict. c. 50. s. 6, from the County Court of Middlesex, holden at Bow.

The action was an interpleader issue in which Bradley, as grantee of a registered bill of sale, claimed the goods of the defendant against the plaintiff, who, as execution creditor, claimed to be entitled to the same goods. The affidavit accompanying the bill of sale, after correctly describing the residence of the grantor, the defendant, stated his occupation as follows: "and was until lately a commercial town traveller or agent." The County Court Judge held this was a sufficient description, and gave judgment for the claimant. The plaintiff moved the Divisional Court, and obtained a rule

calling on the claimant to shew cause why this judgment should not be set aside and judgment entered for the plaintiff, or why a new trial should not be had on the grounds that the affidavit accompanying the bill of sale did not contain such description of the grantor as is required by the statute in that behalf (1).

Melshheimer shewed cause.—There is no evidence to shew that the grantor was following any occupation at the time of the affidavit (2). It must therefore be taken that he had no occupation. The onus of shewing he has some occupation lies on the plaintiff—*Bath v. Sutton* (3). It is the best description which could be given, and it would mislead no one.

Glenn, for the plaintiff, in support of the rule.—The description is not sufficiently definite. The word "is" should have been used—*The London and Westminster Bank v. Chase* (4). The test to be applied is that the description must be so definite that perjury can be assigned on it—per Bovill, C.J., in *Brodrick v. Scale* (5). No description will not do—*Hatton v. English* (6).

[LORD COLERIDGE, C.J.—If the head-note to *Bath v. Sutton* (3) in *Hurlstone*

(1) By 17 & 18 Vict. c. 36. s. 1, which was in force at the time of the execution of the bill of sale, "Every bill of sale of personal chattels . . . shall, with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, . . . be filed with the officer acting as clerk of the doquets and judgments in the Court of Queen's Bench within twenty-one days," &c.

(2) The only evidence of the occupation of the grantor was given by the claimant Bradley, and, as shewn on the County Court Judge's notes, it was as follows: "In November, 1876, I lent defendant 60*l.*; in July, 1877, he asked for more, and I required a security. He gave this bill of sale for 60*l.* and any other sum I might advance. At the date of the bill of sale he had been a commercial traveller, but was an agent." Cross-examined: "When the bill of sale was executed defendant was a commercial traveller. He was selling on commission when the bill of sale was given."

(3) 3 Hurl. & N. 382; 27 Law J. Rep. Exch. 388.

(4) 12 Com. B. Rep. N.S. 730; 31 Law J. Rep. C.P. 314.

(5) 40 Law J. Rep. C.P. 130; Law Rep. 6 C.P. 98.

Castle v. Downton, C.P.

and *Norman* is correct, it appears the *onus* of showing the grantor has some occupation is on the plaintiff.]

It is submitted evidence has been given. There is no such accurate description as could support an assignment for perjury, therefore the affidavit is bad.

Melsheimer, in reply.—*The London and Westminster Bank v. Chase* (4) was disapproved of in *Button v. O'Neill* (7). The true test is no longer that of perjury, but whether, as stated by Brett, L.J., in the Court of Appeal in *Blount v. Harris* (8), the description is sufficient to lead persons of ordinary care and intelligence to a right conclusion.

LORD COLERIDGE, C.J.—I come with reluctance to the conclusion that this bill of sale is invalid. I do not say so because of any hardship which may thereby be occasioned, for I fully agree with the good sense of the remarks of Sir Edward Vaughan Williams in the now overruled case of *The London and Westminster Coal Company v. Chase* (4), that this is an exception to the ordinary rules of property, permitting a person to remain the ostensible owner of goods which are in reality the property of another, and if parties chose to avail themselves of this exceptional privilege they must do so within the terms of the Act of Parliament. The reluctance with which I decide is caused by the feeling that I am setting aside this bill of sale on technical grounds, and I should prefer if I could to take a broad view, but I cannot shut my eyes to the consequences which might follow if I were to hold this description to be sufficient. I do not say that the word “is” would do, but that the words “was until lately” are too vague, and might easily mean different things in different mouths; and without suggesting that in the present case they were used for the purpose of misleading, I cannot help seeing that cases might arise where such a form might be used for the very purpose of misleading, and I am of opinion that

they are in themselves too vague, and do not constitute a sufficient description within the words of the Act of Parliament.

For the purposes of arriving at this conclusion it is not necessary to discuss the views entertained by Erle, C.J., in *The London and Westminster Bank v. Chase* (4), or the judgments in *Button v. O'Neill* (7) in this Court; those cases have no bearing on the point before us. This case differs from them in its uncertainty as to the period of time to which the description is to be applied. It does not state that the occupation of the grantor was such “at the time,” but “until lately:” it might be long before, and such description is consistent with other occupations he may have engaged in since. The case is not governed by any concluded authority, and on the best consideration I can give, and for these reasons, I hold this description to be too vague, and consequently the bill of sale to be invalid.

LINDLEY, J.—I am of the same opinion, and I feel that if we held this description to be sufficient we should be enabling persons to mislead by adopting some such similar description. It so happens there is no evidence that the description was misleading, but it appears to me it would be dangerous to say it would do, and I am of opinion the judgment of the County Court Judge should be reversed.

LORD COLERIDGE, C.J.—I should like to add that the report of the case of *Bath v. Sutton* (8) in *Hurlstone and Norman* does not warrant the head-note, but the report of the case in the *Law Journal* does support it, for there Bramwell, B., puts his finger on the very point. He says: “The question is only as to whether it was necessary to describe himself [the assignor] as of some occupation, and you must shew that he had one.” So that the *Law Journal* report justifies the head-note, while the other does not.

Judgment for the plaintiff.

Solicitors—G. A. Swan, for the plaintiff; John Widdcombe, for the claimant.

(6) 7 E. & B. 94; 26 Law J. Rep. Q.B. 161.

(7) 48 Law J. Rep. C.P. 368; Law Rep. 4 C.P. D. 354.

(8) 48 Law J. Rep. Q.B. 159; Law Rep. 4 Q.B. D. 603.

[IN THE DIVISIONAL COURT FOR THE
Q.B., C.P. AND EXCH. DIVISIONS.]

1879. { COBBOLD AND OTHERS v. PRYKE
July 12. { (administratrix); BAXTER
(claimant).

Power of County Court Judge to restrain an action in the High Court—County Courts Act, 1865 (28 & 29 Vict. c. 99), s. 2—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-sec. 5, and s. 89.

The County Courts Act, 1865 (28 & 29 Vict. c. 99), s. 2, confers upon the Judge of a County Court all the powers and authorities, for the purposes of that Act, possessed by a Judge of the Court of Chancery, which at that time included the power of restraining by injunction an action in a superior Court of Common Law. Such a power has been taken away from the Court of Chancery by sec. 24, sub-sec. 5 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and is therefore impliedly taken away also from a County Court Judge, who has moreover expressly conferred upon him by the same Act (s. 89) the same powers as are possessed by the High Court of Justice.

This was a motion for a rule for a writ of prohibition, addressed to the Judge of the Ipswich County Court, prohibiting him from maintaining and enforcing a restraining order made by him in the above action. The action was brought in the High Court of Justice by the plaintiffs against the defendant as administratrix of her deceased husband for the sum of 16l. 2s. 7d., and judgment was signed on default of appearance on the 24th of June, 1879. In the meantime, a plaint had been issued in the County Court of Ipswich by a Mr. Jarman against the same defendant for the administration of the estate of the intestate; and on the 14th of June Mr. Baxter, claimant in the present action, was appointed receiver of the estate. On the 25th of June, Mr. Jarman obtained an *ex parte* injunction from the Judge of the Ipswich County Court, restraining the present plaintiffs from further proceedings in the action. And on the same day, when they attempted to

levy execution on their judgment, they were met by this injunction. Accordingly, they now moved for a writ of prohibition.

Poyser, for the plaintiffs.—No decree for administration had been pronounced in the County Court action; and, according to the old practice of Chancery, an injunction would not be granted before decree. But the power to grant any such injunction has been altogether taken away from the Court of Chancery by sec. 24, sub-sec. 5 of the Judicature Act; and by s. 89 of the same Act inferior Courts are to have the same powers as the High Court of Justice, and no more.

Malden, for the claimant.—It has been expressly decided in *Ex parte Ditton*; *in re Woods* (1) that the Court of Bankruptcy still retains its power of restraining actions in the High Court. The case of *Wright v. Redgrave* (2) may be distinguished. The object of s. 24 of the Judicature Act was to avoid for the future applications in the same matter to different branches of the same Court; but in this case the actions are in two independent Courts.

LORD COLERIDGE, C.J.—I think that the rule for a prohibition must be made absolute. I do not wonder that the County Court Judge made the order. And I am reluctant to overrule him, for I have a great respect for his opinion. But his jurisdiction to make such an order is gone. It was originally conferred by the County Courts Act of 1865, and has been taken away by the Judicature Act. It may be that sec. 24, sub-sec. 5 of the Judicature Act is not quite conclusive, for that subsection purports to deal with the High Court of Justice itself, and its several Divisions. To that it may be answered that the terms of the County Courts Act only confer the jurisdiction of Chancery, as from time to time. However, if there is any doubt upon this point, it is set at rest by s. 89 of the Judicature Act, which

(1) 45 Law J. Rep. Bankr. 87.

(2) Law Rep. 11 Ch. D. 24.

Cobbold v. Fryke, Q.B.

enacts that inferior Courts with equity jurisdiction shall for the future exercise the same powers as the High Court of Justice. That section is conclusive.

FIELD, J.—I am of the same opinion.

Rule for prohibition made absolute.

Solicitors—Rhodes & Son, agents for Cobbold, Son & Rouse, Ipswich, the plaintiffs in person; Samuel Gooding, Ipswich, for claimant.

Re Res. P. R. Dale 572562276.

[IN THE QUEEN'S BENCH DIVISION AND
IN THE COURT OF APPEAL.]

1878.	} MARTIN v. MACKONOCHIE.
June 27, 28.	
August 8.	
1879.	
March 10, 11,	
12, 13, 14,	
17, 18, 19, 20.	
June 28.	

Ecclesiastical Court—Power to append a Monition to a Definitive Sentence—Mode of Enforcing—Suspension ab officio et beneficio for Contumacy in disobeying such Monition—Prohibition—53 Geo. 3. c. 127; 3 & 4 Vict. c. 86.

A beneficed clerk, having been convicted in a criminal suit in the Court of Arches of offences against the laws ecclesiastical, was suspended ab officio for a certain time, and admonished not to repeat the offence. He disobeyed this monition, and on this being proved the Court again admonished him. This second monition having been also disobeyed, application was made to the Court by motion on affidavits to enforce the monition. The clerk did not appear, and the Court sentenced him to be suspended ab officio et beneficio for three years.

A writ of prohibition directed to the Judge of the Court of Arches to prohibit him from enforcing this sentence was applied for in the Queen's Bench Division, and granted by COCKBURN, C.J., and MELLOR, J. (dissentiente LUSH, J.).

Held, in the Court of Appeal, by COLERIDGE, C.J., JAMES, L.J., and THESIGER,

VOL. 49.—Q.B., C.P. & EXCH.

L.J. (dissentientibus BRETT, L.J., and COTTON, L.J.), reversing the decision of the Queen's Bench Division, that the writ of prohibition ought not to issue; for that such a monition could be so appended to a definitive sentence in a penal suit in an Ecclesiastical Court; that disobedience to such a monition could be punished as contumacy; that such contumacy could be punished, on summary process, by suspension ab officio et beneficio; and that the motion to enforce the monition was not a fresh proceeding instituted within the meaning of section 23 of the Church Discipline Act (3 & 4 Vict. c. 36).

Rule calling on Lord Penzance, the Official Principal of the Arches Court of Canterbury, and on J. Martin, the promoter in a suit in that Court, entitled *Martin v. Mackonochie*, to shew cause why a writ of prohibition should not issue to prohibit the Court of Arches from publishing or enforcing a decree of suspension made against Alexander Mackonochie, clerk, in the above-named suit, such decree being one which was made without jurisdiction.

The proceedings in the suit and the other material facts will be found fully stated in the judgment of Cockburn, C.J., and Lush, J., in the Queen's Bench Division, and in those of Coleridge, C.J., and Thesiger, L.J., in the Court of Appeal.

The Solicitor-General (Sir H. Giffard) (with him O. Bowen), for Lord Penzance; and Stephens (with him Jeune), for Martin, the promoter, shewed cause (on the 27th of June, 1878) (1).

Charles and Phillimore, in support.

Our. adv. vult.

The following judgments were read on the 8th of August, 1878:—

LUSH, J.—This suit was instituted by letters of request from the Bishop of London, pursuant to the 13th section of the Church Discipline Act (3 & 4 Vict. c. 86). The cause was heard on the 7th of December, 1874, when the Court of Arches decreed that

(1) *Coram* Cockburn, C.J.; Mellor, J.; and Lush, J.

Q

Martin v. Mackonochie (App.), Q.B.

the defendant had been guilty of certain practices which were offences against the laws Ecclesiastical, and pronounced sentence of suspension *ab officio* for six weeks, and admonished the defendant to abstain in future from the practices thereby condemned.

The defendant appealed from this judgment to the Privy Council, but abandoned the appeal before it came to a hearing.

On the 26th of June, 1875, a monition, in accordance with the decree, was duly served, and suspension published.

On the 18th of March last, notice was served on the defendant, alleging that he had, in contravention of, and disobedience to the monition, on certain days therein specified (several of which were within two years from that date, and the last of which was on the 24th of February last), done certain specified acts (being acts which he had been admonished to abstain from), and that the promoter would, on the 23rd of March, upon proof of the premises, ask that it might be declared that the defendant had not obeyed the monition in the particulars therein set forth, and would further ask that the monition might be enforced, as to the Court should seem meet; and that the defendant might be condemned to the costs of the proceeding. Copies of the affidavits intended to be used were served at the same time.

The defendant did not appear, and on the 29th of March a second monition was served upon him, which recited the previous proceedings in the suit, the decree, the service of the former monition and the notice, and which alleged that on the 23rd of March then instant, the Court, having read the affidavits, copies of which had been served, did pronounce and declare that the defendant had failed to obey the monition in not having abstained from the before-mentioned practices; and did further admonish the defendant to abstain for the future from those practices.

On the 20th of April, a further notice was served, to the effect that it had been alleged that subsequently to the service of the last-mentioned monition, namely, on the 31st of March and on the 7th of April, the defendant had repeated the practices against which he had been admonished, and that the promoter would apply to the Court on the 11th of May, and would upon proof of the premises ask that it might be declared that the defendant had not obeyed the monitions; and that the same might be enforced as to the Court might seem meet, and that the Court might take such other steps in the matter as justice might require. Copies of the further affidavits intended to be used, accompanied the notice.

The defendant still declined to appear at the time appointed, and the Court, after reading the affidavits and having taken time to consider, declared that the defendant had disobeyed and contravened the monition of the Court, and decreed that he should be suspended *ab officio et a beneficio*, for a period of three years, and be condemned to the costs of the application.

Thereupon an application was made to this Court for a prohibition, on the ground, and the only ground on which a prohibition can be granted, namely, that in awarding a suspension under such circumstances, the Court of Arches had exceeded its jurisdiction.

A rule to shew cause was granted, which came on for argument shortly before the last assizes, when the Court took time to consider its judgment.

The contention of the defendant is, that he has been punished for a contempt of Court, that a contempt of Court is punishable only by imprisonment, under the 58 Geo. 3. c. 127; that such a proceeding as the present is not in accordance with the established practice of the Court of Arches, and that even if it were shewn to have been so prior to the passing of the Church Discipline Act, the provisions of that Act rendered its continuance illegal. It was not disputed that the sentence complained of is one which might lawfully have been pronounced for such ecclesiastical offence as the Court had declared the defendant to have been guilty of, if a fresh suit had been brought against him.

I pause here for a moment to remark that much of the argument which was addressed to us appears to me to be based on the fallacy of treating the acts of which the defendant was found guilty as mere contempt of Court. A contempt of Court may, or may not involve an ecclesiastical offence. A wilful disobedience of an order of the Court made to enforce a private right, such as an order for payment of costs, is a contempt of Court, but nothing more. The acts of the defendant amount to a contempt of Court inasmuch as he thereby committed a breach of the monition or injunction of the Court; but they amount to much more than a contempt of Court. They constitute a distinct ecclesiastical offence. They were done in defiance not only of a monition of the Court, but in defiance of the law as declared by the Court, which is the constituted authority in such cases, and would have been punishable if there had been no monition, and the sentence is admitted to be an appropriate punishment for such a breach of the law. Of course, the Court could not have taken notice of the offence without a

Martin v. Mackonochie (App.), Q.B.

suit, but here there is a suit which has resulted in a decree and a monition; and the argument for the defendant assumes that for some purposes at least the monition is still in force. Whether it is operative to enable the Court, by means of it, to suppress the repetition of the offence; in other words, whether the monition can be effectually enforced, is the question. Now, unless it be shewn that the defendant is under some disadvantage by being prosecuted for the new offence by summary proceeding on the monition, or unless such a proceeding is prohibited by statute, no reason can be assigned why a new suit, which is undoubtedly the more costly and more dilatory, and, therefore, the less efficacious proceeding for the purposes of justice, should be adopted in preference to the more summary proceeding. The object is the same as must be the object of a new suit, namely, to put an end to the practices which have been denounced as illegal, and the sentence is the same as would, or might have been, pronounced in the form of a decree in that new suit.

I proceed to notice, in the first place, the arguments based on the Church Discipline Act, because if the proceeding complained of is either expressly or by implication forbidden by that Act, it matters not what the ancient practice of the Court of Arches was, or what construction the Court might have put upon the statute itself. For it is the province and the duty of this Court to construe Acts of Parliament which affect the temporal rights of the subject, and to protect the subject in the enjoyment of those rights.

The object of the Church Discipline Act is declared in the preamble to be "to amend the manner of proceeding in causes for the correction of clerks," and this it effects by repealing the statute 1 Hen. 7. c. 4, which gave summary powers to archbishops and bishops, and by prescribing a uniform course of proceeding for the institution of suits. Then follows the 23rd section, which enacts that, "no criminal suit or proceeding against a clerk in holy orders, for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted and provided."

The argument is, that this is a "proceeding" for an offence against the laws ecclesiastical, and not being instituted in the manner prescribed by the Act, it is, therefore, a violation of the Act. This argument appears to me to be founded on a misapprehension of the scope and purpose of the Act. If it were to prevail, the consequence would be, that a decree, admonishing the defendant in a suit to abstain, in future, from practices which were thereby declared to be illegal,

would be nugatory, and the Act would have taken away, and that by implication only, one of the most, if not the most, ancient, and probably the most effective process of the Court. For if the acts of the defendant were treated, as it was contended they ought to have been treated, as a mere contempt of Court, punishable under the 58 Geo. 3, that would be equally open to the objection, that it was a "proceeding" for an offence which had not been already adjudicated on, and it would follow that no monition enjoining abstention for the future could ever be enforced at all. It is clear, to my mind, that what the Act meant to abolish by the word "proceeding" was those illegal acts by which forfeiture or suspension was enforced without a regular suit, of which precedents are to be found in the books, and that it was no more intended to interfere with any established mode of enforcing the decrees of the Court, than it did with substantive law. Other sections recognise as still existing and to continue the ancient forms of sentence, and the ancient modes of enforcing it. For example, the 11th section, speaking of the sentence to be pronounced upon hearing before the bishop and assessors, says that it shall be "according to ecclesiastical law," and the 12th says that, "all sentences by any bishop or his commissary shall be enforced by like means as a sentence pronounced by an Ecclesiastical Court of competent jurisdiction." The Act leaves the kind of sentence to be awarded, and the mode of enforcing it, as it was before. It prescribes the mode by which criminal proceedings shall be originated against a clerk, but once commenced and carried on to judgment, it leaves the suit to be worked out to execution according to the ordinary course and practice of the Court. This section therefore appears to me to have no bearing upon the question before us. There is a proviso in the 13th section which at first sight seems to present a difficulty. It was not to my recollection noticed in the argument, but I am desirous of calling attention to it, that it may not be supposed that I have overlooked it.

The 15th section gives an appeal to the Privy Council. The 13th section, in anticipation of the 15th, provides that, "no appeal from any interlocutory decree or order, not having the force of a definitive sentence, and thereby ending the suit in the Court of Appeal of the Province, shall be allowed, save by the permission of the Judge of such Court." At first sight the wording of the clause suggests that when the case is ripe for appeal, it is ended for all purposes in the Court below. But a moment's consideration suffices to make it clear that those

Martin v. Mackonochie (App.), Q.B.

words are only intended to emphasize the distinction between an interlocutory and a final judgment; and that they could not have been intended to enact that a definitive sentence shall end the suit in the sense that nothing more shall be done upon it, not even to enforce the sentence, whether there is an appeal or not. That would be a construction too absurd to be accepted, and this, no doubt, accounts for this proviso not having been referred to in the argument.

I come, therefore, to the conclusion that the mode of proceeding which was adopted in this case, and which is the subject of complaint before us, is not prohibited by the Church Discipline Act. There being no other Act of Parliament bearing on the point, the only remaining question is, whether it is in accordance with the established practice of the Court.

It is admitted, as I have already observed, that the Court had jurisdiction over the subject-matter; and jurisdiction to pronounce for the offence of which it has adjudged the defendant guilty the very sentence which it has pronounced.

I regret that I am compelled to differ from my learned colleagues upon this branch of the case also; I think that we have no jurisdiction to enquire whether the ordinary course of procedure has or has not been followed in this case. The practice and procedure of every Court, where no Act of Parliament intervenes to regulate it, which I assume to have been the case here, is within the exclusive cognizance of the Court itself. If in a particular case the mode of proceeding were shewn to be ever so irregular and at variance with the ordinary practice it would not give this Court jurisdiction to interfere. Irregularity in procedure is matter of appeal, not of prohibition, and the appeal is given to the Privy Council, not to this Court.

It is, of course, conceivable as a possibility, that a system of procedure might be so vicious as to violate some fundamental principle of justice; as if, for example, it allowed a suit to be instituted and prosecuted to judgment in the absence of the party sued, and without summoning him, or giving him any opportunity of defending himself, that would entitle this Court to interfere. It is quite superfluous to say that nothing of the kind is or could be suggested as regards the procedure in the Court of Arches. But neither was it or could it be suggested that the applicant suffered any disadvantage whatever from not having been cited to answer these charges in a fresh suit. The monition gave him full and precise notice, as full and precise as articles in a fresh suit would have

given him, of what he was charged with; he has, moreover, an advantage which he would not have had in a fresh suit, namely, the advantage of knowing who were to be the witnesses against him, and what they were going to say, every opportunity was given him of refuting the accusation, he might have appeared and cross-examined the witnesses, have given evidence on his own behalf, and have called witnesses to disprove the allegations.

The same grounds of defence and the same opportunity of putting them forward were open to him on the monition, as would have been open to him on the hearing of a suit. For he could not, in a second suit, have contested the law as declared in the original judgment. That had become *res judicata*. Having abandoned his appeal, he could not have been heard to argue over again that the practices condemned in that suit were lawful practices. All that he could have done in a second suit would have been to dispute the facts, and that he could have done by way of answer to the monition as fully, as freely and as advantageously as if he had been defending himself in a regular suit. The monition deprived him of no right or advantage which the Church Discipline Act intended that a defendant should have.

I must therefore decline to enter into the question which was so earnestly and at such length discussed at the bar, namely, whether the precedents do or do not sanction the course of proceeding which is complained of. As I have already said, I think that it is a matter for the Court of Arches to decide, subject to an appeal to the Privy Council. I feel it due to the learned Judge of the Court of Arches, however, to advert to the fact, that not only has no authority to the contrary been found, but that the various authorities on the subject, which are all collected in the return presented to the House of Commons in 1868, and which were the subject of so much comment in the argument, have been considered by the Privy Council on appeal, and that high tribunal has affirmed the competency of the Court of Arches to pass such a sentence as the one in question upon a similar proceeding for contumacy (*Hebbert v. Purchas*) (2).

It was strongly urged upon us, in disparagement of that decision, that the Privy Council had not the assistance of counsel on the part of the then respondent, and that if the authorities had been examined and discussed from an opposite point of view, that Court might have come to a different conclusion. That may possibly be so, but I cannot specu-

(2) 40 Law J. Rep. Eccles. 55; Law Rep. 4 P.C. 301.

Martin v. Mackonochie (App.), Q.B.

late upon such a contingency. The judgment of the Privy Council is binding upon the Court of Arches, and for the reasons I have mentioned I think that it is equally binding on this Court. As the judgment of the Court of Appeal in ecclesiastical cases, it has the authority of law, and every clergyman of the Church of England is bound as a loyal subject, to obey that in common with every other branch of the law of the land.

I cannot help repeating my regret that I should stand alone in this Court upon a subject of such grave importance, and that circumstance makes me feel considerable diffidence, but having given my best consideration to the case, I am unable to concur with the views of my learned brethren, and am constrained to say that, in my judgment, no excess of jurisdiction has been committed, and that this rule ought to be discharged.

MELLOR, J.—At the close of the argument in this case I was prepared to concur with my Lord Chief Justice in making the rule absolute; but my brother Lush then expressing his dissent from that course, and requiring time to consider the matter further, we parted without appointing any time for a meeting to give judgment. As the circuits were then immediately about to take place, I did not think it likely that we should be prepared to give judgment before the next sittings, and it is only within the last three days that I became aware that we should be able to meet for the purpose of delivering judgment. I do not mention this by way of objection or complaint, as I think it is extremely desirable that the matter should not be postponed to the sittings in November.

I say it merely by way of excuse for not being prepared with a judgment of my own; I have been so incessantly occupied in the performance of other judicial duties that I have found it utterly impossible to abstract the necessary time from the consideration of other pressing cases. I have had the advantage of receiving in portions during the last three days a judgment prepared by my Lord Chief Justice, with whose view of the case, expressed to me at the time of the argument, I entirely concur, and with whom I was then prepared to concur in delivering judgment.

I have, as far as my opportunities have enabled me, considered his judgment; and although I do not desire without further consideration to be bound by every reason which he has assigned for the conclusion at which he has arrived, yet I am perfectly satisfied to rest my judgment upon the reasons and authorities stated in his most learned and elaborate judgment. I have also had the opportunity of reading the judgment prepared by my brother Lush; I

cannot do otherwise than dissent from the conclusion at which he has arrived, but I am sure he will permit me to say that in my opinion his judgment does not grapple with the real difficulty of the case. There are two cardinal points at which I am at issue with him. The first is that he seems to consider that this Court, in the exercise of its high function, is bound by the decisions of the Judicial Committee of the Privy Council, which were so often referred to during the argument. It is to be observed that the Privy Council have no original jurisdiction in questions of this description; their authority is simply appellate, and is merely a substitution for the former authority of the Delegates. It cannot be doubted, as it appears to me, that in this matter that High Court is as much subject to review by this Court, in the exercise of its authority, as the Court of Delegates was. The Judge of the Court of Arches was no doubt bound by those decisions, and could not have rightly acted contrary to their tenor; but in the exercise of our jurisdiction we are not bound to treat them as conclusive authorities on the subject, but we are at liberty to consider the circumstances under which they were given and the authorities on which they were based.

My second difference with my brother Lush consists in this, that I consider that the offence upon which Lord Penzance adjudicated and passed the sentence now appealed against was a fresh and distinct offence against the laws ecclesiastical; I mean new and distinct from the offence for which he had been sentenced to suspension and payment of the costs by Sir Robert Phillimore when Dean of the Arches. It appears to me that Lord Penzance had no jurisdiction to, adjudicate and condemn the defendant, Mr. Mackonochie, to a sentence of suspension applicable only to a definite and specific offence without fresh letters of request from the Bishop of London, in whose diocese the offence arose.

All the offences charged against the defendant were committed within the diocese of London, and might have been dealt with in the Consistory Court of the Bishop of London, and without letters of request from the Bishop of London. The Arches Court of Canterbury had no jurisdiction to take proceedings in the matter; when, therefore, Mr. Mackonochie had been convicted and sentenced by a definitive sentence of the then Dean of the Arches, and had suffered the punishment assigned to such offence, the suit was at an end. He might be liable to a summary proceeding by way of contempt, and punished in the way prescribed by the Statute of George III. by *significavit* and imprison-

Martin v. Mackonochie (App.), Q.B.

ment; but it appears to me that in order to proceed for a fresh specific offence, which might end in a sentence of suspension or deprivation, it was essential that a new cause should be instituted, and that fresh letters of request should have been obtained from the Bishop of London.

There is no analogy in the law in criminal matters by which, when a new offence has been committed by a defendant, he can be called upon to answer without the institution of a fresh suit, conducted with the formalities which the law prescribes. It might as well be said that a man who has committed a burglary, and been sentenced and suffered his punishment for such offence, and who has afterwards committed a fresh burglary in the same house, could be dealt with summarily, and tried and punished, without any bill being preferred before a Grand Jury for such second offence.

Possibly the monition given by Sir Robert Phillimore on the trial for the former offence might be used in aggravation of punishment on a second trial for a similar offence, but, as it appears to me, it could have no other effect. That the conduct of Mr. Mackonochie is deserving of the highest censure for remaining in a Church whose law and discipline he habitually disregards may be true, but that is not *ad rem* to the present question, and it is our duty to prohibit a course of proceeding before a tribunal which has no authority by law to proceed. Had the proceeding been simply irregular, that would have afforded no ground for the exercise of our extraordinary jurisdiction, as irregularity by a Court having general jurisdiction is no ground of prohibition, but of appeal. I do not intend—indeed I am not able—to follow these differences further, but I refer to them out of respect to my brother Lush, that he may see that I consider I have grounds of difference with him which are of essential importance to our judgment in this case.

COCKBURN, C.J.—This was an application to this Court for a writ of prohibition to prevent the execution of a sentence of the Dean of the Court of Arches, suspending the defendant *ab officio et beneficio*, as incumbent and perpetual curate of the parish of St. Alban's, Holborn, for the term of three years, for contumacy in disobeying two monitions of the Court, of the 26th of July, 1875, and the 29th of March, 1878, admonishing him to abstain from wearing certain vestments while officiating in the Communion Service; from causing the prayer or hymn commonly called the "Agnus" to be sung during the reception of the elements by the communicants; from making the sign of the cross to the congregation during the admini-

stration of the Communion; and from kissing the Prayer-book during Divine worship and the Communion Service. The suit against the defendant in respect of this departure from the established ritual, as an offence against the ecclesiastical law, had been originally instituted under the Church Discipline Act, 3rd and 4th Vict., cap. 86, in the Consistory Court of the diocese of London, on the complaint of the promoter, Mr. Martin, as promoting the office of the Judge, and had been sent by letters of request from the Bishop of London to the Court of Arches. On the 7th of December, 1874, Sir Robert Phillimore, then the Dean of the Court of Arches, by an interlocutory decree, having the force of a definitive sentence, pronounced the defendant guilty of the offences charged against him, and sentenced him to suspension *ab officio* for six weeks; to which sentence the learned Judge superadded a monition to desist from the practices thus condemned as unlawful. On the 12th of June, 1875, a monition was issued under the foregoing decree, admonishing the defendant, as stated, which monition was duly served on the defendant. On the 23rd of March, 1878, application was made by the promoter to Lord Penzance, who had succeeded Sir Robert Phillimore as Dean of the Arches, alleging disobedience on the part of the defendant to the monition of the Court, and praying that obedience thereto might be enforced. Satisfied by the affidavits adduced in support of the application, Lord Penzance declared that the defendant had disobeyed the monition of 1875, and thereupon further admonished him to abstain from the practices in question. A monition was accordingly issued on the 29th March, 1878. On the 20th of April ensuing, a similar application was made to the learned Judge, by motion, on affidavits shewing continued disobedience, and asking that the monitions might be enforced in such manner as to the Court should seem meet. Notice of this motion having been served, but the defendant failing to appear, Lord Penzance on the 11th of May decreed that the defendant had disobeyed the monitions of the 12th of June, 1875, and 29th of March, 1878, and for his disobedience therein declared him "to have been guilty of contumacy," and "for his conduct aforesaid" sentenced him to be suspended *ab officio et beneficio* for the term of three years, condemning him also in the costs of suit.

I have been the more particular in stating the proceedings thus far in detail, because it was insisted by the learned Solicitor-General, in shewing cause against the rule, that the sentence pronounced by Lord Penzance was not founded on the defendant's contumacy,

Martin v. Mackonochie (App.), Q.B.

but was only an enforcement of the former judgment of the Court. When the language of Lord Penzance is looked at, this is obviously an error. The sentence is founded expressly and exclusively on the alleged contumacy; nor could it have been otherwise: there could not possibly have been a sentence in respect of the fresh offence as such without a fresh suit. It is against the execution of the sentence thus founded on disobedience to the monition that the present application is made to this Court. For the reasons I am about to state, I am of opinion that the monitions both of Sir Robert Phillimore and of Lord Penzance were *ultra vires* and inoperative, and that the sentence of suspension pronounced by the latter, and by which Mr. Mackonochie has for the time been deprived of his benefice, cannot be upheld, and, consequently, that the rule for a prohibition must be made absolute.

In the first place, I must say I entertain the gravest doubt whether the decree of Lord Penzance on the first application to him and the monition of the 29th of March were not altogether *ultra vires*. The monition of Sir Robert Phillimore formed part of the definitive sentence pronounced in the original suit. If it had not done so, and no monition had then been given, I apprehend that the suit, which had thus been brought to an end, and in which the defendant had been condemned and had undergone his punishment, and had paid the costs, could not have been resuscitated in order to append to the sentence, on a new state of facts subsequently arising—in other words, on a new offence having been committed—something which had formed no part of it as pronounced, for the purpose of dealing with such new offence summarily, instead of proceeding against the offender as for a substantive offence. I do not, however, desire to base my judgment on this ground. I am disposed to think that if a monition thus appended to a sentence for a specific offence can be made the foundation of a summary proceeding for contempt on the commission of a further offence, the monition of Sir R. Phillimore was still sufficiently alive for that purpose. It seems to me that there are much stronger reasons for making this rule absolute.

I must premise what I have to say in support of the view I entertain of this case by stating that, taking the original monition to have been the foundation of the decree which we are asked to prohibit, the learned Judge of the Court of Arches, after the decisions of the Judicial Committee of the Privy Council in the cases of *Martin v. Mackonochie* (3) and

Hebbert v. Purchas (2), could not have done otherwise than as he did in treating the disobedience of the defendant as contumacious. The Judicial Committee having appellate jurisdiction over his own Court, it would have been inconsistent with the deference always paid to the decisions of a Court of Appeal to refuse to act upon the precedents which had been deliberately set—especially in the case of *Hebbert v. Purchas* (2)—by the appellate tribunal. We, on the other hand, are not bound by the decisions in question. On the contrary, we are called upon as matter of judicial duty, on such an application as the present, to review these decisions, and, if necessary, to overrule them. For it is the province of this Court to restrain all tribunals not forming part of the High Court of Justice, or having appellate jurisdiction over it, within the limits of their respective jurisdictions; and among the tribunals so within its restraining authority are the Ecclesiastical Courts, of which the Judicial Committee of the Privy Council, in its character of a Court of Appeal from these Courts, forms a part, and is, therefore, as such—however high its position and authority in other instances—subject to our controlling jurisdiction by way of prohibition.

That this is so not only results from general principle, but is established by several decisions in which it has been deliberately held that a prohibition would go to Commissioners of Review, the highest Court of Appeal in ecclesiastical matters, as well as to the High Court of Delegates. The first is the case of *Parlor v. Butler*, in the 39th of Elizabeth (4). This was a suit for defamation before the High Commissioners. The Commissioners entertained the suit, but a prohibition was granted on the ground that the words were not of ecclesiastical cognizance. The next was the case of *Hallivell v. Jervoise* (5), a suit for tithes commenced in the Consistory Court. The defeated party appealed to the Court of Audience, where the sentence was affirmed; but on further appeal to the Court of Delegates, both sentences were reversed. Thereupon an appeal was preferred to Commissioners appointed on a Commission of Review under the Great Seal, under the 1 Elizabeth, c. 1. On an application to the Queen's Bench for a prohibition, the question turned on the validity of this Commission, which was disputed on the ground that such a commission was inconsis-

365; 39 Law J. Rep. Eccles. 11; Law Rep. 3 P.C. 52; 40 Law J. Rep. Eccles. 1; Law Rep. 3 P.C. 409.

(4) Moore, 460.

(5) Moore, 462.

(3) 38 Law J. Rep. Eccles. 1; Law Rep. 2 P.C.

Martin v. Mackonochie (App.), Q.B.

tent with the statutes of the 24th and 25th Henry 8. But on a conference of all the Judges, it was held that it was within the power of the Crown to issue such a commission, as the power of appeal on review, formerly exercised by the Pope, had become vested in the Crown, and had not been taken away by the statute of 25 Hen. 8. c. 20, but it was further agreed that if the Commissioners proceeded otherwise than according to the law of England, a prohibition should go to restrain them. A later case is that of *Reeve v. Denny* (6), which was an administration suit commenced in the Episcopal Court of Norwich, and carried thence to the Court of Arches, where the sentence of the former Court was affirmed. An appeal having been brought in the High Court of Delegates, an application was made for a prohibition, the question being raised whether the Court of Appeal had jurisdiction to grant administration, and whether the cause must not be remitted to the Court below for that purpose. After argument a prohibition was granted. Next we have the remarkable case reported by Hobart under the name of *Hutton's Case* (7), the facts of which were as follows: Sir Timothy Hutton had presented one Rowth, as his clerk, to the Bishop of Chester for institution to a living, who, however, refused to institute him; whereupon Sir Timothy complained to the Archbishop of York, who sent a monition to the bishop to receive the clerk, or to appear before him and answer for not doing so; but the bishop did neither; whereupon the archbishop himself instituted the clerk, who was by his warrant inducted. In the meantime one King had been presented by the Crown, and he and the bishop brought a suit in the Court of Delegates to set aside the institution and induction of Rowth. Thereupon a prohibition was applied for in the Court of Common Pleas, on the ground that induction was a temporal act, triable by temporal law, and the church being full could only be avoided by a suit of *quare impedit* or the like, at the common law; and a prohibition to the Court of Delegates was granted. This case is the more striking from the fact mentioned by Hobart, that complaint of this act of the Court was made to King James, who signified his pleasure that he would have the prohibition set aside and a consultation granted. "But," says the learned reporter, "we answered His Majesty by letter that we could not do it by the law; and in the end, after many passages to and fro, it was left, and so it stands." In another case reported by

Hobart (8), one Searle, "parson of Heydon German," having been indicted and convicted of manslaughter, and having been allowed his clergy without being burnt on the hand owing to his being in orders, a suit had been instituted in the Consistory Court of London, to deprive him of his benefice by reason of such conviction. The suit was carried by appeal to the Court of Delegates. But while the Delegates were proceeding with it, Searle moved in the Common Pleas for a prohibition, which was granted. Hobart, who was at the time Chief Justice of that Court, gives the reason, namely, that, though the conviction of a clerk for felony would suffice in the Spiritual Court to "build a sentence of deprivation," in the present case Searle, having been allowed the benefit of clergy, had in fact been pardoned, and under the 18 Elizabeth, c. 7, s. 2, which prohibited in such cases the delivery of the offender to the ordinary, as had been accustomed, could not be further corrected or called upon to make purgation in the Spiritual Court. In *Bacon's Abridgment*, Tit. "Prohibition," it is stated as law that the Delegates may be prohibited when they exceed their authority or proceed in matters not properly within their cognizance. These authorities abundantly establish that the High Court of Delegates was subject to the prohibiting control of this Court. This being so, there can be no doubt that the same rule applies to the Judicial Committee, who have in all respects taken the place of the High Court of Delegates.

The Act of 2 & 3 Will. 4. c. 92, simply transfers the appellate jurisdiction of the Court of Delegates to the Privy Council. We, therefore, as it seems to me, should not be justified on an application for a prohibition, when dealing with the judgment of the Judicial Committee, in treating it as of higher authority, than if it had been a judgment of the Court of Delegates.

Where we are dealing with a sentence of the Court of Arches we ought not to allow precedents set by the Judicial Committee to stand in the way if we are satisfied that they were wrong.

Having, then, this jurisdiction we are, in my opinion, bound to exercise it *ex debito justitiæ*, and not *ex gratia*, or as mere matter of discretion. For though some difference of opinion has existed on this point, as appears from *Bacon's Abridgment*, "Prohibition B," yet such I take to be the effect of the answer of all the Judges of England in the *Articuli Cleri*, in the 3 Jac. 1, as given by Coke in the Second Institute, p. 607, where they say that "prohibitions are

(6) Latch, 85.

(7) Hob. 15.

(8) Hob. 288.

Martin v. Mackonochie (App.), Q.B.

not to be granted of favour but of justice;" and so it was held in *Serjeant Moreton's Case* (9), and by all the Judges of the King's Bench, in the case of *Woodward v. Bonithan* (10); and in that view, whatever may have been said by individual Judges, I entirely concur. So that I cannot but think that to hold that the decisions in question are not to be reviewed, but are to be taken as conclusively binding upon us, would amount to little less than a dereliction of judicial duty. I yield to no one in respect for the authority of the Judicial Committee of the Privy Council or for the eminent members of it who took part in the decisions I have referred to, and I say unfeignedly that I feel all the responsibility and delicacy involved in the task of reviewing and overruling the decisions of such a tribunal—more especially as, in doing so, I have to deal with a branch of law with which, as a Common Law Judge, I am, of course—though I have taken the utmost pains to make myself master of the authorities—less familiar; but I cannot allow these sentiments to lead me to shrink from a duty which, as a Judge of this High Court, I feel myself bound to discharge. And I have the less hesitation in dealing with the judgments in question from the circumstance that the Judicial Committee had not the advantage of hearing counsel on behalf of the parties against whom they decided, or of having their attention specially directed to the procedure of the Ecclesiastical Courts; and it has always been considered that a decision pronounced against the side which has not been heard carries with it but little authority as compared with a case in which the arguments on both sides have been presented to the Court. In fact, the question of jurisdiction involved in the present application was, juridically speaking, never discussed before the Judicial Committee at all.

I shall presently give my reasons for holding the proceeding in the former cases of *Martin v. Mackonochie* (3), and *Hebert v. Purchas* (2), to have been unwarranted by law, and for the conclusion at which I have arrived, that both the monition by Sir R. Phillimore, as well as that by Lord Penzance, as also the sentence of suspension founded upon them, the execution of which we are now asked to prohibit, were *ultra vires* and bad in law. But I cannot give effect to the contention of the counsel for the applicant that a suspension *a beneficio* is beyond the competency of an Ecclesiastical Court, as being a dealing with the freehold. There

can in this respect be no difference between suspension and deprivation; and, as we know, deprivation *a beneficio* for ecclesiastical delinquency has in many instances occurred; and that the subject matter of this suit, the wilful departure from the ritual of the Church, as established by the rubric, the canons, and the Acts of Uniformity, was within the jurisdiction of the Court, cannot be disputed. It is true that the Common Law Courts have from the earliest times rigorously interdicted the Ecclesiastical Courts from exercising jurisdiction where the freehold was concerned; and there can be no doubt that the assertion of the power to deprive an incumbent of his benefice, as well as of his clerical office, was originally a usurpation on the part of the Ecclesiastical authority. But the Common Law Courts declined to interfere on the simple ground that the sentence of deprivation of the office, carried with it of necessity the deprivation of the benefice, inasmuch as the clerical office gave the title to the temporal interest, and with the loss of the former all right to the latter was, as a necessary consequence, at an end. Thus Godolphin says: "Deprivation is an ecclesiastical sentence, whereby an incumbent being legally discharged from officiating in his benefice with cure, the church *pro tempore* becomes void" (cap. xxvii. tit. Deprivation). Therefore when the right of presentation to a living had been obtained by a simoniacal contract, and the party after having been instituted and inducted had been deprived by the Spiritual Court, it being urged, on an application for a prohibition in the Queen's Bench, that it was not competent to a Spiritual Court to meddle with the freehold, it was answered:—"True it is they should not meddle to alter the freehold; but they meddled only with the manner of obtaining his preferment, which by consequence divested the freehold from him by the dissolution of his estate when his admission and institution are avoided"—*Baker v. Rogers* (11). The sentence of deprivation *a beneficio* was, therefore, only the expression of what followed as a necessary effect from the sentence of deprivation *ab officio*, a sentence admittedly within the jurisdiction of ecclesiastical tribunals.

Passing this by, and starting with the position as incontestable that a departure from the established ritual by a clerk in holy orders when officiating in public worship is an offence against the Ecclesiastical law, which if made the subject of a suit properly instituted and conducted may be punished by suspension, I come to what is the real

(9) 1 Sid. 65.

(10) Sir T. Raym. 3.

(11) Cro. Eliz. 788.

Martin v. Mackonochie (App.), Q.B.

question,—namely, the efficacy of such a monition as has been issued in the present case—where the monition has been appended to a definitive sentence in a penal suit—as founding a sentence of suspension or deprivation on a summary proceeding for contumacy; which, again, as the two learned Judges of the Arches Court have done no more than follow the precedents set by the Judicial Committee, involves the necessity of reviewing the decisions of the latter tribunal. Now I must begin by observing that prior to the decision of the Judicial Committee in the case of *Martin v. Mackonochie* (3), no instance was brought to our attention in which this summary jurisdiction, founded on a monition appended to a sentence in a penal suit, had been exercised. In *Hebbert v. Purchas* (2) the Judicial Committee caused a search for precedents to be made, but none could be found. Three or four cases were brought forward; but, as was admitted in the judgment, they totally failed to satisfy the purpose for which they were adduced, and it may safely be asserted that no such instance exists. Nor in the numerous works on Ecclesiastical Law and the jurisdiction and procedure of the Ecclesiastical Courts, so far as I have been able to ascertain, is any mention of such a jurisdiction or procedure to be found. I have gone carefully through, I believe, all the writers—certainly all the writers of authority—who have written on the subject of ecclesiastical jurisdiction and procedure since the Reformation, and I have not only found no authority for the exercise of such a power but not even a trace of it. Monition, indeed, as is well known, is a frequent incident in ecclesiastical procedure. To issue a monition and then to pronounce contumacious a party who set the process of an Ecclesiastical Court at defiance, or refused to obey its lawful order, and then to call in aid the statutory remedy, was, after excommunication, its earlier resource, had been done away with, the only means, except so far as modern legislation had come to its assistance, by which an Ecclesiastical Court could enforce its authority. But there is no mention made by former writers of a monition being superadded to a penal sentence for an ecclesiastical offence, and being thus made the means of exercising a summary jurisdiction over the offender in respect of a future offence. The first reference I find to such a jurisdiction is in Sir R. Phillimore's recent work on Ecclesiastical Law, published subsequently to the two decisions of the Judicial Committee. Treating of admonition, the learned author says:—"Disobedience to this admonition assumes the grave character of contempt or contumacy, and is

visited by a graver punishment." (12) And in another place he says:—"It is to be observed that when an admonition has been duly served after a trial upon the admonished person; disobedience to it entails the penalties incident to the contempt of the order of a lawful Court." (13) But for neither of these positions does the writer cite any authority; and in so laying down the law I presume he is speaking on the strength of the two decisions I have referred to; and I am the more led to think so because I find no reference to any such position in his edition of *Burn's Ecclesiastical Law*; and because when, in a later part of his work, he is dealing with the subject of suspension, and has occasion to refer to the cases of *Mackonochie* and *Purchas*, he uses this significant language: "In two recent cases the Judicial Committee of the Privy Council thought themselves warranted by the law in inflicting the punishment of suspension for disobedience of their orders;" to which he adds: "But for these decisions, it would have seemed that these contempts of Court would be punished, as contempts of all Courts are, by committing, or in the case of Ecclesiastical Courts, signifying, the offender." (14) It is pretty clear to my mind from this language that these decisions must have struck the very learned author as altogether novel, and as going a good deal further than he had been prepared to expect.

That down to the year 1849, deprivation or suspension as the punishment of contumacy was unknown to the Ecclesiastical Courts, is clear from what took place in the case of *The Bishop of Lincoln v. Day* (15), a case to which I shall presently have occasion to refer more fully.

To get at the bottom of this question, as the foundation of any sound and satisfactory opinion, it becomes necessary to look a little more closely into the authority and procedure of the Ecclesiastical Courts; and it is all important to attend to certain distinctions which have frequently been lost sight of, and from inattention to which much confusion on this subject appears to me to have arisen. Ecclesiastical jurisdiction is divided into two main branches—civil and penal. Principles and rules of procedure applicable to the one will frequently be found inapplicable to the other. The suit in which the office of the Judge is here promoted against the defendant is for an offence against the Ecclesiastical Law. Consequently we have

(12) Vol. 2, p. 1088.

(13) Vol. 2, p. 1367.

(14) Vol. 2, p. 1377.

(15) 1 Rob. 724.

Martin v. Maconochie (App.), Q.B.

to deal exclusively with the penal jurisdiction, except so far as the procedure in civil causes may throw light upon the subject of this inquiry. Now, the judicial authority capable of being exercised in respect of such offences was threefold—1, by the bishop at his periodical visitations; 2, by the bishop or his Judge in the Episcopal Court *ex mero officio*, if the bishop or his Judge thought fit so to proceed; or 3, on the office of the Judge voluntarily promoted by a third party by the permission of the bishop. But between the exercise of these different forms of judicial authority an essential difference existed in respect of procedure; for by the practice of the ecclesiastical tribunals, all causes are divided into summary and plenary. Where the jurisdiction is summary, all formality may be dispensed with. Where it is plenary, the formalities of procedure must be followed, and cannot be dispensed with. "Summary causes," says Conset (*Practice*, Sec. 2, § 3), distinguishing them from plenary, "are such as respect not the solemn and ordinary way of proceeding in judgment, but require a summary and short proceeding, *absque strepitu judicii et de simplici et plano*." Such, it is agreed, may be the proceedings at an episcopal visitation, which may be conducted according to Ayliffe (*Parergon*, Tit. "Visitation," p. 516, *sine figura judicii*), all that is strictly required being that the party who is to be visited and punished for any offence or omission shall have an opportunity of being heard. So Comyns says (*Dig. Visitor, C.*), the proceedings are to be '*summarie, simpliciter, et de plano, sine strepitu aut figura judicii*.' It will be important to bear this in mind further on. On the other hand, causes in which the office of the Judge was promoted by a private individual were always plenary, and, as such, required to be conducted according to regular form. Oughton enumerates among plenary causes, "*Causæ omnes correctionum ex officio voluntarie promotæ*" (*Ordo Judiciorum*, Tit. vii. 12). "*Negotium ex officio mero*," he says, "*est causa summaria, ex officio voluntarie promotæ, plenaria*." (*Ibid.*, n. 2). "*Notandum est*," he says again, "*quod omnes causæ correctionum ex mero judicis officio institutæ sunt summarie; saltem in iisdem solet summarie procedi, et ita est procedendum*." (Tit. 144, s. 8). Again: "*Causa correctionis ex officio mero est causa summaria; causa vero correctionis ex officio voluntarie promotæ est causa plenaria*." (Tit. 150, n. A). For which reason he says, "*Eo modo procedendum est ut in cæteris causis plenariis*." (Tit. 150, s. 3.) Where the cause was plenary, it was essential that all the formalities incident to a plenary cause should be ob-

served. "Plenary causes," says Conset (*Practice*, part 1, sec. 2), "are those which require a solemn order in the proceedings." "There must," he says, "be a formal citation to appear in the cause; the style of the Court must be observed; the names of the parties must be set forth. A time and place must be named for appearing. Articles must next be exhibited. Then comes the answer of the defendant; then the *contestatio litis*; and, if required, the oath of the defendant; then the proofs, with the opportunity for cross-examination; then the hearing, and finally judgment."

Assuredly there could be no relaxation as to these requirements in a penal suit. "In all causes of deprivation," says Ayliffe, followed herein by the other text writers, "where a person is in actual possession of an ecclesiastical benefice, these things must concur—viz., first, the person must be cited or admonished to appear; secondly, a charge must be given against him by way of libel or articles to which he is to give an answer; thirdly, a competent time must be assigned for proofs and interrogatories; fourthly, the person accused shall have the liberty of counsel to defend his cause; to except against witnesses, and to bring legal proof against them; and, fifthly, there must be a solemn sentence read by the bishop after hearing the merits of the cause or pleadings on both sides; and these are the fundamentals of all judicial proceedings in the Ecclesiastical Courts in order to a deprivation; and if these things be not observed the party has a just cause of appeal, and may have a remedy in the superior Court." (*Parergon*, p. 209.) Speaking of the articles necessary in such a suit, Sir Robert Phillimore (*Eccles. Law*, p. 1291) says, "The Court cannot go beyond the offence charged, nor the articles beyond the citation." And if these formalities are essential to a proceeding as founding a sentence of deprivation, so must they also be necessary to found a sentence of suspension, which, on all hands, the authorities agree in treating as a deprivation *pro tempore*.

Such being the former law, the Church Discipline Act, the 3 and 4 Vict., c. 86, has intervened, prescribing the mode in which proceedings against persons in holy orders for offences against the Ecclesiastical Law shall be initiated, but leaving the former procedure of these Courts unaltered (see sec. 13). What was before a plenary cause remains so still, and in it all the formalities incidental to a plenary suit must be observed. That that procedure has not been followed in the present instance is beyond controversy. The proceedings have been altogether of a summary character.

Martin v. Mackonochie (App.), Q.B.

Let us next consider in what cases monitions have been used either as incidental to ecclesiastical procedure, or as matter of ecclesiastical censure and punishment in the way of definitive sentence; for in one or other of these forms alone do monitions occur as incidental to such procedure; after which we shall have to consider in what way contumacious disobedience to such monitions has been dealt with according to established law and practice.

As incidental to procedure, monitions were frequently used, whether in a civil or in a penal suit, in order to compel the party proceeded against to do something necessary to the progress of the suit—as to appear; to answer to the articles; to appear to be examined on oath, or the like. Disobedience to such a monition became a contumacy, and was treated as contempt of Court. As incidental to a definitive sentence, where the decree of the Court was not completed by the act of the Court itself, but required some act to be done by the party, a monition to do the thing decreed to be done was issued; and here again disobedience rendered the party contumacious. Thus, as Sir Robert Phillimore observes, (16) there might be a monition for alimony or to churchwardens to hold a vestry, or to a clergyman to reside; or the like; so also to pay the costs if decreed. In short, a monition might be issued, to do anything which it was competent to the Court to order the party against whom the decree was directed to do, and if disobeyed rendered the party contumacious. But then how was such contumacy to be dealt with? In one way and in one way only.

It is familiar knowledge that the only coercive process or punishment for contumacy possessed by the Ecclesiastical Courts was, prior to 53 Geo. 3, c. 127, excommunication, which when “signified” (as it was termed) to the Court of Chancery, was followed by the writ *de excommunicato capiendo*, confirmed and regulated by the statute of the 5 Eliz. c. 23, under which the party was committed to prison till he made his submission and rendered obedience. For this process, by the Act of the 53 Geo. 3, was substituted the writ *de contumace capiendo*, under which a party decreed to be contumacious might be imprisoned till submission and obedience; to which was added by 2 & 3 Will. 4. c. 93, power to sequester the estates of contumacious persons privileged from arrest, and who were not, therefore, subject to the process in question.

Thus the Ecclesiastical Courts Commissioners say: “The execution of the sentence,

in case there be no appeal interposed, is either completed by the Court itself, as by granting probate or administration, or signing a sentence of separation; or remains to be completed by the act of the party, as by exhibiting an inventory and account, by payment of the tithes sued for, and other similar matters, in which case execution is enforced by the compulsory process of contumacy, *significavit* and attachment.”

The law is fully stated in Dr. Stephens's very learned and useful *Treatise on the Laws relating to the Clergy*, under the title “Excommunication.” “By the ancient practice of the Ecclesiastical Courts,” he writes, “it was only by means of an excommunication that they were able to enforce their sentences in any case whatever. So here the common law stepped in to their assistance; for in case of the refusal of the party to submit to his sentence, and being thereupon excommunicated as for a contempt, a writ *de excommunicato capiendo* was issued, under which he was to be taken and committed to the county gaol till he was reconciled to the church, and such reconciliation certified by the bishop. But now, by statute 53 Geo. 3. c. 127. s. 2, excommunication in all cases of contempt is discontinued; and in lieu thereof, where a lawful citation or sentence has not been obeyed, the Judge shall have power, after a certain period, to pronounce such person contumacious and in contempt, and to signify the same to the Court of Chancery. Whereupon a writ *de contumace capiendo* shall issue from that Court, which shall have the same force and effect as formerly belonged in case of contempt to a writ *de excommunicato capiendo*.” Thus in *The King v. Baines* (17) it was held that in a civil suit in an Ecclesiastical Court, judgment being given that a party shall do a given thing—as, e.g., pay a given sum for church rate—a monition may issue, and a writ *de contumace capiendo* may follow upon it as the proper process, where contumacy occurs, either as incidental to procedure or by disobedience to a lawful order of the Court.

This being so, was there anything to alter the process in the case of a clerk in orders? Could suspension be resorted to in such a case as a means of overcoming the contumacy and enforcing obedience? I apprehend assuredly not. The process is spoken of as being, and I see no reason whatever to doubt was, the same, whether directed against a layman or a clerk in orders—the clerk in orders not being in this respect in a less favourable position, except when subject to the visitatorial authority of the bishop.

(16) Vol. II, p. 1257.

(17) 12 Ad. & E. 210.

Martin v. Mackonochie (App.), Q.B.

Suspension is not mentioned by the ecclesiastical authorities as a proceeding to which a clerk is liable by judicial sentence as a means of coercion, as distinguished from punishment, as will be seen on referring to the title "Suspension," in the standard works on ecclesiastical law. "The mode of enforcing all process," say the Ecclesiastical Courts Commissioners, "in case of disobedience, is by pronouncing the party cited to be contumacious; and if the disobedience continues a *significavit* issues, upon which an attachment from Chancery is obtained to imprison the party till he obeys." The writers on ecclesiastical law are agreed in saying that, except where the powers of the Courts have been enlarged by statute, as in the case of simony, non-residence, and the like, the only means of enforcing the decrees of the Ecclesiastical Courts, whether interlocutory or definitive, and whether in a civil or criminal suit, was by the writ *de contumace capiendo*.

And here I have to observe that in the instances in which a definitive decree thus requires for its completion an act to be done by the party, and a monition to do it issues, the suit in which this occurs is, with one or two exceptions, in the nature of a civil proceeding, or has reference to some obligation or duty which it is the object of the suit to enforce, and the performance of which it is competent to the Court to enjoin. Penance, to which I shall presently refer, affords such an exception. Non-residence would appear to lie on the confines of the civil and penal jurisdictions. If the suit is brought simply to enforce residence, monition would be proper, and would carry with it the statutory consequences of contumacy and no other. If non-residence is made the subject of a suit with a view to deprivation or suspension, the suit becomes a plenary one, and cannot be disposed of summarily as a case of contumacy. I find no instance of such a proceeding, by way of anticipation, in a suit *in penam* in respect of an offence committed against the ecclesiastical law. Nor could it well be otherwise. No one has a right to presume, where an offence has been committed, that the offender, having undergone his punishment, will again offend; still less could a Court of justice, unless authorised by established practice or by statute, on such an assumption arrogate to itself the power, if the offence should be repeated, to withdraw it from the ordinary course and procedure of law, and to make it the subject of a summary proceeding as amounting to contumacy.

The case is still stronger when looked at as one in which monition is resorted to, not as a means of furthering the progress of a

suit—for which purpose it would be equally available in a penal as in a civil suit—or as a means of compelling the performance of a duty under a decree in a civil suit—but as a definitive sentence in a penal suit. Punishments, or, as the civilians term them, "censures"—"*Censura sive coercitiones ecclesiasticae*"—according to Sir Robert Phillimore, following herein the writers who have preceded him, are, as regards those to which both clergy and laity are subject in common, as follows: 1. Admonition, otherwise called Monition; 2. Penance; 3. Suspension *ab ingressu ecclesie*; 4. Excommunication, with the spiritual and temporal consequences incident to it. Those to which the clergy alone are subject are: 1. Suspension; 2. Sequestration; 3. Deprivation; and 4. Degradation. "Of these," says Sir Robert Phillimore, "admonition or monition is the first and lightest form of ecclesiastical censure, whether to clergymen or laymen." It is obvious that here "monition" is spoken of not as the foundation of any ulterior consequences, but as a form, however mild, of punishment—the open and public censure or rebuke of the Judge for ecclesiastical misconduct—generally accompanied by the party thus censured being condemned in costs—and to be remembered, doubtless, as matter of aggravation should a repetition of the offence occur—but not capable of being used as the foundation of any future proceeding of a summary character on the score of contumacy in case of such repetition. And this for two reasons—first, that any repetition of the offence would in itself constitute a substantive and distinct offence; second, that constituting a substantive offence, the offender, where the suit was instituted by a prosecutor promoting the office of the Judge, could only be proceeded against in a plenary suit—that is to say, a suit in which a formal citation must be served, articles exhibited, and all formalities strictly observed—a summary proceeding in a penal suit, otherwise than as matter of process, being altogether unknown to and contrary to the spirit of ecclesiastical procedure. Nor has the Church Discipline Act abated anything of the formal requirements of the Ecclesiastical Courts in a penal suit. Section 13 leaves the procedure precisely as it was before. It introduces no abatement of its rigour in respect of the formalities previously required in a penal suit.

And here an observation presents itself, which it will be important to bear in mind. It is nowhere said, nor does it appear to have occurred to any of the authorities on ecclesiastical law, that of these different forms of ecclesiastical censure or punishment, from monition to excommunication, a second can

Martin v. Mackonochie (App.), Q.B.

be superadded to a first; still less that when once a definitive sentence has been pronounced, and a specific punishment awarded, the Judge is not *functus officio* and the judicial authority exhausted, as is the case on the trial of an indictment in a Court of Common Law. I am strongly disposed to think that monition, as made part of, or appended to, a definitive sentence, with the view of treating disobedience thereto as contumacy, has been adopted in these recent instances from its use in the procedure or civil jurisdiction of the Courts, the distinction between civil and penal jurisdiction not having always been kept sufficiently in view. The subject of monition, as also that of contempt or contumacy, is fully discussed by the civilians. Nowhere is it said that a monition can be superadded and appended to a definitive sentence in a penal suit, so as to enable a subsequent offence to be treated summarily as contumacious. Suspension is, as might be expected, amply dealt with. But nowhere is it said that suspension ever has been or can be inflicted as a punishment for contumacy in disobeying a monition in a penal suit in which the office of the Judge has been promoted by a third party. It is possible that the notion that suspension might follow on a monition may have had its origin in the doctrine of the early canonists, that when in the exercise of the visitatorial power the Bishop inquires summarily into clerical offences with a view to deprivation or suspension, a monition must precede the sentence. (See *Gibson, Codex*, p. 1046.)

Again, whatever the penalty to which a party pronounced contumacious was liable, such penalty was not treated in the way of punishment, but as a means of overcoming the contumacy and enforcing obedience, and was only imposed *quousque*. It ceased on submission and obedience. The party in contempt could not be summarily condemned to punishment for a definite period independent of future submission.

A striking illustration of the position that even in a penal, as well as in a civil suit, the only means of enforcing their decrees which the Ecclesiastical Courts possessed, except where their powers had been enlarged by statute, was derived from the statutes I have been referring to, is to be found in an instance in which, in a penal suit, the decree was not completed by the act of the Court, but something was required to be done by the party against whom the decree was directed in order to carry it out—namely, in the instance of penance, which, as we have seen, is a form of ecclesiastical punishment, and which, though now obsolete, was formerly much in use as a punishment for cer-

tain offences. If the party enjoined to do penance refused to comply, the only mode of enforcing obedience mentioned in the books, whether against layman or churchman was by excommunication, or in later times by the writ *de contumace capiendo*. It is nowhere suggested that suspension or deprivation might be applied in such a case where the offender was a clerk in orders. That deprivation or suspension were unknown to the Ecclesiastical Courts as a punishment of contumacy in the case of a clerk as late as 1849, may be gathered from what took place in the case of *The Bishop of Lincoln v. Day* (15). The defendant, a beneficed clergyman, having been suspended *ab officio et a beneficio*, for drunkenness, for three years, and further until he should produce and lodge in the registry a certificate of good conduct during that period, at the expiration of the three years resumed his clerical duties without exhibiting the required certificate. Being proceeded against for thus acting, he was pronounced to be in "contempt." Thereupon counsel prayed for a sentence of deprivation, but the Court (Sir Herbert Jenner Fust), though regarding the case as a most aggravated case of contempt, nevertheless, there being no precedent for the application of such punishment in a case of contempt, declined to pass that sentence for such an offence, and the decree was that the contempt should be "signified" so as to make the defendant liable to imprisonment under 53 Geo. 3. It is obvious from the language of the report that if there had been any authority for the sentence of deprivation or suspension in such a case, the Court would willingly have inflicted that punishment. But there was none, and the established process under the statute was consequently resorted to.

Before I quit this portion of the subject I have also to call attention to a very important distinction taken in the Act of the 53 Geo. 3 between excommunication as incident to a civil suit, as a means of enforcing decrees, whether interlocutory or final, and excommunication as a form of punishment in a penal suit. While the Act supersedes the former, substituting for it the writ *de contumace capiendo*, it expressly preserves it "on definitive sentences, or interlocutory decrees having the force and effect of definitive sentences, pronounced as spiritual censures for offences of ecclesiastical cognizance," limiting, however, its operation in such cases to a period of six months—thus affording a statutory recognition of the difference I have been adverting to between contumacy in the course of a suit and any act amounting to an offence under the ecclesiastical law.

Martin v. Mackonochie (App.), Q.B.

Thus far I have been dealing with the law as administered in a plenary penal suit in the Episcopal Courts. But, as has already been observed, where the bishop dealt with offences of the clergy of his diocese—in which would be comprehended simony, non-residence, non-performance or irregular performance of divine service, heresy, false doctrines, profaneness, immorality, drunkenness, and the like—in his office of visitor at a visitation, in what has been termed his *forum domesticum*, or where a proceeding was instituted *ex mero officio*, the case was altogether different. There the formalities required in a regular suit were not deemed necessary. There the bishop in the one case, or his Judge in the other, might proceed summarily, subject, however, to the condition insisted on by the canonists, that, where the offence was one of omission, a monition should precede deprivation or suspension. Not, however, that, in a matter which amounted to an offence against the law or discipline of the Church, as distinguished from the non-performance of some duty which the bishop, as ecclesiastical superior, had power to enjoin, disobedience to the monition created the offence for which deprivation or suspension might afterwards be decreed. The definitive sentence was founded, not on the disobedience, but on the offence itself. The purpose and effect of the monition was practically to give a *locus penitentie* to the offender or party in default.

Thus stood the law as administered by the Ecclesiastical Courts till the time when, within the last few years, the jurisdiction now exercised was for the first time assumed, I had almost said—I hope it will be understood not using the term in any offensive sense—usurped—not, indeed, by the Judges of the ordinary Ecclesiastical Courts, but by Judges of whom, however great and eminent, I hope I may be pardoned for saying that they may be supposed to be less familiar with the administration of Ecclesiastical Law—namely, by the Judicial Committee of the Privy Council sitting on appeal. In the year 1868, in a case of *Martin v. Mackonochie* (3), the parties being the same as are before us in the present proceeding, a suit had been instituted in the Consistory Court of London against the defendant, a clerk in holy orders, and perpetual curate of the parish of St. Alban's, Holborn, for offences against the Ecclesiastical Law in the manner of administering the Holy Communion, in the use of incense, the undue elevation of the paten and cup, as also the practice of excessive kneeling and prostration before the consecrated elements during the prayer of consecration, the mixing of water with the wine,

and the use of lighted candles during the celebration of the Communion. The suit having been transferred by letters of request to the Court of Arches, the learned Judge of that Court decided that the defendant had offended in respect of the use of incense, the elevation of the paten and cup, and in mixing water with the wine used in the administration of the Communion, and admonished him not to repeat these practices; but he declined or omitted to pronounce that the defendant had offended against the Ecclesiastical Law by the alleged kneeling and prostration, or by the use of lighted candles. The promoter having appealed to the Judicial Committee of the Privy Council against this judgment in respect of the two last-mentioned particulars, the Judicial Committee held that the respondent, the defendant in the original suit, had offended against the law ecclesiastical, within the meaning of the Uniformity Acts, in the particulars relating to the kneeling and prostrating himself before the consecrated elements during the prayer of consecration, and in the using of lighted candles during the celebration of the Communion; and reported that the respondent, in addition to the admonition administered in the Court below, should be admonished to abstain from the practices pronounced by them to be unlawful. An Order in Council to that effect was accordingly made, and a monition under the seal of the Court was in due course issued and served on the respondent. This judgment having been pronounced at the close of 1868, two years afterwards a petition was presented to the Judicial Committee praying them to enforce obedience to the monition, on affidavits shewing that the defendant still persisted in the practices against which he had been admonished. The defendant, the respondent in the cause, not appearing either by counsel or in person, their Lordships, on the application of the appellant's counsel, made an order that the respondent and the witnesses who had made affidavits in his favour should appear on a given day to be cross-examined, which was accordingly done. The evidence having been taken, their Lordships decided that the respondent had been guilty of disobedience to the monition, and sentenced him to be suspended *ab officio* for three months (18). It is to be observed that, the respondent neither appearing in person nor being represented by counsel, no question was raised as to the jurisdiction thus invoked and exercised.

(18) Law Rep. 2 P.C. 365; Law Rep. 3 P.C. 52; 40 Law J. Rep. Eccles. 33, 35; Law Rep 4 P.C. 501.

Martin v. Mackonochie (App.), Q.B.

Two years later the case of *Hebbert v. Purchas* (2), a case in many respects similar to the foregoing, came before the Judicial Committee of the Privy Council on an appeal from the decision of the Court of Arches, so far as the judgment there had been favourable to the defendant, in a suit in which, being a clergyman in holy orders, he had been charged with various breaches of Ecclesiastical Law in the celebration of the communion, among other things as regarded the vestments worn by him during its performance, the position assumed by him during the prayer of consecration, as also in the use of wafer bread, and of an admixture of water with the sacramental wine. The Judge of the Court of Arches having declined to pronounce against the defendant and to admonish him in respect of these particulars, the promoter appealed to the Judicial Committee, who, after argument, decided against the respondent in respect of these charges, and advised, as in the former case, that a monition should be issued admonishing him to abstain from such practices in future; and an Order in Council having been made accordingly, a monition was issued and served on the respondent. Later in the year an application was made to the Judicial Committee, by a motion founded on affidavits shewing a continued use of the practices against which the defendant had been thus admonished, for a sentence of deprivation against him for his contumacy and contempt (18). In this case, notwithstanding the precedent set in the case of *Martin v. Mackonochie* (3), their Lordships appear to have had some misgiving as to their power to pass sentence of deprivation or suspension for contumacy on motion, and desired to have further information regarding the exercise of such a power by the Court of Delegates, to whose powers they had succeeded under the Acts of 2 & 3 Will. 4. c. 92, and 3 & 4 Will. 4. c. 41; and they accordingly directed the motion to stand over for that purpose. Their Lordships having on a subsequent occasion been referred by counsel to certain alleged precedents, the Lord Chancellor Hatherley pronounced a judgment, as to which I can only say I think there must be some error in the report, as his Lordship, having first observed that "the researches of counsel have resulted in no such precedent being found—as indeed their Lordships supposed would probably be the case"—and having added that the Court was of opinion that it "could not proceed to enforce compliance with the order which had been disobeyed by any summary process for contempt through the medium of a motion," is notwithstanding made to say: "On the other hand, their Lordships are quite satisfied that there exists

in this tribunal, as there did exist in the High Court of Delegates—all the powers of which have been transferred to this committee—a power of suspension, not only *ab officio*, but a *beneficio* also, as a summary punishment for contumacy;" having said which, his Lordship proceeds to pass sentence of suspension for a year in respect of the contumacy. Yet the only proceeding then pending before their Lordships, on which this summary jurisdiction was exercised, was a *summary application on motion*. The suit, out of which the appeal had sprung which gave jurisdiction to the Judicial Committee over the defendant, had terminated in the suspension for six weeks and the twofold monition, which together formed the sentence—monition being, as we have seen, a form of ecclesiastical censure; and assuming even that disobedience to a monition of this nature would amount to a substantive offence against Ecclesiastical Law, which might be made the subject of a substantive charge in a fresh suit, no such charge was before the Judicial Committee: the only proceeding before it was an application to deal with a further and substantive offence summarily on motion. I am unable, if I may be forgiven for saying so, to follow the reasoning in the judgment in question. Precedent and authority being altogether wanting, we are left without any ground being assigned for the assertion that the Court of Delegates had before possessed, and therefore the Judicial Committee, as their successors now possess, the power of suspending a clergyman as a summary punishment for contumacy. So far as I am aware, no instance of the exercise of this power in a penal suit, prior to these judgments of the Judicial Committee, is anywhere to be found. And assuming even that the issuing of the monition was within the competency of the Court—which, however, I cannot admit—and that the defendant in disobeying it had been guilty of contumacy, the recognised penalty of contumacy was not suspension, but, as I have shewn, imprisonment under the 53 Geo. 3. c. 127. Moreover, it is not a question whether the Court of Delegates possessed such a power, but whether the Courts of the first instance, the Consistory Court, and the Court of Arches, possessed it. For, the authority and power of a Court of Appeal, however high its position, can be no greater, except as to correcting the judgment of the Court below, than those of the Court appealed from. It can annul the judgment, or can affirm it; or in some cases may reform it; but it can pronounce only the judgment which the Court below could and should have given. What was required to be established, therefore, was that the Episcopal or Archi-

Martin v. Mackonochie (App.), Q.B.

episcopal Courts possessed this power of suspending summarily for disobedience to a monition in respect of an offence against the Ecclesiastical Law. But for this neither authority nor precedent is to be found; nor, I venture to think, has or can any sufficient ground be given for asserting it, while there is, as I shall presently shew, very sufficient ground for maintaining the contrary.

The cases referred to in *Hebbert v. Purchas* (2) were again brought forward on the argument in the present case, but they fail to furnish any precedent or authority in support of the jurisdiction now in question. The case principally relied on is that of *Harrison v. The Archbishop of Dublin* (19), which in the first instance came before the Courts on a writ of prohibition and eventually found its way to the House of Lords. Harrison, being the rector of St. John's, Dublin, had altogether omitted to perform divine service in the parish church. Summoned by the archbishop to attend at a visitation to answer for not performing divine service, he declined to appear, upon which he was suspended by the archbishop for contumacy. Hereupon he applied to the Court of Common Pleas in Ireland for a writ of prohibition; and, having been put to declare in prohibition, set forth that the rectory of St. John's had formerly been attached to the priory of the Holy Trinity of Dublin; and that when that priory had been suppressed by King Henry 8, and the Deanery of Dublin established in its place, the rectory had by the King's gift been attached to one of the prebends of the cathedral; that, having been appointed a prebendary, he had acquired the rectory by right of his prebend; and that, so long as he continued to be a prebendary, the rectory being inseparable from the prebend, he could not be deprived of the rectory unless first deprived of his prebend; that as prebendary he was not subject to the visitation of the archbishop, and, therefore, was not subject to it in respect of the rectory, nor subject to be deprived of or suspended from the rectory, so long as he remained prebendary of the cathedral. This contention was overruled by the Court of Common Pleas in Ireland, as also on appeal by the Court of Queen's Bench in England, and lastly by the House of Lords. But it is to be observed that the sole question raised was as to whether under the special circumstances the living was subject to the visitatorial power of the archbishop. No question was raised as to the manner in which that power, assuming it to exist, had been exercised. The decision

does not, therefore, in any way affect the present question. In a subsequent stage, however, the matter assumed a different form. Some years later, Harrison, who persisted in not performing service, was admonished by the archbishop, at a visitation, to extract, within a month of that time, a license to serve the cure of souls, and to preach in the parish church of St. John's. Disobeying the monition, he was pronounced contumacious, and sentenced to be suspended. He appealed to the Court of Delegates, taking, in the first place, the same ground as before, as to the rectory of St. John's not being subject to the archbishop's visitation; but, in addition thereto, insisting that the proceeding had been irregular and void, because no articles had been exhibited against him or any proofs brought in. The Delegates rejected the appeal, and rightly. The first point had been settled by the decision of the House of Lords in the previous case; and, as regarded the second, it was established law that proceedings instituted by the ordinary *ex mero officio*, and, *a fortiori*, proceedings at a visitation, might be dealt with summarily. Articles and proofs, therefore, in a matter within the personal knowledge of the bishop, and within his immediate jurisdiction—as non-performance of divine service undoubtedly was—would be superfluous and unnecessary, and could not be insisted on. Here, again, no question was raised, nor was any decision pronounced, as to the power of the archbishop to suspend, whether before or after monition; the only questions involved being whether the rectory was within his jurisdiction and whether the proceedings were not void for irregularity.

This case, as well as those to which I am immediately about to refer, were cited from a series of cases extracted by Mr. Rothery, the Registrar of the Court of Arches, from the records of the Court of Delegates, and printed by order of the House of Commons in 1868. But it is to be observed that in these records neither the arguments of counsel nor the grounds of the decisions appear; and it is, therefore, impossible to say with certainty on what points these decisions turned. They are, therefore, of but little authority.

The case of *Higgins v. The Archbishop of Dublin* (20) was precisely the same as the foregoing, except that the appellant appeared before the archbishop, and therefore was not declared contumacious for not appearing. Having, however, been ordered to procure a license, as Harrison had been, he

(19) Rothery, 135; 2 Brown's Parl. Cases, 190.
VOL. 49.—Q.B., C.P. & EXCH.

(20) Rothery, 136.

Martin v. Mackonochie (App.), Q.B.

was suspended for contumacy in not doing so, and the sentence was upheld on appeal. The same observations apply to this case as to the foregoing. That a complaint of non-residence or non-performance of public worship was within the visitatorial authority of the ordinary seems clear. "To whom," asks Sir Robert Phillimore, in the case of *The Bishop of Winchester v. Rugg* (21) (a case of non-performance of divine service) "are the parishioners to look for redress for this wrong done to them? How are they to obtain the performance of divine service in their church? Surely by an appeal to the authority of their bishop. He has the *cura curarum animarum* within his diocese. It is his bounden duty to enforce in every church in his diocese the performance of the services prescribed in the Book of Common Prayer. I see no reason to doubt," the learned author goes on to say, "that the general authority of the ordinary in matters of this kind, recognised by the universal Ecclesiastical Law as inherent in the nature of his office and necessary for the performance of the duties which are cast upon him, is properly applied to a case of this kind."

Another case referred to was that of *Boughton v. The Chapter of York* (22) which again was an appeal from the exercise of episcopal authority. Boughton, a vicar choral of the cathedral of York, having absented himself from the discharge of his duties, the dean and chapter appointed a substitute, and sequestered the revenue of the office for his use; upon which Boughton gave notice to the receiver not to pay the substitute. For this the dean and chapter called upon him to make a suitable apology, and on his refusal suspended him until he should comply. On appeal to the archbishop as visitor, the sentence of the dean and chapter was confirmed. A further appeal to the Court of Delegates was attended by a like result. This, again, was an instance of visitatorial authority summarily exercised *in foro domestico*. The cases, therefore, which have arisen on the exercise of visitatorial jurisdiction are beside the present question, when we are dealing with a jurisdiction in which the formalities required by strict law have to be complied with.

The case of Thomas Jones (23), rector of Llandyrnock, in the county of Denbigh, differs somewhat from the foregoing, inasmuch as the suit against him, for not read-

ing the prayers in the accustomed place, had been instituted not by the bishop *ex mero officio*, but on the presentment of the churchwardens in the Consistory Court of the diocese. Having been monished to read the prayers in the accustomed place, the defendant had peremptorily refused to obey the monition. For this the bishop ordered him to shew cause why he should not be suspended *ab officio*. Not appearing to shew cause, he was suspended. On appeal the sentence was upheld by the Court of Arches, and afterwards by the Court of Delegates. But here the churchwardens were, beyond all question, the proper persons to present in respect of any irregularities in the performance of divine service, as fully appears from the statement of the law, as found under the title "Churchwardens," in Burn's *Ecclesiastical Law*, or in Dr. Stephens's treatise on the laws relating to the clergy. The proceedings may therefore have been considered as instituted *ex mero officio*, and consequently as not subject to the necessity of being strictly formal; nor does it appear that any objection was taken to the exercise of the episcopal jurisdiction in a summary form. These cases are, for the reasons I have already given, inapplicable to the question before us. I entirely concur with the Judicial Committee in thinking that none of them establish a precedent for the exercise of the summary jurisdiction in dispute.

That neither precedent nor authority is to be found for the existence of this jurisdiction prior to its recent exercise is, I cannot help thinking, a very strong argument against it. Nor do I feel the force of the observation that no instance has been found of its exercise being held to be unlawful. That no attempt has ever been made to exercise it will readily account for the fact that no instance of its rejection is to be found. I cannot help thinking that it is incumbent on those who assert and invoke a jurisdiction so unusual to give proof of its existence.

But it is not only that no authority or precedent can be found to support the summary jurisdiction thus exercised; a still more formidable objection is, first, that, looking to its supposed origin, such a jurisdiction cannot in the nature of things exist, and secondly that, if it could, its exercise would be contrary to fundamental principles. As regards the first point, it is clear that the Court of Arches possesses no primary jurisdiction over offences committed within any other diocese than that of Canterbury, except so far as such jurisdiction is conferred by the letters of request from the bishop of

(21) 37 Law J. Rep. Eccles. 85, at p. 88; Law Rep. 2 A. & E. 247, at p. 252.

(22) Rothery, 134.

(23) Rothery, 63.

Martin v. Mackonochie (App.), Q.B.

the diocese. But the letters of request are necessarily confined to the specific offence which is the subject matter of the suit transferred, and, as I have already stated on the authority of Sir Robert Phillimore, the suit so transferred relates to the offence expressly set forth in the articles which form the subject of the complaint, and to that alone. Being confined to the specific charge thus articulated, the letters of request, as it seems to me, do not and cannot confer jurisdiction in respect of any other offence committed beyond the sphere of the primary metropolitan jurisdiction, and any further offence so committed remains in that of the diocesan. It may, perhaps, be said that the bishop, having transferred the cause to the Court of Arches, transfers with it the power to issue such a monition, and to punish for contumacy in disobeying it. But this assumes that the bishop's commissary would himself have that power in the Diocesan Court, in a suit in which the office of the Judge is promoted by a third party, which remains to be proved, and which, as far as I can see my way, is not only not proved, but incapable of proof. *A fortiori* is it to be proved that the diocesan can thus, by transferring a specific cause, confer, as it were, by anticipation, on the Metropolitan Court jurisdiction over offences not yet committed, and which are, therefore, not as yet within his own—a proposition which, to my mind, I must say involves a legal absurdity. Every one will agree that the Diocesan cannot transfer his judicial authority to the Metropolitan Court generally, or *ante rem natam*. It is only when a suit has been instituted in respect of a specific offence that the jurisdiction can be transferred. When it is so transferred, the letters of request, and the suit thereby removed to the Metropolitan Court, must be strictly confined to the charge contained in the articles. How can this give jurisdiction in respect of an offence not yet committed? And what if the second offence should be committed within the limits of a different diocese? Would the transfer of the cause by the bishop of one diocese give the Court power to treat as contumacy an offence committed in another, the bishop of which might possibly have refused his sanction to a prosecution on account of the second, and thus enable one bishop to invade the province of another? Finally, I ask by what authority can an Ecclesiastical Court, whatever may be the stage of the proceeding, by reason of a suit having been instituted in reference to a specific offence, assume to itself, without statutory authority, a power to keep the party, for all time to come, in a state of *surveillance*, and as subject

to a summary jurisdiction hitherto unknown to the ecclesiastical law? To what extent is this jurisdiction to be carried? Over what area of episcopal jurisdiction is it to reach? To what limit in point of time is it to endure? Considerations which would be important if the matter were made the subject of legislation, but which are left wholly at large in the exercise of this novel authority. I fail altogether to see how it can be competent to a bishop to confer on the Court of Arches, by way of anticipation, jurisdiction over offences to be committed in the future, and over which, as not being as yet *in rerum natura*, he has himself no authority. Be this as it may, I am of opinion that letters of request relating to a specific charge carry no such jurisdiction with them with reference to a future offence.

That the exercise of such jurisdiction would, in more than one respect, be inconsistent with general principles of penal jurisprudence, will, I think, readily appear. In the first place, the difference between plenary and summary jurisdiction in the matter of criminal procedure is recognised and established in every system of penal jurisprudence, including, beyond all question, the law ecclesiastical; and no Court can, without legislative authority, take upon itself, *ex proprio motu*, to substitute the one for the other. Yet that is what has been done here. Every departure from the established ritual in a member of the Church having the cure of souls is an offence against ecclesiastical law, and constitutes in itself a distinct and substantive offence, and not the less so because the offender may already have been guilty of the like offence. It is therefore obvious that a repetition of a first offence may be so treated. What reason can be given why it must not be so treated? But if it were so treated, the prosecutor promoting the office of the Judge would in such a case have to go through all the formalities of procedure required in a plenary cause; and, as I have shewn, a suit so instituted in respect of an ecclesiastical offence was, and still remains under the Church Discipline Act, a plenary cause; and, as we have seen, in a suit *in penam* for an ecclesiastical offence, all the formalities of the criminal procedure must of necessity be observed. If a suit were thus instituted in respect of a second offence as a distinct and substantive offence, a citation with all its formalities would be necessary, and articles must be exhibited—and how much is involved in these requirements will be seen on consulting Oughton, title "Citation," or Burn's *Ecclesiastical Law*, title "Practice"—the defendant must have the opportunity of answering, and of

Martin v. Mackonochie (App.), Q.B.

being examined on oath, of traversing the facts, of demurring in point of law; in short, all the incidents of procedure required by the established law and by the statute must be gone through, and any summary proceeding, such as treating the case as one of contumacy, would be out of the question. By what authority short of legislative enactment can a defendant be deprived of the right to insist on the observance of these formalities? Oh, but, it is said, substantial justice has been done: the facts were fully proved, and the offence was the same as that of which the defendant had before been convicted; and, though this may have been, strictly speaking, an informal and possibly irregular proceeding, full opportunity was afforded him of being heard and making his defence as much as if all the formalities required in a plenary suit had been complied with. To which, at least out of Court, many persons will be disposed to add in thought, if not in words, "These Ritualists are very obstinate and troublesome, and this, being the shortest, is the best way of putting them down; there is no occasion to be over nice in dealing with them." It seems to me, I must say, a strange argument in a Court of justice to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceedings should be upheld. In a Court of law such an argument a *convenienti* is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings *in penam* are, it need scarcely be observed, *strictissimi juris*; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the Legislature to amend it. The Judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the law and to the ends of justice, is as much part of the law as the substantive law itself. I

cannot, therefore, concur in the view that because the defendant might have defended himself on this summary proceeding, or, if a formal suit had been instituted against him, must upon the facts necessarily have been condemned, therefore the proceeding in question was valid, and ought to be upheld. Such reasoning has and can have no place in an English Court of justice. It may be that this summary jurisdiction would be exceedingly useful in order to prevent erratic clergymen from setting the law at defiance, and retaining benefices in a Church, the rules and ritual of which they habitually disregard, if the Legislature should think proper to create it. But its possible utility affords no justification for usurping it, and expediency is a new and I must say to me strange ground to assign for upholding the exercise of assumed judicial authority when it cannot be shewn to exist in point of law. If the effect of our decision will be to enable Mr. Mackonochie to continue to set the law at defiance, I shall greatly regret it; but I cannot allow any such consideration to operate in deciding, not whether rough justice may not have been done, but, what, after all, when looked at judicially is a dry question of law, whether the sentence we are asked to prohibit has been according to law. At the same time let it not be for a moment supposed that the law is not quite strong enough to deal with and punish such offences, if the right course is pursued. The only question is, whether that course, as prescribed by law, may now be departed from, and another, unknown to the law, substituted for it. It is obviously a very different thing to treat as contumacy, the refusal or omission to do a specific thing which the Court has authority to enjoin, or to treat as such a substantive offence for which the law has itself provided the appropriate treatment. The law constitutes a given act an offence. As such it attaches to it a given punishment. But it prescribes a plenary course of procedure by which, if at all, the offence is to be brought home to a party charged with having committed it. A Court having jurisdiction over the offence, takes upon itself to substitute a different and more summary method of proceeding. Surely this is to make the Court, as it were, supersede the law. What would be thought if the Judges were to determine without legislative authority that they would in future admonish all persons convicted and sentenced for larceny not to repeat the offence, and if they did so, were to deal with them summarily as for contempt, without the formality of an indictment or the verdict of a jury? Yet in principle the innovation would be no greater than is involved

Martin v. Machonochie (App.), Q.B.

in the proceedings adopted in the present case.

Another grievance of which a defendant so dealt with may justly complain is, that the power of appealing, if not on the facts, at all events on the law, which he would have had on a second suit is by the summary mode of proceeding taken from him. Nor let it be said that the power of appealing of which he is thus deprived may not be of material advantage to him. The facts may not be precisely the same. The sentence in the first suit may have been so light as not to make it worth his while to go to the expense of an appeal. Even if he has appealed in the first suit, that will not preclude him from renewing his appeal on the second. Or, in some cases he may take the appeal to a Superior Court. Be this as it may, it is a right which ought not to be taken from him.

But this is not all. Another and a very serious difficulty presents itself. Every fresh departure from the established ritual being, as I have pointed out, like the repetition of any other offence against the law, a distinct and substantive offence, other promoters may, with the concurrence of the bishop in whose diocese such second offence may have been committed, institute a distinct and separate suit in respect of it. Or, even the bishop in whose diocese the second offence has been committed may himself institute proceedings *ex mero officio* in respect of it in his own Court. In the first place, I take it to be clear that the bishop, in transferring the suit in respect of the first offence to the Court of Arches, does not thereby divest himself of his jurisdiction over any other offence subsequently committed within his diocese, should he think proper to exercise it. Still less could the transfer of a suit by one bishop bind another, should a second offence be committed in a different diocese. Yet this summary jurisdiction, as here asserted, would reach the offender, so far at least as the authority of the Court of Arches extends, wherever the second offence might be committed, without affording him a ground of defence should a second suit be instituted against him in a diocesan Court. This being so, how, consistently with the first principles of justice, can the defendant be made liable twice over, once for the fresh substantive offence, and again for contumacy in disobeying the monition not to repeat the offence in respect of which he had been originally condemned?

In addition to the objections thus resting on general principles, technical difficulties present themselves of a no less serious character. In the first place, as I have already pointed out, a definitive sentence in a penal

suit terminates the suit and exhausts the authority of the Court. It is not competent, therefore, to a Court pronouncing such a definitive sentence, in the absence of established practice or statutory power, to append to it, by means of a monition, an injunction to abstain in future from a repetition of the offence, so as to give itself summary jurisdiction over the offender in all time to come.

In the second place, the letters of request, transferring only a specific charge, cannot, in my opinion, for the reasons I have already given, confer jurisdiction over an offence which has not as yet come into existence, or subject the party charged to the summary jurisdiction of the Metropolitan Court in respect of future offences not arising within the area of its authority.

As regards the effect of a monition, the difficulty is equally great. If taken as a definitive sentence in a penal suit, unlike a monition issued in a civil suit to enjoin performance of the thing decreed to be done, so as to subject the party admonished to the consequences of contumacy if performance is withheld, it operates, as has been shewn, as a punishment by way of censure, and entails no further consequences. If issued in the course of a suit, or with the view of enforcing a decree made in it, all the authorities agree that the contumacy could only be dealt with, before the statute of George 3, by excommunication and its consequences; since that statute, by the writ *de contumace capiendo*.

Even if the doctrine of contumacy upon a definitive sentence could be transferred from the civil to the penal jurisdiction of the Ecclesiastical Courts, there is nothing that I can find to warrant the application of a more rigorous rule as to its consequences, or to make suspension, which it is admitted cannot be applied in a case of contumacy on a sentence in a civil proceeding enjoining a given thing to be done, applicable to a monition in a penal suit directing that a given thing shall not be done. The fact is, that monition, in the sense in which that term is used with reference to a definitive sentence in a civil suit, has no place as appended to a definitive sentence in a penal suit; and its introduction into the penal branch of ecclesiastical procedure has—I cannot help thinking, though I say it with the utmost deference—arisen from a want of attention to the essential difference which exists between these two branches of procedure.

It is laid down, it is true, as a rule, by the early canonists, as I have already mentioned, that monition should precede deprivation or suspension; no doubt for the purpose of preventing any too rigorous or arbitrary exercise of episcopal authority.

Martin v. Mackonochie (App.), Q.B.

But such a rule does not prevail in our Ecclesiastical Courts; as is plain from the fact that in this case no monition preceded the sentence of suspension pronounced by Sir Robert Phillimore; and though it is said that monition shall precede suspension, it is nowhere said that in a penal suit monition will suffice, without more, to found a sentence of suspension in respect of a second offence. It has indeed been suggested that contumacy in disobeying the lawful order of any ecclesiastical superior is in itself an offence, independently of any question of contempt. Conset seems to say so; but then he treats it as no longer the subject of summary jurisdiction, but as requiring formal proceedings; and he gives a form of articles applicable to such a suit. (*Ecclesiastical Practice*, Part II. c. 2.) What would be the appropriate punishment is not said. Possibly, in such a case, suspension might be within the authority of the Judge, or the case might come within the power to excommunicate the offender, kept alive by the 53rd Geo. 3, and thus a punishment of six months' imprisonment might be imposed. But so far as relates to contumacy as matter of summary jurisdiction, the authorities are clear that the only penalty is that of imprisonment by the writ *de contumace capiendo* under the statute of Geo. 3. Lastly, it is to be observed that in the treatment of contumacy arising in the course of a suit, this statutory process was not designed for punishment, but for the overcoming of the contumacy: consequently, as soon as the party contumacious submitted, he was set free. It is therefore inapplicable to a case in which the contumacy, having arisen as to an accomplished fact, has become, so far as that fact is concerned, incurable.

The result then at which I arrive on the most careful consideration I can give to the subject is—1, that a monition in a penal suit, while if pronounced as a definitive sentence it carries with it no ulterior consequences, cannot be appended to a definitive sentence awarding a specific punishment, so as to prolong and enlarge the jurisdiction of the Court, and to warrant any further proceedings on a repetition of the offence as for contumacy; 2, that even if a monition could be so pronounced, disobedience would entail no other punishment than is provided by the 53 of Geo. 3. Consequently that suspension is inapplicable to such a case.

The only question which remains to be considered—and it is by no means the least important—is whether the present case is one on which a prohibition should go. I quite agree that mere irregularity, or even mistake in point of law, though it may be

sufficient to found an appeal, will not be sufficient to call for or warrant a prohibition. I agree with what was said by Lord Denman in *Ex parte Smyth* (24), namely, that “the only instances in which the temporal Courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court.” But it seems to me that we have here much more than irregularity or mistake, and that something has been done which is manifestly beyond the jurisdiction.

I take it to be too clear for argument that, although an inferior Court may have jurisdiction over a given subject-matter when arising within the local limits of its own jurisdiction, if it takes upon itself to deal with such a matter when arising beyond such limits, it acts without authority, and may be restrained by prohibition. Such I apprehend to have been the case here.

I have given my reasons for thinking that the jurisdiction of the Court of Arches was limited to the offence handed over to it by the diocesan Court, and that consequently the Court of Arches had no authority to deal with a distinct and separate offence not comprehended in the letters of request, and arising beyond the local limits of its jurisdiction.

Furthermore, I apprehend that if a Court takes upon itself, without authority, to alter the course of its procedure, and to create a new offence, as was here done by superadding monition to a definitive sentence and converting a second and distinct act into the offence of contumacy instead of dealing with it as a substantive offence, there arises in this respect, also, an excess of authority which we are called upon to prohibit. Blackstone, in 3 Com., c. 7, speaking of the Writ of Prohibition, says, that “it may be directed to the Courts Christian, where they concern themselves with any matter not within their jurisdiction, or if, in handling matters clearly within their cognisance, they transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy: in such cases also a prohibition will be awarded.” On the authority of the law as laid down by Coleridge, J., in the case of *Jones v. Jones* (25), Mr. Lloyd, in his Treatise on the Law of Prohibition, states that prohibition will lie in cases where the Judge of an inferior Court transgresses the rules which ought to govern the proceedings of all Courts, or is guilty of

(24) 3 Ad. & E. 719, at p. 724.

(25) 17 Law J. Rep. B.Q. 170.

Martin v. Mackonochie (App.), Q.B.

an irregularity which amounts to an excess of jurisdiction, though the case may otherwise be within his authority. In this view of the law I entirely concur, and I think it is applicable here.

But the strongest ground remains to be stated. Treating the second offence of the defendant as an act of contumacy, the Court of Arches has applied to it a punishment which could not according to the ecclesiastical law, in the view I take of it, be applied to a case of contumacy, by sentencing the defendant to suspension, instead of dealing with the case under the 53rd of George 3. The effect of this proceeding is to deprive him of his freehold during the period over which the sentence of suspension extends. Now, I take it to be clear that, where the law which a Court has to administer prescribes a given punishment as applicable to an offence, to vary that punishment, or substitute another, is a usurpation of jurisdiction. No one, I think, could say that if the Court of Arches had sentenced the defendant to a fine of a thousand pounds, and on non-payment had sentenced him to be suspended for contumacy, such a sentence would not have been properly the subject of prohibition. But the only penalty which an Ecclesiastical Court can impose in a case which is properly one of contumacy is that of imprisonment under the statute of George 3. By applying to the alleged contumacy the penalty of suspension, the sentence, if executed, will deprive, and as I think, wrongfully deprive, the defendant of his freehold interest in his benefice; and although, where a sentence of deprivation or suspension can be properly pronounced by the Ecclesiastical Court, this Court will not interfere, though the effect of such sentence will be indirectly to affect the interest in the freehold, yet where the sentence is not properly within the competency of such a Court, or applicable to the alleged offence, this Court becomes bound to protect the temporal interest by prohibiting the execution of the sentence.

The result is that, in my opinion, the monition of Sir Robert Phillimore, and, *a fortiori*, that issued by Lord Penzance, was *ultra vires*, and, consequently, that the subsequent proceedings before Lord Penzance, which terminated in the sentence of suspension for three years, were *coram non iudice*, and the sentence of suspension inoperative and null; and that, even if this were not so, the sentence of suspension, being inapplicable to an alleged case of contumacy, was one which the Court of Arches had no authority to pronounce. I am therefore of opinion that the rule for a prohibition must be made absolute.

I may observe, in conclusion, that we have not called upon the applicants to declare in prohibition, as, in consequence of the Court being divided in opinion, we might otherwise have done, because, the facts not being in dispute, the question is solely one of law, and as the parties, if advised to appeal, can, under the Judicature Act, go direct to the Appellate Court on an appeal against our order, it is better to leave them to do so, without the expense, inconvenience and delay of a proceeding by way of declaration.

Rule absolute.

From this judgment both Lord Penzance and the promoter appealed.

The Solicitor-General (Sir H. Giffard) (with him *C. Bowen and Blakesley*), for Lord Penzance (26) (on March 10, 1879).

It is necessary, before entering on the consideration of the questions raised on this appeal, to remember that all analogies drawn from suits at Common Law or in Criminal Courts must of necessity be misleading, when the question is as to an Ecclesiastical Court. Phrases identical in terminology will be found to bear totally different meanings in the Church Courts from those which they bear in the ordinary Courts. The Ecclesiastical Courts adopted the practice and the formularies of the Roman Consistory, as may be seen by reference to the names of the various steps in a suit such as the *litis contestatio* or the *litteræ compulsoriales* (*Cooté's Ecclesiastical Practice*, p. 10). The object of the suit in the Ecclesiastical Court is not the same as that of a suit in the ordinary lay Court; in the latter performance or damages or punishment is sought for; in the former the suit is instituted *pro salute animæ et reformatione morum*, and the sentence is not merely *in pœnam*, but for reformation—*Cooté's Ecclesiastical Practice*, p. 104; and *Ex parte Rose* (27).

This distinction being borne in mind, it is contended that it will be found that there has been no irregularity in the proceedings in the Court of Arches in this case, but that the suit has been re-

(26) *Coram* Lord Coleridge, C.J.; James, L.J.; Brett, L.J.; Cotton, L.J.; and Theisiger, L.J.

(27) 18 Q.B. Rep. 751; 21 Law J. Rep. Q.B. 339.

Martin v. Mackonochie (App.), Q.B.

gularly instituted and proceeded with in due form, respect being had to the laws of the Church Courts; but it is also submitted that, even if there has been any irregularity, the remedy is by an appeal, and not by an application for a writ of prohibition.

It is argued on behalf of the respondent that the Court of Arches has no power to add a monition to a definitive sentence, so as to enable the promoter of the suit to apply to the Court in a summary way, by motion, for a sentence in respect of disobedience to that monition. It is said that this would be to give the Court, in fact, power to pass sentence of deprivation on an accused clerk on a motion made in a cause in respect of which another sentence has been already passed, and it is said that such a proceeding would give the Dean of the Arches jurisdiction to hear a cause of which he was never seised, inasmuch as no letters of request had been issued so as to give him jurisdiction over the matter.

The use of the word "summary" is in itself misleading, for ecclesiastical causes, although described as plenary and summary, are not so in the sense in which proceedings before Courts of criminal jurisdiction are, some summary and some not summary. It is true that Conset, in his book on ecclesiastical practice, in treating, at p. 22, of plenary and summary causes, states that correction is a plenary cause; but he corrects that statement at p. 385, and says that "all causes of correction instituted of the mere office of the Judge are summary causes;" and it is to be noted that articles were required both in plenary and summary causes.

Monition is undoubtedly an ecclesiastical censure, although one of the milder censure, and as such it has often been attached to other sentences: an instance will be found in the form in *Coote's Practice*. In *Clarkson's Case*, p. 222, the monition is part of the sentence of the Court, and the Court is not *functus officio* till that monition has been obeyed. In Oughton's *Ordo Judiciorum*, vol. i. tit. 137, note A, *monitio* is given as one of the *pœnæ et censuræ ecclesiasticæ*, which are there

described as *nervi ecclesiasticæ jurisdictionis*; and although no monition is added to the outline of the sentence, as given by the same author in tit. 147 of the same book, that is because he does not there pretend to give a complete form of sentence containing paragraphs suitable to every case. The cases in which a monition has been added to or formed part of the sentence are not few, as instances may be cited, *Field v. Cosens* (28), *Blackmore v. Brider* (29), where the monition is found in the body of the sentence, and *Burgess v. Burgess* (30), where the Court excused penance, condemned in costs, and emphasised the fact that, although the monition was the only sentence then passed, yet that grave punishment would follow if it should be disobeyed. In *Cox v. Goodday* (31) a monition was added to a sentence of suspension. Monitions will also be found in *Sanders v. Head* (32); *Burder v. Hale* (33); *Newberry v. Goodwin* (34); *Canning v. Sawkins* (35); and *Austen v. Dragger* (36).

Instances will also be found in *Rothery's Return* of monitions being added to other sentences. In *Orchard v. Orchard* (37) penance was inflicted, the accused was condemned in costs, and a monition added; in *Chamberlayne v. Hewetson* (38) penance was ordered, and there was a monition; and the form of sentence in *Coote's Practice*, at p. 222, contains both a sentence and a monition. These monitions have also been recognised by statute, for 10 Geo. 4. c. 53 makes provision for the payment of fees on monitions. There can be successive sentences in a suit in the Ecclesiastical Courts—there can be an interlocutory sentence and a final sentence.

If, then, a monition can form part of the sentence, it cannot be a *fulmen*

(28) 3 Hag. 178.

(29) 2 Phill. Ec. Rep. 359.

(30) 1 Hag. Cons. 384.

(31) 2 Hag. Cons. 138.

(32) 3 Curt. 565.

(33) 6 Notes of Cases, 611.

(34) 1 Phill. Ec. Rep. 282.

(35) 2 Phill. Ec. Rep. 293.

(36) 1 Add. Ec. Rep. 307.

(37) Rothery, 98.

(38) Rothery, 100.

Martin v. Mackonochie (App.), Q.B.

brutum; there must be a power in the Court by which it can enforce these monitions. The statutes which have been passed to enable the Church Courts to enforce the sentence of excommunication, and since that has been disused, to signify the contempt to the Court of Chancery, have in no way limited the power of the Ecclesiastical Courts to enforce by their own procedure their own censures, and the provisions of 5 Eliz. c. 23, 53 Geo. 3. c. 127, and 2 & 3 Will. 4. c. 93, do not abolish suspension as a punishment for contumacy.

Ecclesiastical censures are treated of in *Oughton*, vol. i. tit. 137; in *Ayliffe's Parergon*, p. 155; *Phillimore's Ecclesiastical Law*, p. 1088; and in a note to *Clarke v. H—* (39).

Such being the sentences which the Ecclesiastical Courts can inflict, the next question is, what are the offences in respect of which they can be inflicted? Contempt and contumacy are two distinct offences. *Oughton* treats of the former in tit. 30, and of the latter in tit. 37. It is, however, possible that an act may be both, and while contumacy may be punished as contempt, it may also be punished as a separate and distinct offence. *Ayliffe* treats of contumacy p. 196 of the *Parergon*, and *Godolphin*, in the Appendix to his *Rep. Canonium*, p. 15, s. 43, says that suspension and excommunication are punishments for "contumacious offenders." In *Gibson's Codes*, Appendix, s. x. p. 1524, there is a form of sentence given by which it appears that, a man having been admonished to reside, was afterwards deprived for disobedience to that monition, that is, for doing what has been done in the present case. There, as here, there was one continuing suit; and the fact that the stages of a case are separated from each other by a considerable interval of time does not prevent its all being one continuous identical cause. The effect of the monition is to suspend part of the sentence, and it is often pronounced in mercy, to give the accused an opportunity of amendment, as was done in *Barnes v. Shore* (40) and *Austen v.*

Dugger (36). *The Bishop of Winchester v. Rugg* (21) and *Jarratt v. Steele* (41) shew that the Court retains power over the cause after pronouncing the monition, and that, as was the case in *Ex parte Rose* (27), *Blackmore v. Brider* (29), and *The Bishop of Lincoln v. Day* (15), the cause is alive, and the accused not dismissed from the suit, so that disobedience to the monition may at any time render him liable to punishment.

The Bishop of Lincoln v. Day (15) has been misunderstood in the Court below, for the Judge in that case said that he could find no instance of deprivation for drunkenness, not, as is said in the judgment of Cockburn, C.J., no instance of deprivation for contumacy, and in many points the case is very similar to the present.

It is then urged that there is no other case until quite modern times of anyone being punished summarily for disobedience to such a monition as this. No doubt, as is stated in the introduction to *Rothery's Return*, p. 15, there is "almost a total want of materials;" but *Harrison v. The Archbishop of Dublin* (19) shews that suspension *ab officio et beneficio* has been inflicted for contumacy. In that case there was a suit, and there were articles in the Visitation Court, and when, as would appear to be the case, the objection was taken that to warrant a sentence for contumacy there ought to be a fresh suit and fresh articles, it was overruled, and the sentence confirmed on appeal. So in *Higgins v. The Archbishop of Dublin* (20), a sentence of suspension was passed for contumacy in not procuring a license, and the sentence confirmed on appeal. In *Chamberlayne v. Hewetson* (38), which was a case against a layman, a sentence was passed for disobedience to a monition; the same was done in the case of *Rutter v. Wainwright* (42) and in *Boughton v. The Chapter of York* (22), in none of which cases does it appear that a fresh suit was instituted. In *Martin v. Mackonochie* (3) the Privy Council passed a sentence of suspension for disobedience to a monition without

(39) 1 Robert. 377.

(40) 1 Robert. 382; 15 Law J. Rep. Q.B. 296.

(41) 3 Phill. Rep. 170.

(42) *Rothery's Return*, No. 82.

Martin v. Mackenochie (App.), Q.B.

any fresh suit being instituted, but on a motion supported by affidavit. In *Hebert v. Purchas* (2) the Privy Council directed an enquiry into the precedents, and although the Court doubted whether it had power to pass a sentence of deprivation or amotion (for the words "on a motion" should be "or amotion") for disobedience to an order, there was no doubt as to the power to pass a sentence of suspension "*ab officio et beneficio* as a summary punishment for contumacy;" and this authority is directly in point.

Analogous to these monitions with their consequences are injunctions, which play so important a part in civil jurisprudence. In *Saxby v. Easterbrook* (43), an injunction was granted against the publication of libels, and the mode of enforcing this would be by personal process for contempt on motion made to the Court, for if a person infringes a perpetual injunction he can be committed on affidavits.

It is further said that the proceedings in the Arches Court were contrary to the provisions of the Church Discipline Act, that there has been a "proceeding instituted" within the meaning of section 23 of 3 & 4 Vict. c. 86, and that that proceeding has not been instituted in the manner provided by that Act; but the argument of the appellant is that no new suit was necessary, that no suit other than the original one has been instituted, and that that suit was duly instituted by letters of request, which were excepted from the provisions of 23 Hen. 8. c. 9. No fresh citation or suit was ever required in cases where it was clear that the party to be sued had full notice—*Clowes v. Clowes* (44), *Catteral v. Catteral* (45); and in the present case there is abundant proof that the respondent had full notice of everything that was to be alleged against him.

It remains to consider what is the appropriate remedy even if it be assumed that there has been an error of practice in the proceedings in the Court of Arches. It is submitted that even granting this,

still the remedy is by appeal and not by prohibition. There has in any case only been an error in procedure, not any excess of jurisdiction, and no prohibition will be granted for an error in practice. The cause was properly before the Court of Arches, and this Court will not correct the practice of the Ecclesiastical Courts—*Ex parte Smyth* (24); *Couch v. Toll* (46); *Shatter v. Friend* (47); *Breedon v. Gill* (48); *The Queen v. Payton* (49). If prohibition is to be granted for error in procedure then an action would lie against the Judge for that error, whereas no such action will lie—*Ackerley v. Parkinson* (50); *Ex parte Story* (51); *Re Crawford* (52).

The Ecclesiastical Court is not open to prohibition unless it has acted contrary to the law of the land and in violation of natural justice, for the practice and procedure of every Court is, unless regulated and prescribed by statute, a matter of its own cognizance—*Ex parte Smyth* (24).

Stephens (with him *Droop* and *Jeune*), for the promotor.—The appellants contend that an Ecclesiastical Court can admonish a clerk not to repeat the offence which has been proved against him, and can make that admonition a substantial part of the original sentence; that it can punish disobedience to such a monition as contumacy, that it can punish it by suspension *ab officio et beneficio*. This contention is supported by the precedents in *Coote's Ecclesiastical Practice*, p. 227; by several cases in *Rothery's Return*, such as *Kemp v. Knightsbridge* (53); *Blackiston v. Barnard* (54). Monitions were also added to the sentences in *Oanning v. Sawkins* (35); *Blackmore v. Bridger* (29); *Turmine v. Clarkson* (55); *Field v. Cozens* (28); *Burder v. Langley* (56). In *The Bishop of Winchester v. Bugg* (21);

(46) March 98.

(47) 1 Shower 158, 172.

(48) 1 Ld. Raym. 219.

(49) 7 Term Rep. 153.

(50) 3 Mau. & Sel. 411.

(51) 22 Law J. Rep. Exch. 33; 8 Exch. 195.

(52) 18 Law J. Rep. Q.B. 225; 13 Q.B. 613.

(53) *Rothery* 80.

(54) ib. 163.

(55) *Coote's Practice*, 253.

(56) 1 Notes of Cases, 542.

(43) Law Rep. 3 C.P.D. 339.

(44) 3 Curt. 185, 194.

(45) 5 Notes of Cases, 466.

Martin v. Mackonochie (App.), Q.B.

Burgess v. Burgess (30); *Jones v. Curtis* (57); *Clewer v. Pullen* (58); *Barton v. Wells* (59); *Wilson v. McMath* (60), *Barnes v. Shore* (40); *Martin v. Mackonochie*, first case (61); *Sumner v. Wiz* (62); and in *Elphinstone v. Purchas* (63), the monition was the only sentence passed.

As might be expected from the fact that the earlier Judges of the Court of Chancery were ecclesiastics, the injunctions granted by that Court present close analogies to these monitions, and injunctions even if obtained *ex parte* and on a misstatement of facts, must be obeyed until dissolved. Both the monition and the injunction place those to whom they are directed in a different position from all other persons; if disobeyed all the proceedings which follow are summary, and the only question is, has the Court been obeyed?—*Spokes v. Banbury* (64); *The Attorney-General v. Bradford* (65). That punishment follows by summary process on disobedience to a monition is not doubtful, and that that punishment was in old times in the case of laymen or unbeneficed clerks excommunication, is established by *Woodbridge v. Holloway* (66); *Rutter v. Wainwright* (42); *Chamberlayne v. Hewetson* (38). It is clear that the punishment for clerks who so offended was excommunication or suspension—*Oughton*, tit. 38, tit. 137. It is to be observed that *Godolphin's Appendix* is cited in *Phillimore's Ecclesiastical Law*, at page 1379, and no doubt is thrown on its authenticity by that learned author.

Jones v. The Bishop of Bangor (23); *Clewer v. Pullen* (55); *Harrison v. The Archbishop of Dublin* (19); *Higgins v. The Archbishop of Dublin* (20); *Hancock*

v. Bomer (67); *Martin v. Mackonochie* (3); *Hebbert v. Purchas* (2); afford instances of suspension as a punishment for contumacy in disobeying a monition. In the present case the Dean of the Arches issued the monition when acting under letters of request from the Bishop of London, and when once those letters have issued the cause is transferred to the Provincial Court, and the bishop loses all control over it—*Hodgson v. Oakley* (68); *Elphinstone v. Purchas* (63).

The cause then is in the Court of Arches, and the Judge of that Court has full jurisdiction to enforce the orders and decrees of his Court.

Charles and Phillimore, for the respondent.—Without doubt the cases referred to and the precedents cited prove that monition, suspension and deprivation are ecclesiastical censures; but it is submitted that they do not establish the position that a monition can be appended to another distinct ecclesiastical censure, or that, if appended, disobedience to it can be punished on summary process, or that a clerk who has been admonished can for ever be tried on the charges which formed the ground of the original suit without the institution of a fresh suit, without either letters of request or the protection of a commission, or that such disobedience even if punishable in that way can be properly punished by suspension *ab officio et beneficio*. It would not be *a priori* probable that such a position could be maintained, for an accused clerk would, if such were the law, suffer under many and manifest disadvantages. He would have no right to claim that oral evidence should be given on the hearing of the motion to enforce the monition, and would thus lose a right conferred on him by sections 17 and 18 of the Church Discipline Act; he would also lose the benefit of the two years' limitation given by section 20 of the same Act—*Ditcher v. Denison* (69). He might be in fact punished for an offence which was statute barred, and might even be punished on a charge which, as has

(57) Rothery 119.

(58) Rothery 79.

(59) 1 Hag. Cons. 21, 34.

(60) 3 Phill. 95.

(61) 37 Law J. Rep. Eccles. 17; Law Rep. 2 A. & E. 116.

(62) 39 Law J. Rep. Eccles. 25; Law Rep. 3 A. & E. 58.

(63) 39 Law J. Rep. Eccles. 28, 124; Law Rep. 3 P.C. 245.

(64) Law Rep. 1 Eq. 42.

(65) Law Rep. 2 Eq. 71.

(66) Rothery 61.

(67) Rothery 99.

(68) 4 Notes of Cases, 180.

(69) 11 Moo. P.C. 324.

Martin v. Mackonochie (App.), Q.B.

happened, might have been declared, since the original sentence was passed, to be no offence at all. He would be unable in the case of his having been convicted at the assizes under the Act of Uniformity to plead that conviction in bar, and so would be twice punished for the same offence. Such a proceeding would also infringe the provisions of the Statute of Citations, 23 Hen. 8. c. 9, for it would enable a clerk to be cited out of the diocese, where he might be at the time of the citation, and that without, as is required by the Statute of Citations, any letters of request.

The argument for the appellants has drawn attention to a distinction between suits in the Ecclesiastical and those in the Civil Courts; but in cases such as the present, where the charges are of offences against the Act of Uniformity, and which are made by that Act indictable at assizes, the argument does not apply, for the jurisdiction of the Court is penal and not as in many cases paternal and correctional—*Free v. Burgoynes* (70). If the Ecclesiastical Courts deal with an offence which is capable of being made the subject of an indictment, they must follow the procedure of the Court with all strictness, for the Ecclesiastical Courts have always exercised strict supervision over the citation, the articles and the proof in ecclesiastical causes—*Breake v. Wolfrey* (71).

It appears from the judgment of Lord Penzance in *Combe v. Edwards* (72) that the respondent has been punished both for contumacy and for a fresh ecclesiastical offence. It is contended that the sentence is equally illegal and the proceedings equally irregular, whichever view be adopted of the sentence passed. If the Dean of the Arches inflicted the punishment for a fresh ecclesiastical offence, the proceedings are void, because the respondent was not before him, there was no suit in the Court, and thus the respondent was at liberty to disregard a notice of motion which was entitled in a suit which was at an end; for there had

been no fresh letters of request, nor, as was necessary, any fresh articles.

Letters of request transfer to the Dean of the Arches a particular suit, a particular set of charges and nothing more. The offence must exist at the time of the issuing of the letters of request, and the Court must follow the letters strictly—*Breake v. Wolfrey* (71). By the Church Discipline Act the Dean is to hear the case (section 13), and when he has done that, he is *functus officio*, his delegated authority is at an end, and if fresh proceedings are taken they must be, by section 23, instituted according to the provisions of the Act; that is, either by a commission (section 3) or by fresh letters of request (section 13), and as this has not been done in the present case the proceedings were illegal and the Court had no jurisdiction.

For this was a proceeding within section 23 of the Church Discipline Act, and therefore the provisions of that Act must be observed—*The Dean of York's Case* (73), and whatever the ancient practice of the Ecclesiastical Courts may have been this statute must be obeyed.

It is however urged by the appellants that the suit was not at an end because a monition had been appended to the sentence, and that the suit was thus kept alive for the purpose of supervision, so that the Dean of the Arches acquired by the letters of request a perpetual jurisdiction over the respondent, and that the Bishop resigned by those letters all discretion and power in connection with any future proceedings to be taken against the respondent; but the contention of the respondent is that this cannot be so, that a monition cannot be appended to a definitive sentence in a penal suit, that there is, until quite modern times, no instance of such an addition being made with the view of treating disobedience thereto as contumacy and of punishing that contumacy without a fresh suit, and that the cases in the Privy Council, relied on by the appellants, introduced a new practice without authority or precedent on insufficient information in *ex parte* cases. If the suit was

(70) 5 B. & C. 400; 2 Bligh 65.

(71) 1 Curt. 880.

(72) 3 P. D. 103 at pp. 114 & 130.

(73) 2 Q.B. 1.

Martin v. Mackonochie (App.), Q.B.

not at an end, then by section 13 of the Church Discipline Act there can be no appeal, for there can be no appeal until the suit is ended without the leave of the Judge, so that if a monition be added to a sentence the cause thereby kept alive and the suit not ended during the whole of the clerk's life, then there can never be an appeal without leave.

Monitions have sometimes been the only sentence passed by the Court, and such monitions present the nearest analogy to the injunctions to which reference has been made, for in the case of an application for an injunction, the Court could not, prior to the 21 & 22 Vict. c. 27, give damages for the act against the commission of which the injunction was sought. In this class may be ranged *Barton v. Wells* (59); *Hodgson v. Dillon* (74); *Barnes v. Shore* (40); *The Bishop of Winton v. Bugg* (21); *Woodbridge v. Holloway* (60); *Weston v. Hand* (75); *Rutter v. Wainwright* (42); *Sumner v. Wix* (62); *Martin v. Mackonochie* (61); *Jarratt v. Steele* (41); *Olewer v. Pullen* (58); *Maynard v. Brand* (76); *Burgess v. Burgess* (30). The first four cases were really suits for the trial of civil rights, although in form criminal, and if the jurisdiction of the Court did continue after sentence in any of these cases it was only for the purpose of execution, as for enforcing the payment of costs, for a sentence is enforced by execution, and not as is suggested by the appellants by another sentence; such monitions would also be used in aggravation of punishment in the case of another suit being instituted against the same offender—*Burder v. Pughe* (77). Instances of monitions issued in the course of the suit to compel appearance, and for other purposes of procedure, will be found in several cases, and disregard of these monitions has been treated as contumacy, and punished accordingly; but when suspension is spoken of as the punishment for such contumacy, it is to be noted that the word *suspensio* in itself meant *suspensio ab ingressu ecclesie*, a lighter kind

of suspension which was applicable both to laymen and to clerks. The Statute of Citations, 23 Hen. 8. c. 9, shews that suspension from the performance of service was recognised as a punishment for contumacy. In *Lynwood's Provinciale*, part I. p. 39, in the glossary to a Constitution of Archbishop Peccham about the supply of the Sacred Chrism, it is stated that where *suspensio* is mentioned by itself the lighter form is meant. So in the Constitutions of Otho in the second part of *Lynwood*, at p. 64, the words "*suspenditur ut contumax*" are explained as meaning "*ab ingressu ecclesie*." It is true that Godolphin states in his appendix that suspension *ab officio* is the punishment for contumacy; but the appendix was not published with the first edition nor during his life, and is thought not to be authentic. Moreover, Conset at p. 35 says that the only remedy for contumacy in not appearing is excommunication; Clarke at p. 24 writes to the same effect; Gibson also says, Tit. 46, cap. iv., that excommunication is the only way by which a spiritual Court can enforce appearance, and the Report of the Ecclesiastical Courts Commissioners states at p. 16 that the remedy for contempt is by *significavit*. In *Chamberlayne v. Hewetson* (38) there was a monition before sentence; in *Hancock v. Bomer* (67) the suspension was *donec aliter visum*, and that was a case of a suspension to enforce a particular act, not a sentence *in poenam* as in this case. *Jones v. Ourtis* (54) is against the contention of the respondent; but it was in a local country Court, and the irregularities of inferior officials of those petty Courts cannot be relied on as proving the regular practice of the Ecclesiastical Courts—*Andrews v. Lytton* (78); *Parham v. Templar* (79).

Oughton, indeed, includes suspension and excommunication amongst the punishments of the Church Courts, and mentions them as punishments *post monitionem*; but he is referring to *monitiones preparatorie*, such as the monitions by which were commenced cases of non-residence, as the *Henley Case* cited in

(74) 2 Curt. 388.

(75) Rothery 154.

(76) 3 Phill. 501.

(77) 1 Jur. N.S. 1178.

(78) 3 Phill. 18.

(79) 3 Phill. 243.

Martin v. Mackonochie (App.), Q.B.

Gibson, 1544, cases of *duplex querela* as *Walsh v. The Bishop of Lincoln* (80)—and formerly salvage cases *in personam* in the Admiralty Court, all of which are very different from a penal monition such as this monition was intended to be.

There are, it is true, several cases in which a monition has been appended to a definitive sentence in a penal suit, as instances of this may be cited:—*Field v. Cozens* (28); *Turmine v. Clarkson* (55); *Fendall v. Wilson* (81); *Blackmore v. Bridger* (29); *Blackiston v. Barnard* (54); *Cox v. Goodday* (31); *Sanders v. Head* (32); *Burder v. Hale* (33); *Newberry v. Goodwin* (34); *Canning v. Sawkins* (35); *Orchard v. Cobb* (82); *Austen v. Duggar* (36); *Kempe v. Knightbridge* (53). Such a practice was probably imported into the penal suit from the civil suits in the Ecclesiastical Courts; it was added as a warning; it must often have been appended as a matter of form; it is sometimes found in the formal sentence and not in the judgment; was sometimes so vague as to be difficult of enforcement, and was probably *ultra vires* if it be considered as a sentence; for there is no authority for adding one sentence to another or for inflicting cumulative censures.

If the monition was considered as a sentence and if it had ever been enforced there would not be so complete an absence of instances of its summary enforcement, for if reference be made to the cases of *Harrison v. The Archbishop of Dublin* (19); *Higgins v. The Archbishop of Dublin* (20); *The Bishop of Kildare v. The Archbishop of Dublin* (83); *Boughton v. The Chapter of York* (22), it will be found that the questions which were argued were those of visitatorial jurisdiction, and not of sentence and punishment, for as they were cases of visitatorial authority the proceedings were *in foro domestico* and were not so strictly formal; but further, it would seem that in these cases there was a suit for contumacy, and that in *Harrison's Case* (19)

part of the contumacy was the not appearing after being thrice summoned. In *Olewer v. Pullen* (58) there were several suits. Clewer had been admonished and there was then a fresh suit; no attempt was made to enforce the monition, but a regular and fresh suit was instituted; the same was the case in *Jones v. Jones* (25). In *Jones v. the Bishop of Bangor* (23), the accused was suspended *ab ingressu*.

If, however, it be assumed that a monition can be appended to another definitive sentence in a penal suit, and that it can be enforced as contumacy, still suspension *ab officio et beneficio* is not the appropriate punishment for such contumacy.

The old punishment for contumacy was excommunication, which did not include suspension *ab officio et beneficio*; for an excommunicated clerk, though he lost the right of officiating, might well receive the temporalities of his benefice, so that it was not, as is this sentence, equivalent to deprivation. Excommunication was enforced by the secular arm under 5 Eliz. c. 23, then 53 Geo. 3. c. 127, gave the writ *de contumace capiendo* and enabled the Ecclesiastical Court to signify the contempt to the Court of Chancery, and further provisions were made for certain cases by 2 & 3 Will. 4. c. 93.

It is stated in the report of the Ecclesiastical Commissioners that "execution is enforced by the compulsory process of execution, *significavit* and attachment," that "the mode of enforcing all process in case of disobedience is by pronouncing the party cited to be contumacious, and if the disobedience continues a *significavit* issues."

In *The Queen v. Barnes* (17) it was held in a civil ecclesiastical suit that a writ *de contumace capiendo* may follow on disobedience to a lawful order of the Court. It was held in *Bowerbank v. The Bishop of Jamaica* (84) that suspension is not a proper punishment for contumacy, and in *The King v. The University of Cambridge* (85) that deprivation could not be inflicted for contempt. In *The Bishop of*

(80) 43 Law J. Rep. Eccles. 13; Law Rep. 4 A. & E. 242.

(81) 2 Moo. P.C. N.S. 375.

(82) Rothery 98.

(83) 2 Brown's Parl. Ca. 179.

(84) 2 Moo. P.C. 449.

(85) 1 Str. 567.

Martin v. Mackonochie (App.), Q.B.

Lincoln v. Day (15) the clerk was suspended *ab officio et beneficio* for a named period as the punishment for his offence. He was also suspended until he should bring a certificate, and as he failed to do that, he was guilty of contumacy, and so was signified, but he was not suspended for contumacy.

The two modern cases of *Martin v. Mackonochie* (3) and *Hebbert v. Purchas* (2) are the authorities which tend against the contention of the respondent. It is to be observed that in *Phillimore's Ecclesiastical Law*, p. 1377, it is said that but for these cases suspension would not have been the proper punishment, the applications to the Court were made *ex parte*, and if it has been shewn that the precedents on which the Privy Council relied, do not, when examined, warrant the conclusions drawn from them, then those cases lose all their weight as authorities. If, moreover, there should be a difference of opinion on a question of jurisdiction between this Court and the Privy Council, it is clear, as was said in *The Cargo Ex Argos* (86), "that the Queen's ordinary Courts of law which hold the power of prohibition must in the end decide the question." *The Mayor of London v. Cox* (87); the Courts of Westminster Hall are not bound by the decisions of the Privy Council—*Smith v. Brown* (88).

But further, assuming that suspension *ab officio et beneficio* can be inflicted for contumacy, still it must be a suspension for a fixed period; for when such a sentence has been passed the Judge has no power to relax it, for the promoter has an interest in the suit, *Bridgen's Case* (89), and a person taken under a writ *de contumace capiendo* cannot be discharged without the consent of the other parties to the suit; the Bishop, moreover, has an interest in the sequestration of a living which is vacant by the suspension of a clerk—*Re Thakeman* (90). The result

of such a sentence is, that although the Dean of the Arches cannot inflict a fine *eo nomine*, yet he indirectly fines the clerk who is thus deprived of the fruits of his benefice without any process of sequestration—*Morris v. Ogden* (91); *Bunter v. Cresswell* (92).

It is contended that prohibition is the proper remedy, for the argument on behalf of the respondent is that there has been an excess of jurisdiction, and that the provisions of the Church Discipline Act have not been pursued. If the sentence was passed for a fresh ecclesiastical offence as well as for contumacy, then the statute law of the land has been disregarded; there has been an excess of jurisdiction if the sentence for contumacy was unauthorised by law; there has been an excess of jurisdiction if the respondent was never really before the Court at all; so that there has been not a mere irregularity of practice or procedure, but something done contrary to the law of the land, and manifestly out of the jurisdiction of the Court—*Ex parte Smyth* (24); *Dimes v. The Grand Junction Canal* (93).

Writs of prohibition will be directed to the Courts Christian where they transgress their bounds—Blackstone, 3 Com. c. 7. Prohibition is the proper remedy where an illegal sentence has been passed—*Francis v. Steward* (94); *Free v. Burgoyne* (70), and prohibition will lie even though there may be an appeal—*Burder v. Veley* (95); *Jones v. Jones* (25); *Caudrey's Case* (96); *The Bishop of Winchester's Case* (97); *Trebeck v. Keith* (98); *Levey v. The Bishop of St. David's* (99); *Simpson v. Blues* (100); *Pinder v.*

(91) 38 Law J. Rep. C.P. 329; Law Rep. 4 C.P. 687.

(92) 14 Q.B. Rep. 825; 19 Law J. Rep. Q.B. 357.

(93) 3 H.L. Cas. p. 759.

(94) 5 Q.B. Rep. 84; 3 Curt. 209.

(95) 12 Ad. & E. 228 and 265.

(96) 5 Coke 1a.

(97) 2 Co. Rep. 43 a; Cro. Eliz. 511.

(98) 2 Atkyns 498; Rothery 162.

(99) 1 Lord Raym. 451.

(100) 41 Law J. Rep. C.P. 121; Law Rep. 7 C.P. 290.

(86) 42 Law J. Rep. P.C. 49; Law Rep. 5 P.C. 124, 356.

(87) 36 Law J. Rep. Exch. 225; Law Rep. 2 H.L. Cas. 239.

(88) 40 Law J. Rep. Q.B. 214; Law Rep. 6 Q.B. 729.

(89) *Phillimore's Ecclesiastical Law*, 774.

(90) Law Rep. 12 Eq. 494.

Martin v. Mackonochie (App.), Q.B.

Barr (101); Davey v. Masters (102); Miller v. Palmer (103); The Queen v. Dunn (104); Middleton v. Middleton (105). The Report of the Ecclesiastical Commissioners of 1832 was also cited and discussed.

The Solicitor-General (Sir H. Giffard), in reply.

Cur. adv. vult.

The following judgments were read on June 28:—

THE SINGER, L.J.—In this case a suit was instituted in the Court of Appeal of the province of Canterbury, against the respondent, a beneficed clerk holding preferment within the diocese of London, for offences against the ecclesiastical laws. It was instituted under letters of request from the Bishop of London, issued in accordance with the provisions of the Church Discipline Act (3 & 4 Vict. c. 86), and being so instituted, proceeded with all the formalities required by the law and practice of the Court in a plenary cause, down to the time when Sir Robert Phillimore, the then Judge of the Court, pronounced that certain of the practices set forth in the articles had been proved, and passed upon the respondent a sentence of six weeks' suspension from his clerical office and duties, accompanied by a monition which was duly served, and by which he was monitioned to abstain for the future from the condemned practices. The respondent disobeyed the monition, and after a considerable interval of time, during which the practices were repeated, the matter was again brought before the Court, of which Lord Penzance had become a Judge, in a summary way by notice of motion and upon affidavits; and the respondent not appearing, a second monition, similar to the first, was issued and served. That monition also, was disobeyed, and upon the matter again coming before the Court in the same summary way as before, and the respondent still not appearing, Lord Pen-

zance passed upon the respondent a sentence of three years' suspension, *ab officio et beneficio*. The respondent thereupon applied to the Queen's Bench Division for a writ of prohibition to restrain any proceedings to enforce the sentence; and upon argument, that Court made an order for the issue of such writ, against which order the present appeal is brought. The grounds upon which it was made were that the proceedings against the respondent were contrary to ecclesiastical law and practice, and incompetent to support Lord Penzance's sentence in these respects, namely, first, that the original monition could not properly be appended to the sentence of six weeks' suspension; second, that even if it could be so appended, disobedience to it could not be made the subject of ulterior proceedings in the suit; and, third, that even if that were not so, the disobedience could not be punished by suspension *ab officio et beneficio*, or by any other process than that of the *significavit*, under the statute 53 Geo. 3. c. 127. I pass by, for the present, any consideration of the point whether, assuming that the proceedings were contrary to ecclesiastical law and practice in any or all of the above respects, a writ of prohibition could properly issue; and propose to discuss only whether the proceedings were open to the objections alleged against them. With reference to the first of the three grounds upon which the decision in the Court below proceeded, it is no longer in dispute that a monition such as was issued by Sir R. Phillimore, may by ecclesiastical law and practice either constitute the whole of the definitive sentence in a penal suit, or be appended to and form part of the definitive sentence. A considerable number of precedents of monitions of both these classes have been found in the official forms extracted from the registry of Lambeth and other places, as well as in the ecclesiastical reports, and many of them were issued in suits instituted in the Court of Arches under letters of request. This fact, of which the majority who decided the case in the Court below seem to have been unaware, constitutes, in my opinion, a not unimportant step towards the establishment

(101) 4 E. & B. 105; 24 Law J. Rep. Q.B. 30.

(102) 3 Phill. 171.

(103) 1 Curt. 540.

(104) 12 Q.B. Rep. 1026.

(105) 2 Hag. Ecc. Rep., Sup. 134.

Martin v. Mackonochie (App.), Q.B.

of the next, and as it seems to me, the turning point in the case, namely, that these monitions which I will call final monitions in criminal suits, are enforceable; in other words, that disobedience to them is punishable without the formality of a fresh suit.

I cannot but think it improbable that they would have been employed at all unless they were intended to serve some more useful purpose than that of mere menace, still less that they would have been found in company with sentences of actual punishment, where the punishment itself would, one must suppose, constitute a sufficient intimation that a repetition of the offences punished would subject the offender to increased punishment upon a second conviction in a fresh suit. Passing from that consideration, it appears to me on general grounds most reasonable that these final monitions should be capable of enforcement. The Acts or omissions which constitute ecclesiastical offences vary almost indefinitely from what has no element of moral wrong about it, as for instance putting up a tablet in a church without a faculty, or omitting under a *bona fide* claim of right to take out a license from a particular bishop to serve the cure of souls, to the grossest offences against morality, and the majority of criminal suits for ecclesiastical offences are brought not so much, if at all *in pœnam*, but to compel offenders, by means of ecclesiastical censures or *coercitiones*, to do something which by the law of the Church it is their duty to do, or to abstain from doing something which by this law is illegal. If then the Ecclesiastical Court is *functus officio* when it has punished the past offence, whether of omission or commission, and has no power to enforce the performance of the omitted duty or to restrain the repetition of the illegal act, except by the cumbrous machinery of a fresh suit, its usefulness is at least seriously impaired. The present case is not an inapt illustration of what I have just said. The wearing of an alb, the singing of the Agnus, and the kissing of the Prayer Book, are acts for which no one would have wished, in the first instance, any serious punishment to be inflicted

upon the respondent; but what the promoter of the suit would reasonably desire, and that which would be the object of his suit, would be the effectual putting a stop to practices contrary to law and offensive to those who wish to maintain the rites and doctrines of our Reformed Church.

But against the considerations drawn from the existence of these final monitions, and from the subject-matter of the suits in which they issue, the following arguments have been urged. First, it has been said that to hold that in a suit instituted under letters of request a monition to abstain for the future from the offences forming the subject of the suit can ground any further proceedings, would be to run counter to both the Bill of Citations (23 Hen. 8. c. 9) and the Church Discipline Act, the former because it provided that no person should be cited out of the diocese or peculiar jurisdiction where he was dwelling at the time of the citation, except in certain specified cases, and the case supposed does not belong to them, there having been no fresh letters of request to the Court of Appeal of the province in respect of the offences committed after the definitive sentence—the latter, because by the 23rd section of the Church Discipline Act, it is provided as follows: "No criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland for any offence against the laws ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or provided," and yet in the case supposed the clerk would be punished for acts in respect of which none of the proceedings enacted or provided by the Church Discipline Act were taken. With deference to those who accede to this argument I think that it involves a *petitio principii*. Take, for example, the present case itself. The respondent was originally cited to appear in the Court of Appeal of the province, in strict accordance with the provisions of the Bill of Citations; the formalities required by the Church Discipline Act and those required by the law and practice of the Ecclesiastical Courts in a plenary cause were

Martin v. Mackonochie (App.), Q.B.

complied with down to the decree of Sir Robert Phillimore. If, therefore, by ecclesiastical law and practice the monition which formed part of that decree was capable of being enforced in the suit, it cannot be said that the provisions of either the Bill of Citations or the Church Discipline Act have been violated, and whether it could be so enforced is the question now to be decided. That the Church Discipline Act, while protecting accused clerks from the summary proceedings which were competent in certain cases before the Act, preserved everything which appertained by ecclesiastical law and practice to a plenary cause or suit, is clear so far as the Court of Arches is concerned from section 13 of the Act, which provides that a case may be sent to that Court by letters of request, "to be there heard and determined according to the law and practice of such Court," and as regards the bishop's Court from section 11, which provides that "upon the hearing of such cause the bishops shall determine the same and pronounce sentence thereupon according to the ecclesiastical law." The 12th section throws further light upon this subject by providing, as was necessary in the case of the newly constituted tribunal, but unnecessary in the case of the Court of Appeal of the province, that the sentence might be enforced by the like means as a sentence pronounced by an Ecclesiastical Court of competent jurisdiction. But it is said that the limitation contained in the 20th section of two years after the commission of the offence for the commencement of every suit or proceeding against the offending clerk, would be practically violated if under the colour of contumacy for disobedience to a monition, the clerk can at any time be brought by summary proceeding before the Court in which the suit was originally instituted, and further, that the provision in the Act of Uniformity (1 Eliz. c. 2), under which punishment by the ordinary would be a bar to conviction by the justices and *vice versa*, would also be practically violated. These contentions also appear to me to be fallacious. It might as well be said that an injunction to restrain a trespass

to land with the power of the Courts to punish disobedience to such an injunction violates the Statute of Limitations relating to such trespasses, or as has been suggested by James, L.J., that the power of a Court to punish as contempt an assault upon one of its officers ought not to exist, because such punishment if inflicted would not be a bar to an indictment for the assault. In law the same act may constitute separate offences in respect of which the punishment for the one is not theoretically a bar to punishment for the other, and a limitation which may apply to the one may not be applicable to the other. Any hardship which might thence arise may without fear be left to be remedied by the action of the tribunals having jurisdiction in the particular matter.

The reference to analogies drawn from the procedure of the temporal Courts leads me to the consideration of the next objection urged on behalf of the respondent. It is said that it would be contrary to the analogy of criminal proceedings in the temporal Courts, and opposed to first principles of justice, that an offender against the ecclesiastical laws should after a conviction and punishment in respect of the specific offences charged against him, which could only result from the regular and formal proceedings of a duly constituted suit, be thenceforward in respect of a repetition of these offences deprived of the safeguard of such proceedings, and be liable at any time to punishment upon summary process. I have already in part and by anticipation met this objection by a consideration of the character of criminal suits in the Courts Christian in reference to their subject-matter; but it is capable of further answer by considering their character in regard to the offender. They are not suits instituted like criminal proceedings in the temporal Courts, simply for the punishment of the offender in respect of specific acts charged against him. They are brought, to use the technical language of ecclesiastical law, "*pro salute animæ et reformatione morum*." The *censuræ* or *coercitiones* in them are correctional and disciplinary. The sentences may have, and often do have, a

Martin v. Mackonochie (App.), Q.B.

double aspect; they may be, to use the words of Coleridge, J., in *Ex parte Rose* (27), "not merely in *panam*, but for reformation," and I could not possibly point and illustrate the view which I am presenting more strongly than by further reference to the case I have just quoted. There a beneficed clerk, after the report of a commission of enquiry under the Church Discipline Act, instituted upon rumour that he had been guilty of adultery, submitted himself, pursuant to the 6th section of the Act, to the sentence of the bishop. The bishop thereupon passed upon the clerk a sentence of suspension for three years, accompanied by a direction that at the expiration of the three years he should procure a certificate signed by three beneficed clergymen, of his good behaviour and morals during his suspension, and that such certificate should be approved of by the bishop before the suspension should be taken off. By means of this sentence the bishop obviously might keep a hold over the clerk beyond the period of suspension, and accordingly the latter applied for a writ of prohibition on the ground that the bishop's sentence was contrary to the common law of the land. But the rule was refused, and Lord Campbell, after referring to the fact of the sentence with the condition annexed to it being short of deprivation which might have been pronounced, said of the condition that it was "a most reasonable condition, annexed for the benefit of the delinquent." And he added, "It is, therefore, a power which ought to belong to the bishop, and no authority has been cited to shew that it does not so belong according to the course of the common law." Could Lord Campbell's language be more fittingly applied than to the present case? Sir Robert Phillimore inflicted a light punishment where he might have inflicted a more severe one, but made the condition of that light punishment the non-repetition of the offences for which it was inflicted. He did, therefore, what it was said in *Ex parte Rose* (27) it was reasonable should be done, and although he did it through the exercise of a power of a somewhat different kind, the power is one of which, as I shall shew presently,

it may be said, as was said in *Ex parte Rose* (27), that no authority has been cited to shew that it does not belong to the Ecclesiastical Court. Pausing, then, at this point of the case, and looking at the question apart from precedent and direct authority it appears to me that a strong presumption arises in favour of the view that monitions constituting the whole or part of the definitive sentence in a penal suit are capable of being enforced by summary process in the suit. But further enquiry into the matter strongly confirms this view. The form of these monitions in the first place is to be observed as indicating that they are enforceable. That adopted by Sir Robert Phillimore and by Lord Penzance in the present case is the same as that given in *Coot's Ecclesiastical Practice*, p. 255. By it the offender is warned not to repeat his offences "under pain of the law and contempt thereof;" *Coot*, p. 150-52. The same form also is used in citations and monitions in civil causes and in reference to matters of an interlocutory character, or in the nature of process, or to pay costs: *Coot*, p. 826-828; and obedience to all such last-mentioned citations and monitions, it cannot be and has not been disputed, may be enforced by summary process. In the second place, the dicta of ecclesiastical Judges upon the subject of monitions to abstain from offences, go far to establish that disobedience to them may be punished as contumacy or contempt. Sir William Scott, in *Burgess v. Burgess* (30), a criminal suit for incestuous cohabitation, and in reference to a monition of this kind, which by the way he called an injunction, said, "If obedience be not given to this order, excommunication and other consequences will follow." In *Barnes v. Shore* (40), the case of a clergyman charged with reading services and preaching without a license in an unconsecrated chapel, Sir Herbert Jenner Fust, after stating that the offence alleged against the clerk had been proved, and that he had thereby incurred ecclesiastical censure, and must be admonished to refrain from offending in like manner in future, added, "Should he be guilty of a repetition of this offence, it will be one not only against his diocesan

Martin v. Mackonochie (App.), Q.B.

but against the authority of this Court." In *The Bishop of Winchester v. Rugg* (21), a case where a beneficed clerk was admonished to obey the direction of his ordinary to hold services at a particular church, Sir Robert Phillimore in granting the monition was careful to call the defendant's attention to the fact that a disobedience to it would be attended, to use his own words, "with the grave penal consequences which the law attaches to the offence of contumacy." And lastly, in *Weston v. Hand* (70), a suit promoted in a consistory Court for fornication and adultery, the offender was warned not to consort or cohabit with the person who was the subject of the charge against him, under pain of the greater excommunication.

As regards the execution of decrees generally, in *Austen v. Dugger* (36) Sir John Nicholl speaks of the Court not being *functus officio* until the execution of the decree; and indeed it is manifest that in order to the execution of a final decree of suspension or deprivation, or to pay costs, the Court making the decree must have a power inherent in it of enforcing its decree. Accordingly in the case of *The Bishop of Lincoln v. Day* (15), where a clerk had been for drunkenness suspended from office and benefice for three years, and further, until he should produce and lodge in the registry a certificate of good conduct during that period, and the clerk at the end of the three years resumed his clerical duties without exhibiting the required certificate, Sir Herbert Jenner Fust pronounced him in contempt, and signified the contempt under 58 Geo. 3. c. 127; and in *Austen v. Dugger* (36) the monition to pay costs was enforced in a similar way. It is not easy to understand why where a decree is in the nature of an injunction to restrain the repetition of an offence, and such a decree may properly be made, it should be any the less enforceable than the decree suspending a man from serving the cure of souls or ordering him to pay his adversary's costs. I thought for a time that in this respect a distinction might possibly exist between final monitions in civil or only *quasi*-criminal suits and those issuing in purely criminal suits.

But even assuming that the suit against Mr. Mackonochie was, which I think it was not, a purely criminal suit, I cannot find in ecclesiastical text-books or in ecclesiastical reports that the distinction referred to exists as a matter of strict law, although it might probably to some extent be borne in mind in considering in what cases it would be desirable in the exercise of their judicial discretion to issue a monition. It is also obvious that the difficulty of drawing the line as a matter of strict law would be almost insuperable. Much stress has in another part of the argument been laid by the respondent's counsel upon the Report of the Ecclesiastical Commissioners in 1832, but I do not find in it any trace of the distinction in question, and inasmuch as the Lord Chief Justice in the Court below has for one purpose quoted Sir Robert Phillimore's work on Ecclesiastical Law, I would observe that that learned Judge, than whom no living person could be better versed in the practice of the Ecclesiastical Courts, treats as a matter really not in controversy at all, the proposition that these final monitions or admonitions in penal suits can be enforced. He says (vol. ii. p. 1088), "Disobedience to this admonition assumes the grave character of contempt or contumacy, and is visited by a graver punishment." And again (vol. ii. p. 1367), "It is to be observed that when an admonition has been duly served, after a trial, upon the admonished person, disobedience to it entails the penalties incident to the contempt of the order of a lawful Court."

So far then as the form of these monitions, and the language of Ecclesiastical Judges in relation to them goes, the *a priori* presumption that they are capable of being enforced receives considerable support, and it is strongly corroborated by early text-writers, to some of whom I shall have to refer later upon another branch of the case which involves this point, and to whose authority more particular reference will be made by Lord Coleridge in his judgment. But there is further confirmation of the presumption in what has been actually done by the Ecclesiastical Courts.

It is true that the recorded instances of

Martin v. Mackonochie (App.), Q.B.

the enforcement in a penal suit of monitions of the kind which I am discussing are rare; and those persons therefore who maintain that they are not enforceable at all are entitled to the benefit of that fact. But the argument derived from it cannot be pressed very far. The spectacle of clergymen setting at defiance the authority of the ordinary and the orders of the Ecclesiastical Courts is one which, at least until recent times, has happily been of infrequent occurrence, and even if one could suppose that disobedience to monitions against the repetition of offences had been not uncommon, still upon the assumption that the punishment of such disobedience as contumacy or contempt was warranted by ecclesiastical practice, there is no reason why reporters should have taken special notice of the exercise by the Ecclesiastical Courts of its ordinary jurisdiction. Turning then to such instances as can be found, I take first Mr. Rothery's Return. In *Woodbridge v. Holloway* (66) a parishioner was charged by churchwardens, at the archdeacon's visitation, for not having received the Holy Communion at Easter. He appeared in the Archdeacon's Court voluntarily, and submitted himself to the judgment of the Court, which ordered him to communicate at the next administration, and to notify on the following Court day that he had done so. Having failed to obey the order of the Court, he was declared contumacious and decreed to be excommunicated.

In *Rutter v. Wainwright* (42) a schoolmaster was cited before the Consistory of Chester for contempt of the law and ecclesiastical jurisdiction in teaching boys without having obtained any faculty or license. Having confessed the charge, he was monished to obtain a license by a certain day, but not then producing one was warned, under pain of excommunication, to desist from exercising the office of schoolmaster within the city of Chester without having first obtained a license. On a subsequent day he was asked by the Judge whether he relinquished the office of schoolmaster, and, not replying, was sentenced *pro confesso haberi* and to be excommunicated. It may be said, however, that in these two cases the process

was entirely of a summary character, arising out of visitatorial jurisdiction of the archdeacon and bishop respectively. Assume this to be so, still the cases indicate at least the correctional and coercive character of ecclesiastical jurisdiction, and in *Chamberlayne v. Hewatson* (38), a suit for adultery promoted in the Court of Arches by letters of request, disobedience to a monition forbidding the guilty parties to consort together except in public, was punished by excommunication. Leaving Mr. Rothery's Return, I find among the official forms extracted from the registry of the Arches Court of Canterbury a case of *Trebeck v. Keith* (95), which was a suit promoted in the Consistory Court of London, in the year 1741, against a clerk for performing divine service in St. George's, Hanover Square, without the license of the bishop. The clerk, by an interlocutory decree having the force of a definitive sentence, was pronounced to have done what he was charged with doing, and was admonished not to do so for the future. He disobeyed the monition, and for his contempt was excommunicated; and, as appears from a report of proceedings, in the same case before Lord Hardwicke, the excommunication was followed by its ordinary consequences. Lastly, I come to the recent cases in the Privy Council of *Martin v. Mackonochie* (3) and *Hebbert v. Purchas* (2), in which upon four separate occasions the suits, each of which had been in a sense, as here, terminated by a definitive sentence containing a monition to abstain for the future from the condemned practices, were held so far alive as to give jurisdiction to treat or to punish as contempt disobedience to the monitions. In *Martin v. Mackonochie* (3) a monition had been issued by Order in Council on appeal from the Court of Arches, and in 1869 a summary application was made to the Judicial Committee for an order to enforce compliance with such monition. The Committee, consisting of Lord Hatherley, L.O., the Archbishop of York, Lord Chelmsford, Sir James Colville, and Sir Joseph Napier, pronounced that the monition had been disobeyed with reference to a particular practice, and monished the re-

Martin v. Mackonochie (App.), Q.B.

spondent to abstain from that practice in future, ordering him to pay the costs of the motion. This, therefore, is a precedent for the issue by Lord Penzance of the second monition. In 1870 a further motion to enforce obedience to the original monition was made, when the Committee, consisting of Lord Hatherley, L.C., the Archbishop of York and Lord Chelmsford, referring to the proceedings which led to the second monition and to Mr. Mackonochie's subsequent repetition of his offence, ordered him to be suspended *ab officio* for three months.

In *Hebbert v. Purchas* (2) two monitions had been issued by Orders in Council, the one commanding Mr. Purchas to abstain from certain illegal practices, the other to pay the taxed costs of the suit. He disobeyed both monitions, and in February, 1872, as appears at p. 306 of the Report, the Committee of the Privy Council, consisting of Lord Hatherley, L.C., the Archbishop of York, the Bishop of London, Sir James Colville, Lord Justice Mellish, Sir Montague Smith and Sir Robert Collier, on motion made to them, suspended Mr. Purchas for a year from his office, and directed a sequestration for the amount due from him for costs. Mr. Purchas continued to disregard the monitions, and in July, 1872, a second monition to enforce obedience to them was made, and deprivation was asked for by Dr. Tristram, on the ground that the Committee had the same powers of enforcing their orders and decrees as belonged to the Court of Delegates, and could make an order of deprivation. The committee, consisting of Lord Hatherley, L.C., the Archbishop of York, the Bishop of London, Lord Chelmsford, Sir James Colville, and Sir Montague Smith, expressed a desire to receive further information upon the single point as to the exercise of the power on the part of the Court of Delegates or the Privy Council to deprive a clerk on a summary application against him for contempt. On a later day it was stated by counsel that they were unable to find a case in which the Court of Delegates decreed a sentence of deprivation for a contempt of its decrees or sentences, but stated that there was abundant authority

for such a sentence of suspension. The Lord Chancellor, in giving judgment, the report of which, at the twelfth line, should, I think, clearly be corrected by reading for the two words, "a motion," the one word "a motion," the synonym of deprivation, in substance stated that their Lordships could not proceed to enforce compliance with their monition by deprivation upon summary process for contempt; but he added, "On the other hand, their Lordships are quite satisfied that there exists in this tribunal, as there did exist in the High Court of Delegates—all the powers of which have been transferred to this Committee—a power of suspension not only *ab officio*, but a *beneficio*, also as a summary punishment for contumacy;" and a sentence of one year's suspension *ab officio et beneficio* was therefore inflicted. I shall have to touch upon these cases of *Martin v. Mackonochie* (3) and *Hebbert v. Purchas* (2) once again when I come to the question whether the monitions in this case could be enforced by suspension, and I may admit at once that, owing to the defendants in neither case appearing and arguing any point of law or practice, something must be taken off the weight which properly attaches to decisions of such a tribunal as the Privy Council; but if there was nothing but these decisions to support the view that monitions to abstain from the repetition of offences are enforceable, there being no authority supporting the contrary view, I should doubt very much whether, looking to the constitution of the Committee upon the four occasions when the point was mooted, I should be justified in holding that what the Privy Council did upon those four occasions was a violation of ecclesiastical law and practice.

I express no opinion whether or not the proceedings of the Privy Council could, under any circumstances, be the subject of a writ of prohibition, for the counsel on both sides have abstained from arguing that question; and I do not affirm that the decisions of the Privy Council are in strictness binding on the Courts of Westminster Hall. But, on the other hand, no one will dispute that they demand the highest respect, whatever be

Martin v. Mackonochie (App.), Q.B.

the particular matter to which they relate, and when the matter is a moot point of ecclesiastical law and practice in respect of which the Privy Council is the supreme Court of Appeal, and, as such, must be supposed to be the most competent to decide such a point, respect should at all events, except in some very extreme case which is not likely to occur, reach, in my opinion, as far as submission.

In this case, however, the decisions of the Privy Council only confirm the conclusion at which I should arrive without them, namely, that the monition of Sir Robert Phillimore was capable of being enforced by summary process, and if so, it could hardly be with any reason contended that Lord Penzance, by giving the respondent a *locus penitentie* in the shape of a second monition before inflicting punishment upon him for his contumacy rendered his subsequent decree bad.

The question remains whether the two monitions could, according to ecclesiastical law and practice, be enforced by suspension of any kind, and if so, whether by suspension *a beneficio* as well as "*ab officio*;" or whether they could only be enforced in the manner pointed out by 53 Geo. 3. c. 127. I cannot help thinking that, at the root of the objection to their being enforced by suspension lurks a mistaken supposition that the punishment of suspension is one of a higher and graver character than excommunication, which was, until the statute 53 Geo. 3. c. 127, admittedly a punishment capable of being inflicted for disobedience to such monitions as were enforceable. So far from this supposition being correct, it appears to me that, as in the case of the laic, suspension "*ab ingressu ecclesiæ*," so in the case of the cleric, suspension even from office and benefice was, in the eyes of Ecclesiastical Courts, a milder form of punishment than excommunication; and as regards suspension "*ab officio*," it is clear that excommunication would include that and much more. If this be so, there is at least a presumption that if final monitions not to repeat offences are enforceable at all, they may be enforced by suspen-

sion "*ab officio*" at least; and inasmuch as the power of the Ecclesiastical Courts to interfere with a man's freehold by suspension from or deprivation of his benefice really flowed, as the Lord Chief Justice, at p. 751, points out in the Court below, from the power to suspend or deprive him "*ab officio*," we are advanced a step in the argument that these monitions may be enforced by suspension "*a beneficio*" as well as "*ab officio*." There is really *a priori* no reason why the Ecclesiastical Courts should not have power to punish disobedience to its orders by suspension just as much as by excommunication, or the modern statutory substitute for excommunication. Suspension and excommunication are appropriate censures for ecclesiastical offences. Contumacy is an ecclesiastical offence, and there is nothing in the nature of contumacy by disobedience to a final monition which renders the latter censure more appropriate to it than the former.

Indeed, at the present day, it seems to me that in most cases of contumacious clergymen, suspension is a far more desirable punishment than the *significavit* and imprisonment under the 53 Geo. 3. c. 127. The spectacle of a clergyman imprisoned for persistence in illegal ritualistic practices may shock the public conscience, and raise sympathy for a man who really deserves none, while the spectacle of a man suspended after due warning from an office the laws attaching to which he disregards, or from a benefice obtained under conditions which he will not fulfil, is one which must commend itself to every reasonable man. I may again therefore apply the language of Lord Campbell, C.J., in *Ex parte Rose* (27), and say that the power to suspend as well as signify for contumacy being a most reasonable power, is one which ought to belong to the Ecclesiastical Court; and before interfering with its exercise the temporal Courts should at least require some authority to be produced shewing that it does not so belong. No authority whatever to that effect has been produced, and, on the other hand, there is authority to support it. In prosecuting any enquiry upon this point, involving as it does the hypothesis that disobe-

Martin v. Mackonochie (App.), Q.B.

dience to final monitions is punishable upon summary process in some way, it must be remembered that whatever tends to shew that suspension is an appropriate punishment for disobedience to interlocutory monitions, tends with equal, if not greater, force to shew that it is appropriate to the punishment of the graver offence of disobedience to final monitions. Bearing this observation in mind, I proceed to refer to some passages of the early text-writers upon ecclesiastical law, which have been referred to in the argument. In the outset I would say that I do not attribute very much weight as bearing upon the question to the passage in Oughton's *Ordo Judiciorum*, tit. 137; *Modus procedendi*, p. 213, in which he says, "Suspensio dicitur quæ (post monitionem debite factam) ecclesiasticam personam ab officio seu beneficio vel utroque ad tempus excludit," for he there appears to me to be speaking not of a final monition and a suspension upon summary process for its disobedience, but of the monition which, in another passage under the same title, he describes as "*Præparatoria plerumque præcedens ecclesiasticas censuras*," and which Ayliffe, in his *Parergon*, p. 260, calls the "canonical monition," and of a suspension which constitutes the definitive sentence in a penal suit. He is not, in other words, speaking of punishment for contumacy, but of ecclesiastical censures for offences against the ecclesiastical laws, in respect of which, at least where the offences were prosecuted in a summary manner by the Bishop in his visitatorial capacity or *ex mero officio*, the early canonists appear to have considered that the offender should have an opportunity of ceasing to offend before the particular ecclesiastical censures could be inflicted upon him. But at the same time the fact that a monition to abstain from the repetition of an offence may lead to suspension in a summary cause before a Bishop acting in his visitatorial capacity renders it not unlikely that a monition of the same kind, when issued as the definitive sentence or part of the definitive sentence, in a regular suit, whether promoted in the Bishop's Court or under letters of request in the Court of

Arches, would be enforceable by the medium of the same punishment. Some weight, therefore, is to be attributed to the passage I have referred to, and it is further to be observed that Oughton, dealing with the offence of contumacy itself, tit. 38, p. 68, note (a), in a note to the words "*Accusata contumacia*," writes "*Pœna contumaciæ est excommunicatio vel suspensio*."

It has been suggested that the term "*suspensio*" in this and similar passages of Oughton and other text-writers, when mentioned without addition, means the lowest form of suspension, namely, "*suspensio ab ingressu ecclesiæ*," but there is really no foundation for this sweeping assertion, and in regard to this very passage of Oughton there is in it a reference for further explanation about these specified punishments to tit. 137 of the same work, where suspension includes suspension from benefice. The authority of Oughton is confirmed by that of the appendix to Godolphin's *Repertorium Canonium* (2nd ed.), London, 1680, pp. 15, 16, par. 43, which speaks of the censures of the Church as being introduced "to defend the ecclesiastical power, and control obstinate sinners and contumacious offenders," and as consisting, according to Lyndwood, of "*suspensio*," "*excommunicatio*," and "*interdictum*." Suspension, he says, is the proper punishment of an offending clergyman. "It is either *ab officio vel beneficio*; the first is the punishment for not appearing upon lawful summons, the second for higher crimes." And again, "This censure," i. e., suspension, "is inflicted . . . by the decree of the Judge or the laws, and then for a greater or a smaller crime; if for a smaller fault, then it is only *ab officio*." And the passage goes on further to say that in the event of a clerk suspended *ab officio* continuing without submission, or seeking to be restored, he might be suspended "*a beneficio*" also, and that by the canons of King James, if his contumacy continued, he was to be excommunicated, and after forty days was deprivable for incorrigibility. In subsequent paragraphs (46 and 49) suspension for ecclesiastical offences is spoken of in terms which distinguish

Martin v. Mackenochie (App.), Q.B.

such offences from contumacy in disobeying the orders of the Court, and which when read in conjunction with the previous passages I have quoted, indicate that suspension is an appropriate punishment for both.

Those passages are most important, for whether or not it be the case, as has been urged as an objection to their authority, that Godolphin did not write the appendix to his work himself, the fact remains that in a text-book the whole of which, including the appendix, has been for nearly two hundred years a received authority upon ecclesiastical law and practice, we find, first, suspension *ab officio* recognised as a punishment suitable to the offence of not appearing upon lawful summons; secondly, suspension *a beneficio* recognised as a suitable punishment for offences of a more serious character, and which would apparently include graver instances of disobedience to orders of an ecclesiastical superior or court than non-appearance upon lawful summons, and if so would probably include disobedience to such a monition as was issued in this case; thirdly, the hold of the ecclesiastical superior or court over a contumacious clerk recognised in the procession of punishment from the lighter suspension to the graver, and from that to excommunication, which is put as the highest punishment of all, and yet which it is argued against all probability was the punishment which in all cases of contumacy the Ecclesiastical Court was, by its law and practice, bound at once to inflict. That excommunication was a punishment in use for contumacy is shewn in another paragraph of Godolphin's appendix (par. 49), where it is said:—"The next censure of the Church is excommunication, which is inflicted either *ab homine vel jure*; when it is inflicted *ab homine* it is usually for contumacy in not appearing before the ecclesiastical judge after a legal summons, or else for disobeying the orders, decrees or sentences of the Court, and the slighting of his authority;" and it is possible that, being a punishment common to lay as well as spiritual persons, it may have been the more ordinary one in use; but that is very different from its being ex-

clusively in use, and unless the authority of the appendix is to go for nothing, it is clear that suspension and excommunication might be applied as separate and distinct punishments for the same offences, including contumacy, and that if employed progressively suspension would, as the lighter punishment, be the first to be employed. Deprivation and degradation as punishments for ever altering the status of an offending clergyman stood upon a different footing. This view is borne out by other text-writers, to whom reference will be made by Lord Coleridge; and turning from text-writers to reported cases, however few there may be, bearing upon the question, it is nevertheless the fact that so far as they go they are to the same effect.

First I find in Mr. Rothery's Return instances of monitions by which in express terms an Ecclesiastical Court has ordered something to be done by a defendant clerk under pain of suspension. *Jones v. Curtis* (54) was a suit promoted in the Court of the Archdeacon of Berks by inhabitants of the chapelry of Garford for the purpose of compelling the vicar of Marcham to perform or provide divine service in the chapel of Garford. The Archdeacon's Court made a decree in accordance with the prayer of the promoters; the Consistory Court reversed that decree by one which was in its turn reversed by the Court of Arches, and on appeal to the Delegates they pronounced sentence against the appeal with costs, and remitted the cause, whereupon the report states, "The costs were taxed at 15*l.*, which Jones was ordered to pay within three months on pain of suspension."

Clewer v. Pullen (58) was a suit promoted in the Court of Arches by a parishioner of Croydon, which was in the peculiar jurisdiction of the Cathedral Church of Canterbury, against the vicar for neglecting his duties in certain specified particulars. In the report of the case by Mr. Rothery, he states that the clerk "had on a former occasion been presented for similar offences, and admonished to attend to his duties under pain of suspension."

I find next instances of the punishment

H

Martin v. Mackonochie (App.), Q.B.

of suspension having actually been inflicted, either for contumacy in disobeying the monitions of Ecclesiastical Courts, or as interim punishment for continuance of offences charged in a suit, which is an analogous proceeding. I do not place much reliance in the way of authority upon cases of suspension for disobedience to citations to appear at visitations, or to do or abstain from doing any other act directed by a bishop in his visitatorial capacity, for there may arise the objection that these are instances of the canonical or preparatory monition spoken of by Ayliffe and Oughton, followed by the definitive sentence of suspension inflicted, not for disobedience to the monition, but for a substantive ecclesiastical offence persisted in, notwithstanding the monition. At the same time with regard to them the observation I have already made is pertinent, that the fact that under any circumstances of summary procedure a monition was followed by suspension, is, at least, some argument that this punishment was by ecclesiastical law and practice appropriate to the enforcement of monitions generally. The records then of three cases of suspension for non-appearance at a visitation after a monition to appear have been produced. Passing from them I come to other cases more directly in point.

In *Jones v. Curtis* (54), already quoted, the clerk when cited to appear in the Archdeacon's Court did not at first obey the citation. He was therefore pronounced contumacious and decreed to be suspended. In *Olewer v. Pullen* (58), also already quoted, the clerk was on the institution of the suit, and upon his prayer, absolved from a sentence of suspension which he was under for having absented himself from a visitation held by the archbishop at Croydon; but subsequently on a petition from some of the parishioners of Croydon, representing that the clerk still neglected his duties, and praying that a curate might be appointed to perform them, the Court again suspended him *pendente lite*, and sequestered the profits of the benefice to be applied by the churchwardens in providing a curate. This, therefore, is an instance of suspension for acts done after

the commencement of a suit. In *Harrison v. The Archbishop of Dublin* (19) the clerk was monished at a visitation by the archbishop to extract within a month from that time a license to serve the cure of souls, and to preach in the parish church of St. John's, Dublin. The monition was not obeyed, and the clerk not appearing in the Archbishop's Court was pronounced contumacious, and sentenced to be suspended for his contumacy in not appearing.

The fellow case of *Higgins v. The Archbishop of Dublin* (20) is subject to the observations which I have made upon cases of suspension for non-appearance at a visitation, for although similar in most of its circumstances to *Harrison v. The Archbishop of Dublin* (19), it differs from that case in this particular, that the sentence of suspension was inflicted for the disobedience to the archbishop's monition to extract a license instead of for contumacy in not appearing, and might therefore be looked upon as the definitive sentence in a summary cause instituted and tried by the archbishop in his visitatorial capacity. I am quite free to admit the force of the criticisms made upon cases such as those found in Mr. Rothery's Return, and in which, looking to the character of the tribunals in which many of the cases arose, irregularities of procedure would not be unlikely to occur. Still the fact remains that reported cases, so far as any can be found bearing upon the point, confirm the views of the text-writers, and prove that that has been done which it is *a priori* reasonable to expect could and would be done. Lastly, come the cases of *Martin v. Mackonochie* (3) and *Hebbert v. Purchas* (2), to which I have already referred, and in which the Judicial Committee of the Privy Council upon three occasions entertained no doubt as to its power to suspend and did suspend a beneficed clerk for disobedience to monitions of the same kind as that issued in the present case. The applications made to the committee were *ex parte*, the cases cited upon the applications were not strong, but putting these objections at their highest it cannot but be allowed that the decisions in these cases are entitled at least to some weight as strength-

Martin v. Mackonochie (App.), Q.B.

ening a view which has very considerable support even without them. But the lack of authority in the opposite direction on this point, as on the former, still further strengthens this view. The *Bishop of Lincoln v. Day* (15) has been cited as such authority, but upon reference to that case it appears that the doubt of the learned Judge of the Ecclesiastical Court was not as to the mode in which his sentence could be enforced, but arose upon the original hearing when he doubted whether, according to ecclesiastical practice, he could deprive a clerk of his benefice for drunkenness. Putting aside this case, which has no bearing upon the matter in hand, not a single passage in a text-book, not a single record, not a single reported case has been produced from which any affirmative argument against the propriety of Lord Penzance's action in the present case can be deduced. The only authority upon which the respondent can reasonably rely is the Report of the Ecclesiastical Commissioners in 1832, in which at page 16, in respect of process, and at page 67 in respect of orders of Ecclesiastical Courts generally, the means of enforcement is stated to be that provided by statute. Unless, however, the statute itself provides that this shall be the only means, I cannot, even assuming that the commissioners intended to affirm that it was the only means, accept their statement as satisfactory, in the face of the reasons and authority to the contrary upon which I have already commented. But the statute does nothing of the kind. All that it does do is, in lieu of excommunication and its consequences, where used as a punishment for non-compliance with the orders or decrees as well final as interlocutory of the Ecclesiastical Courts, to substitute the declaration of contumacy the *significavit*, the writ *de contumace capiendo* and imprisonment under it for a period not exceeding six months. It leaves excommunication untouched as a spiritual censure for offences of ecclesiastical cognizance when pronounced in definitive sentences or interlocutory decrees having the force and effect of definitive sentences. It is silent upon the subject of suspension, whether looked upon as an ecclesiastical censure

in a definitive sentence or as a punishment for contumacy: and if suspension was an appropriate and lawful punishment for contumacy before the Act it remains so still. That it was a lawful and appropriate punishment for contumacy I feel bound to hold.

But it is said that even if this be so, the sentence of Lord Penzance is still bad, as assuming to punish the respondent upon summary process, not merely for his contumacy, but for the fresh ecclesiastical offences which constituted that contumacy. The objection may, in my opinion, be answered, first, by the fact that Lord Penzance in his decree in terms assumes to punish the respondent for conduct consisting of certain specified acts, that such conduct he pronounces to be, as it was, disobedience to the monitions, and as such contumacy. The decree, therefore, on the face of it shews jurisdiction. It must speak for itself, and upon a reasonable interpretation the declaration that the respondent by his conduct had repeated the offences previously proved against him is nothing more than a mode of shewing the grave character of the acts evidencing the contumacy, and justifying the severe punishment to be applied to that contumacy. But, secondly, however, the decree may be read, inasmuch as it shews on the face of it jurisdiction to inflict the particular punishment for the specified acts, that jurisdiction cannot be said to have been exceeded so as to render the decree bad, because while designating and punishing those acts by a name which is appropriate to them in reference to his jurisdiction, Lord Penzance designates and punishes them also by a name which is also appropriate to them in their nature, but under which, apart from any reference to the monitions, they would not have been punishable upon summary process. The character of the acts, as constituting contumacy, and the punishment inflicted in respect of them, which is appropriate to contumacy, is in no way altered by the additional name given to them.

I have dealt now with all the objections that have been taken to the regularity of the proceedings against the respondent, and I arrive at the conclusion that they

Martin v. Mackonochie (App.), Q.B.,

were warranted by ecclesiastical law and practice, and do not violate any statutory provision. But upon the assumption that no statutory provision is violated, it appears to me further that the proceedings would not have been properly the subject of a writ of prohibition, even if they had not been warranted by ecclesiastical law and practice. We have in this case, the Court of Arches, a Court of competent jurisdiction seised under letters of request, and through the medium of a properly instituted suit, with jurisdiction over the respondent in respect of certain offences against ecclesiastical law. The mode in which that suit is to be conducted, the sentence which it is open to the Judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provision relating to these matters to be regulated by the practice of the Court itself, and in respect of which if the Judge errs, appeal and not prohibition would be the proper remedy, unless his error involves the doing of something which, in the words of Littledale, J., in *Ex parte Smyth* (24), is "contrary to the general law of the land," or, to use the language of Lush, J., in the Court below, is "so vicious as to violate some fundamental principle of justice."

But I entirely fail to see how this can be predicated of proceedings which really amount, as I have already pointed out, to no more than this, namely, a Court in a suit the object of which is to put a stop to certain illegal practices, and having power to inflict a severe sentence, inflicting a light one upon the condition that the practices which it condemns and orders to be discontinued are so discontinued, and inflicting, upon the practices being repeated, a punishment which would have been appropriate in the first instance if the respondent had announced his intention of continuing to break the law. No one could complain if the Judge of an Ecclesiastical Court were to suspend any sentence of punishment with the view of enabling an offending person, by submission and desistance from the illegal practices charged against him, to escape punishment altogether. How does such a suspension of the sentence practically

differ from a sentence which is only a monition to abstain from such practices? In both cases the ultimate punishment would be brought about through the medium of summary proceedings by which the Judge would be informed of the offender's conduct. If the two courses are practically the same, is there any substantial distinction, if instead of the sentence being a monition and no more, it is a monition, appended to a sentence of light punishment in a case where the Judge thinks that some punishment should be at once inflicted? Can it reasonably be said that any fundamental principle of justice is violated by the adoption of such a course? I think not. It appears to me only another mode, not less favourable to an offending clergyman, of arriving at the result which in *Ex parte Rose* (27) was arrived at through the medium of a long term of suspension, to be followed, in the event of continuance of misconduct, by further punishment, until the bishop was satisfied of the offender's complete amendment of life, and as such appears to me most just and reasonable. The power to adopt either of these modes for the reformation of an offender, is no doubt open to abuse, as almost any judicial power must be. But as in other cases so in this, Judges must be trusted, and may happily be trusted to exercise their functions with moderation and good sense, and I cannot anticipate either that monitions will be appended, except in suitable cases, or that clerical offenders who have *bona fide* and for a substantial period complied with the monitions addressed to them, are in any danger of being held under the guise of contumacy or contempt in a sort of bondage to the ecclesiastical Judge. It is well, on the other hand, that for offenders who persistently disregard orders which they are bound to obey, there should be a speedy and summary method of enforcing obedience, and in no class of cases is this observation more applicable than in cases like the present, where the rights of parishioners to have the services in their parish church performed according to law are involved. In such cases the monition really assumes in substance as well as form the

Martin v. Mackonochie (App.), Q.B.

character of an injunction to do or abstain from something of a civil character, and may therefore most reasonably both be appended to the definitive sentence, and also if disobeyed, be enforced.

On all points, therefore, I feel compelled to differ with the views of the majority of the Court below upon this case. So differing, as well as from some of my colleagues in this Court, I realise that there may be and probably are flaws in my own reasoning. But I must observe in conclusion that much of what I have said in support of my opinion upon this case might be displaced without altering the opinion itself, and for this reason: The writ of prohibition, valuable as it is when kept within proper bounds, is a weapon not lightly to be used; and in days when ecclesiastical judgments are subject to the supervision of a tribunal comprising all the elements which go to the making of a trustworthy Court of Appeal, the confidence which must be felt in that tribunal, as well as the comity which should exist between Courts, requires that the interference on the part of the temporal Courts with matters of ecclesiastical concern should be reduced to a minimum, and it is for a Court of Prohibition to be punctiliously careful not to assume the functions of a Court of Appeal. No one, I think, who has weighed the arguments adduced by the parties to this appeal, and considers the difference of opinion which exists upon the points in dispute both in the Court below, and I regret to say in this Court, can positively affirm that either Sir Robert Phillimore or Lord Penzance has *clearly* mistaken the practice of his own Court, or that what either of them has done is, to quote the words of Littledale, J., in *Ex parte Smyth* (24), "manifestly out of the jurisdiction of the Court." That which has been done is what the supreme ecclesiastical tribunal has said may be done, and has itself done. It is something, the irregularity of which at least admits of a doubt. The proceedings against the respondent have resulted, however irregularly, in appropriate punishment being applied to proved acts of misconduct, and under such circumstances I cannot but think that the only

safe, and, as a consequence, the only proper course for the Court below to have pursued, was to refuse to interfere with the proceedings of the Ecclesiastical Court. I am of opinion, therefore, that this appeal should be allowed, and that the order for the writ of prohibition should be discharged.

COTTON, L.J.—The facts of the case, and the circumstances under which this appeal came before us, have been sufficiently stated.

It was argued for the appeal, that the matter dealt with by the order of the 1st of June was one within the jurisdiction of the Ecclesiastical Court, that the order was duly made in accordance with the law and practice of the Ecclesiastical Court, and that, even if the Judge in making that order had fallen into any error of law or practice, that was ground for appeal only, not of prohibition.

It is in many cases difficult to draw the line between that which is matter of appeal and that which justifies the issuing of a prohibition. But the general rule is clear, that if the Court of limited jurisdiction in dealing with a matter over which it has jurisdiction, has fallen into an error of practice or of the law which it administers, this can only be set right by appeal, and affords no ground for prohibition. When, however, an Act of Parliament has imposed restrictions as to the circumstances under which a Court of limited jurisdiction is to act in matters otherwise within its jurisdiction, then, if the Court of limited jurisdiction disregards the restriction so imposed, and acts in violation of the statutory restrictions, the party aggrieved has a remedy by prohibition, even although the Court of limited jurisdiction may have put a construction on the Act, and there is an appeal from its decision. Moreover, for the purpose of deciding whether, in fact, an order is contrary to the provisions of an Act of Parliament, the Court to which application is made for a prohibition may have to enquire and determine what is the law and practice of the Court of limited jurisdiction, and to decide whether that Court has in the matter complained of acted in accordance with

Martin v. Mackonochie (App.), Q.B.

the law which it administers, and with its established rules of practice.

In this case it was contended for the respondent that the order of the 1st of June is contrary to the provisions of the 23rd section of the Church Discipline Act. That section is as follows:—"And be it enacted that no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland for any offence against the laws ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or provided."

The question on this appeal is, in my opinion, having regard to this section, whether the order of the 1st of June is a proceeding to enforce obedience to the decree of the 7th of December, 1874; or whether it is an adjudication upon acts done by Mr. Mackonochie since that decree and sentence upon him for those acts as offences against ecclesiastical law. If it is the latter it comes, in my opinion, within the prohibition of the enactment to which I have referred, and is also contrary to the general scope and intention of the Act. The object was to prevent proceedings being taken against a clerk summarily and without due consideration; whereas, if the order be an adjudication and sentence on Mr. Mackonochie for an ecclesiastical offence which, though similar to that for which sentence was originally passed on him, is a distinct offence, and one for which a fresh suit might have been instituted against him, then the order asserts a right in the Court for all time to come without any of the safeguards required by the Act, to adjudicate upon the defendant's acts and to pass sentence on him. Even if the order of the 1st of June is partly a proceeding to enforce obedience to the decree of December, 1874, and partly such an adjudication and sentence on Mr. Mackonochie as above referred to, in my opinion the Queen's Bench Division was right in directing a prohibition to issue, because it is impossible to divide the order or apportion the sentence.

It may be suggested that the suit against Mr. Mackonochie was duly instituted in accordance with the Church Discipline Act, and, therefore, that an

order in that suit cannot be treated as a fresh proceeding within the prohibition of the 23rd section of the Church Discipline Act. It is true that a suit continues after final decree so far as to enable the Court to enforce the decree which has been made, and to direct any lawful process to issue for that purpose. But where the matter alleged to be an offence in respect of which the suit was instituted, has been adjudicated on, and what the Court considers the appropriate sentence has been passed, the suit for the purpose of adjudication and sentence is, in my opinion, concluded, and if the order of the 1st of June was made to punish Mr. Mackonochie for an ecclesiastical offence, it must, in my opinion, be treated as a fresh proceeding. It was argued that to allow a prohibition in the present case would make the decree of the Ecclesiastical Court nugatory, as it would deprive that Court of the power to enforce its decrees, at least where the act of disobedience is an offence against ecclesiastical law. In my opinion this is not well-founded. I do not accede to the argument that a monition, which forms part of a decree, cannot be enforced. In my opinion it may, in the mode authorised by the Act of 53 Geo. 3. c. 127, and an act of disobedience to an order of the Court may be dealt with as such, even though it may also be an offence against ecclesiastical law. This is not questioned by considering whether the order deals with the acts of Mr. Mackonochie as offences against ecclesiastical law or as disobedience to a previous decree of the Court.

The order of the 1st of June declares that it had been proved that the defendant had done certain acts in the performance of divine service, and then proceeds as follows: "And that in so doing he had repeated the offence against the statute laws, constitutions and canons of the Established Church of England, which were alleged against him in certain of the articles exhibited against him in this suit, and declared by the Court to have been sufficiently proved, and further had therein and thereby disobeyed and contravened the monition of this Court served upon him on the 26th day of July, 1875,

Martin v. Mackonochie (App.), Q.B.

and also the further monition of this Court served upon him on the 29th day of March, 1878, for which disobedience the Judge did pronounce him to have been guilty of contumacy. And for the conduct aforesaid the Judge did further decree and declare that the said Rev. Alexander Heriot Mackonochie be suspended for the space of three years from the time of publishing the suspension for that purpose."

For the purpose of determining what this order is, it is necessary to consider what is the power of the Ecclesiastical Court as regards enforcing its decrees and orders. It was contended in support of the order appealed from that orders of the Ecclesiastical Court cannot be enforced by suspension. This was contested by the appellants.

The argument of the appellants on this part of the case is not, in my opinion, advanced by establishing that, according to the ancient law and practice of the Ecclesiastical Courts, suspension was always preceded by monition. For the monition which was to precede suspension was a mere warning to give the offending clerk an opportunity of retracting his error, and submitting himself to his ecclesiastical superior. This is obviously of an entirely different nature from the monition which, it is alleged, the order of the 1st of June was intended to enforce, and which was preceded by a sentence of suspension passed without any preceding monition or warning. Nor is the argument of the appellants assisted by the numerous authorities quoted to shew that suspension is an established ecclesiastical censure or punishment. Undoubtedly it was in the power of the Ecclesiastical Court in a suit properly constituted to pass sentence of suspension as a punishment for an offence against ecclesiastical law, but the question remains whether suspension is a means of enforcing obedience to orders of the Ecclesiastical Court.

It is remarkable that the Report of the Ecclesiastical Courts Commissioners, made in 1832, where at pages 16 and 19 it deals with the mode of enforcing decrees of the Church Courts, makes no mention of suspension, though that part of the report must in my opinion be taken to refer to

all suits in the Ecclesiastical Court, whether of a purely civil or of a criminal or corrective character, against clerks beneficed and unbeneficed, as well as against laymen. This absence of all mention of suspension as a mode of enforcing decrees is certainly, having regard to the learning and high authority of the commissioners who signed the report, very strongly in favour of the view that suspension is not an authorised means of enforcing decrees of the Ecclesiastical Court. Unless clear authority can be produced to shew that the Ecclesiastical Courts have enforced their decrees by suspension, the Report of the Commissioners is to my mind conclusive. But the authorities quoted in support of the contrary proposition are, independently of two decisions of the Privy Council, very few in number. Moreover, with the exception of one decision made by an Archdeacon's Court, they are not free from ambiguity. For in considering them and the passages in text-books referred to in support of the appellants' contention, it must be remembered that disobedience to the order of an ecclesiastical superior was an offence against ecclesiastical law, and might as such be punished. In some at least of the few instances of orders for suspension on which the appellants rely, it appears that the suspension was ordered as a sentence passed by the ordinary at his visitation against a clerk for committing, after previous warning, an ecclesiastical offence, as in *Harrison's Case* (19), and in *Higgins' Case* (20), by preaching in a church of which the archbishop was diocesan without license. One of the cases mentioned went to the House of Lords on an appeal presented by the clerk Harrison, who had been suspended, against the decision of the Civil Court, refusing to grant a prohibition. And this case has been relied on as a decision of the House of Lords, that decrees of the Ecclesiastical Court can be enforced by suspension. If so, this will be conclusive. But apparently the question was not and could not, on the pleadings or on the facts, have been raised in the case; for it appears from the report in 2 Brown P.C., page 200, that the clerk Harrison, by his declaration in prohibition, stated that the

Martin v. Mackonochie (App.), Q. B.

suspension had been decreed, not as a means of enforcing obedience to a decree or order, but in a suit instituted against him for not appearing at the visitation of the archbishop. And the defence of the archbishop was, that for this non-appearance at his visitation, and not for disobedience to an order made by him, the clerk had been declared contumacious, and decreed to be suspended. This illustrates the danger of relying on orders directing a clerk to be suspended for contumacy as authorities that obedience to a decree (in a suit which, except for the purpose of enforcing the decree, is at an end) can be enforced by suspension.

But it is said, and correctly, that in *Hebbert v. Purchas* (2) and in the previous case of *Martin v. Mackonochie* (3) the Privy Council did make orders for suspension, with a view to enforce obedience to decrees. Neither of these cases was argued by counsel for the defendant who was suspended, and the attention of the members of the Judicial Committee who heard those cases was in neither of them directed to the question which we have to consider in this appeal. Though this Court is not bound by decisions of the Privy Council, yet I should not feel at liberty to decide that what the Privy Council, the ultimate Court of Appeal from the Ecclesiastical Court, had deliberately decided to be in accordance with the law and practice of that Court was illegal and irregular. But I cannot look upon these cases as deliberate decisions that obedience to orders can be enforced by suspension. No statute has given to the Ecclesiastical Courts the power to enforce obedience to their decrees by suspension. If they have the power it must be on the ground that it has been the established practice of the Church Courts thus to enforce their decrees, and that this has been acquiesced in so as to become part of the law of England. In my opinion it has not been made out that any such established practice exists, and I am of opinion that though an order of suspension can be made as a sentence on a clerk for an offence against ecclesiastical law, it cannot be made to enforce obedience to a decree, that is, as process of contempt. If this be so, the order of the 1st of June

must be treated, not as made to enforce obedience to a decree, but as a sentence for the acts of the defendant as offences against ecclesiastical law. But even if orders for suspension could have been made to enforce obedience to decrees of the Ecclesiastical Courts, the question remains, has the order of the 1st of June adjudicated upon the acts of the defendant as an offence against the law ecclesiastical and inflicted suspension as a punishment for his acts as such an offence? Suspension, if a possible means of enforcing the decree of the Ecclesiastical Court, is not the usual or recognised mode of doing so, and, having regard to this and to the terms of the order, my opinion is that the order is one made, not as a means of enforcing a decree of the Court, but as an adjudication on and sentence for an ecclesiastical offence.

This is the conclusion at which I have arrived from the terms of the order of the 1st of June, and from what is shewn to be the practice of the Ecclesiastical Courts in enforcing their decrees. What is said in another case by the learned Judge who made that order cannot be relied on for the purpose of interpreting it, but at least it shews that the terms of the order of the 1st of June were not used by accident or inadvertently. For in the case of *Combe v. Edwards* (72) the learned Judge says: "What the Court did, therefore, in the case of Mr. Mackonochie, and what it did also in this case, is this: to suspend the defendant *ab officio et a beneficio*, not merely because he had been guilty of contumacy in disobeying the orders of the Court, but because he had also been guilty of a grave ecclesiastical offence by repeated breaches of the law of the Established Church in respect of ritual." And again, page 139: "The sentence of suspension in Mr. Mackonochie's case was intended to be passed upon him not only for his contempt in disobeying the motion, but also for his breach of the ecclesiastical laws in the repetition of his original offence. And some pains were taken in drawing up the order of this Court to make the intention clear and unambiguous."

I am of opinion that the order was in violation of the 23rd section of the Church

Martin v. Mackonochie (App.), Q.B.

Discipline Act, and that the order appealed from ought to be affirmed.

I must, before concluding, advert to the argument that the order under appeal cannot be supported unless a prohibition can issue against the Judicial Committee of the Privy Council. I am not of opinion that this can be done. But the Court prohibited is the Court of Arches, not the Judicial Committee, and in my opinion no difficulty in prohibiting that Court arises either from the circumstance that the appeal from it is to the Judicial Committee, or from the circumstance that the Court of Arches is acting on the authority of a decision of the Privy Council.

BRETT, L.J.—The defendant was, on the 18th of March and on the 20th of April, 1878, served with notices to appear before the Court of Arches, in respect of certain acts alleged to have been done by him in 1876 and 1877, and on the 24th of February, the 31st of March, and the 7th of April, 1878. The defendant did not appear in obedience to either notice. The Court of Arches, in respect of the acts complained of, which were proved by affidavit to have been done by the defendant, decreed that he should be suspended *ab officio et a beneficio* for a period of three years. The Queen's Bench Division has prohibited the Court of Arches from proceeding further on such decree. The appeal is against that prohibition.

The acts complained of were certainly such as if committed or questioned for the first time might have been treated as breaches of the Church Discipline Act (3 & 4 Vict. c. 86). Though committed after similar acts had been committed by the same defendant, and after such previous acts had been called in question and pronounced upon, it is admitted, or, if not, it cannot be doubted, that they might nevertheless have been treated now as breaches of the Church Discipline Act, and have been proceeded against as if committed for the first time. If they had now been committed for the first time, or if they had now been treated as so committed, it cannot be doubted but that the suit brought in order to question them ought to have been instituted according

to the provisions of the Church Discipline Act. This involves that there must have been new letters of request to enable the Court of Arches to entertain the suit, and upon those being granted and accepted the defendant must have been cited to appear. After having been so cited the defendant might have been, upon proof, sentenced to suspension or deprivation. But to have proceeded against the defendant otherwise than by citation would, upon the hypothesis of the acts being treated as if committed for the first time, have been to proceed in violation of the enactments of the Church Discipline Act. The acts in respect of which the order appealed against was made were however, in fact, repetitions of acts in respect of which the defendant had been before cited, tried and sentenced. And in the sentence the defendant had been admonished to abstain from repeating the acts then complained of.

It is argued on the one side that the acts last complained of may be treated as acts done in disobedience of that monition; that the notices served on the defendant were therefore notices in that suit; that that suit was still pending in the Arches Court; that the notices therefore rightly called upon the defendant to appear and answer in that Court in that suit for disobedience to the monition decreed in that suit and served; and that the order of suspension was an order made in that suit, and was the proper mode of enforcing obedience to a monition issued in that suit; that that suit was properly commenced by citation; and therefore that the order complained of was no breach of the Church Discipline Act. It was said that the Arches Court had power to make the order of suspension in that suit, because it was, before the passing of the Church Discipline Act, a part of the recognised practice of the Ecclesiastical Courts to make such an order after a monition which was disregarded.

But it was argued on the other side that the Court of Arches had no legal power to make in that suit the order complained of, because by the recognised practice of the Ecclesiastical Court an order of suspension could only be made in a suit which treated the acts complained of as offences

Martin v. Mackonochie (App.), Q.B.

such as are dealt with in the Church Discipline Act; that if the acts in respect of which the order was made were treated as such offences, they ought to have been treated according to the requirements of the Church Discipline Act, in which case there ought to have been new letters of request, and the defendant ought to have been cited; that if the acts could be treated as acts of disobedience to the order made in the original suit, they could only be properly treated as acts of contempt; and then the order of suspension would be wrong, because the only power the Court has to punish for contempt is that regulated by the statute 53 Geo. 3. c. 127, namely, a power to signify and thereby procure imprisonment. And it was urged that the order appealed against did in terms treat the acts complained of as offences against the Church Discipline Act.

The question thus presented is one as to the power of Ecclesiastical Courts to award under certain circumstances a certain punishment. That can only be solved by deciding what has been the recognised practice of the Ecclesiastical Courts. As if a Court of limited jurisdiction were to assert it had the power of flogging, the question whether it had such a power or not would be tested by the question whether it had ever practised such power. But practice considered for this purpose is not the procedure of the Court used in order to arrive at an end to which it is admitted the Court has power legally to arrive; but practice in the sense of its being evidence of the power exercised and so submitted to as to have been validly recognised as law. The question being, what is the power under certain circumstances of the Ecclesiastical Courts in England, the required evidence is not that such a power has been asserted by ecclesiastics in other countries or in this, but whether such a power, if asserted, has been admitted and adopted by the English people acting either through the Legislature or by authoritative acquiescences. Such admission and adoption, I wish to state most distinctly, is in my view the only basis of any jurisdiction which can be allowed to any Ecclesiastical Court in these kingdoms. In accordance with this

view an elaborate examination of the practice as alleged by either side was made before us. It was an examination of a system of law which may, I think, be not improperly said to be unfamiliar to every Judge who has had to consider this dispute. It was an examination of a course of procedure which to my mind is not enunciated with anything like clearness or precision by any ecclesiastical writer whose works were cited to us. It is a question therefore, in my opinion, which would almost inevitably lead to difference of opinion, and it has done so. Called upon to decide, I do so to the best of my ability. As at present advised, I confess that after long consideration the case seems clear to my mind; yet I cannot and do not pretend that my view is the right one.

The question really is, what according to the practice of the Ecclesiastical Courts was the effect of a monition to abstain from repeating an offence, which monition was a part of or was issued in consequence of a sentence in a penal or correctional suit. That such a monition has constantly been and can properly be made part of a sentence in such a suit has not, I think, been seriously disputed. At all events the proposition is clearly established in the affirmative. I think it is also clearly proved that there were in ecclesiastical practice different kinds of monitions, in the sense that there were monitions issued for different purposes and leading to different consequences.

There was, I think, a monition sometimes issued before or at the commencement of a suit or proceeding, in order to found upon disobedience to it a charge of contumacy in the persistent committal of an offence. There was certainly a monition which was issued in the course of the proceedings in a suit in order to lead to, and leading to, the performance of a step of the process. There was a monition which was issued in order to enforce the completion of a decree, when the decree ordered something to be done or undone, such that until that something was done or undone, the decree had no effect, or incomplete effect. A sentence in a criminal suit might contain such a monition, which was in effect an order,

Martin v. Maconochie (App.), Q.B.

as for instance, if there were in the sentence an order to perform penance, or to repair a chancel, or take down a cross, or to cease cohabiting, or the like. In such a case it cannot but be observed that, without any new offence by the defendant, the offence proceeded against would not be punished, the order in the decree would not be fulfilled, until the thing ordered to be done or undone was done or undone. It is indisputable, as I said before, that there was also a monition, which was also contained in a sentence in a criminal suit, which, without ordering anything then existing to be done or undone, admonished the defendant in general terms to abstain from repeating the offence. And this monition or admonition formed either the whole of the sentence or was a part of it adjoined to some specified punishment. In the first case I have mentioned, if there were contumacious disobedience, there would be a suit or proceeding and sentence according to the nature of the offence. It cannot be maintained, I think, that if the offence itself were, for instance, a breach of the Church Discipline Act, the case could be taken out of the statute, so that the suit might be commenced or continued, contrary to the provisions of that Act, by means of a preliminary monition and a disregard of it, which might enable the Court to consider the defendant contumacious. In the second and third cases it is not, I believe, disputed, but that disobedience is contempt which may be punished by signification and imprisonment until obedience is produced. It may be suggested further, that for a continued or contumacious disobedience to such last mentioned monitions, a clerk might be further punished by suspension *a beneficio* or by deprivation. If that is a part of the suggestion its accuracy is not admitted. Its accuracy becomes one of the matters for consideration. But the principal question in this case arises with regard to the fourth kind of monition. It is distinguished from the third by this, that in respect of the past offence the sentence of which it forms a part is by the passing of the sentence itself completed. In the former case if no new offence be com-

mitted, the sentence is nevertheless not fulfilled until the order contained in it is obeyed; in this latter, unless there be a new offence, the sentence is completely satisfied. The question is, what is the power of the Ecclesiastical Court after it has in a sentence in a criminal suit enunciated the last kind of monition? The power is to be proved by the practice. On the one side it is said that by the recognised practice this power is proved, that the Court may, on a repetition of the offence by a beneficed clergyman order him to appear and sentence him to suspension *a beneficio*, or to deprivation; on the other side it is said that no such practice can be shewn to have ever existed, that no such practice has ever been recognised, that no such power is therefore proved. The proposition in dispute is this, that it was the practice of the Ecclesiastical Courts, after a monition in a sentence admonishing the defendant to abstain from repeating the offence, and a subsequent alleged repetition of the offence, to summon the clerical delinquent to appear, and upon proof of the repetition to sentence him to suspension *a beneficio*, or to deprivation. Whether this proposition is correct or not depends entirely on authority. They who assert that there was such a practice have an affirmative proposition to prove; they who deny it have a negative proposition to support. The one should be able to shew the practice; the others need only say that no such practice can be shewn. If no practice be shewn, those who maintain the negative should succeed. It is no valid argument to say that there is no authority to the contrary of the alleged practice. Unless the practice is established affirmatively, those who maintain the negative should logically succeed. But if in the sources in which one would naturally seek for proof of the affirmative proposition, one finds all kindred propositions affirmed but this omitted, it seems to me that the conclusion is immensely strengthened that the negative of the proposition is proved.

Now the first source to which one naturally resorts is that of the books of recognised authors on the practice of the Ecclesiastical Courts. It is useless to go

Martin v. Mackonochie (App.), Q.B.

again through each passage that was cited to us. We went through them for nine days. Every possible comment has been made on them. I have read them again as carefully as I could. It seems to me that there is no assertion of the suggested practice in Conset, or Oughton, or Ayliffe, or Lynwood, or Coote; none in Burns, or in the works of Sir R. Phillimore. In the latter there is a passage cited by the Lord Chief Justice, which certainly seems rather to question than to recognise the doctrine laid down in the Privy Council cases. In the judgment in *Combe v. Edwards* (72), Lord Penzance cites Oughton in support of a proposition which the learned Judge thus enunciates: "The ancient and proper methods of enforcing obedience to the ecclesiastical law, and to the decrees of the Ecclesiastical Courts, is by the infliction of ecclesiastical censures." But with great deference, the quotation supports only the general reference "to ecclesiastical law," and does not support that for which it is cited, namely, its reference to "the decrees of the Ecclesiastical Courts." Neither does the passage cited from Godolphin, at p. 109. The contumacy there mentioned is a persistence in conduct, against the continuance of which there has been a monition as the foundation of the suit. In such cases the contumacy exists before the sentence. One then turns to the books of forms. I find forms apparently for every step in an ecclesiastical suit, but in no book any form for the notice, the application or the sentence in question, or any note or direction referring to such important steps. The decisions to which we have been referred are of three kinds—those in the regular ecclesiastical reports, those in the Common Law reports on applications for prohibition, and those in Mr. Rothery's collection. In the first, one would wish to find instances clearly in point, that is to say, where upon such an application as was made in this case to Lord Penzance, after a monition such as is in question in this cause, a notice to appear has followed, and thereupon a sentence of suspension *a beneficio* or of deprivation. It is useless to go again in detail through all the cases. It is obvious

that there is no such case; I mean there is no case in which it is reported that this thing has been done. *Fendall v. Wilson* (81) and *The Bishop of Salisbury v. Williams* (106) shew only that a monition may be part of a sentence; they do not shew whether any action can be taken afterwards in the same suit on a repetition of the offence. *Blackmore v. Brider* (29) is relied on, because in his judgment or sentence Sir T. Nicholl uses the expression "under pain of law," and *Burgess v. Burgess* (30), because Lord Stowell says: "If obedience be not given to this order, excommunication and other consequences will necessarily follow." And Dr. Lushington has, in giving judgment, used similar expressions. It would not be candid, I think, to say that these are not at least important indications in favour of the affirmative proposition; but it seems clear to me that they are not the authority one would wish or expect to find. They are certainly consistent with the view of their being minatory cautions as to probable further proceedings, which would however be obliged to bear the form of a newly instituted suit.

I turn more anxiously to the authorities in cases of prohibition for reasons which I shall directly give. It seems to me that there is not one reported case in which even an application for a prohibition against this alleged practice has ever been made. I cannot with deference think that *Harrison's Case* (19) raised this question, or that the House of Lords decided this question. The declaration in prohibition was pointed to other matters. I cannot see that the present question was ever hinted at in the argument. The absence of any case of application for a prohibition is, to my mind, of the strongest significance. The difference in the position of an accused person, lay or clerical, and of the different bishops, according as this alleged power of keeping the accused person under the perpetual surveillance of the Court of Arches can or cannot be exercised, has been shewn to be immense. That difference, however great, is doubtless no conclusive argument of itself against the existence of the alleged power.

(106) 12 Moo. P.C. N.S.

Martin v. Mackonochie (App.), Q.B.

Such a power, however despotic, may have been so acquiesced in as to have become part of the law of England. But that difference is so great, and in the case of a clerk suspended from or deprived of his benefice touches him so sensitively, that it seems to me beyond the bounds of any practical probability to suppose that the alleged power can have been exercised so as to have become a practice, without ever having been challenged. The absence of any authentic evidence of challenge by application for a prohibition, is, to my mind, evidence of the strongest kind that the power has never been attempted till lately to be exercised.

As to the use of the cases collected by Mr. Rothery, I think it obliges one to make this remark. They are decisions of many different Ecclesiastical Courts. If they shewed a constant practice, such as is alleged, it being also shewn that their decisions on the point had not been appealed against, I should think such uniformity of practice and such want of appeal would prove that such practice was generally acquiesced in, and should think the affirmative proposition now in question was proved. But if there be only some isolated instance or instances of decisions by judges of minor courts, I think, with deference, that such decisions fail to prove a recognised practice. Now at the most I think there is some isolated instance. In my judgment there is no indisputable instance in those cases of the exercise of the alleged power. Those cases were microscopically considered in the argument. It is wholly unnecessary to go through them again in detail. There is yet another place in which, if this power was ever exercised, one would expect to find it recorded, namely, among the records of the Court of Arches. But I gather from Lord Penzance that no record, not even a note in any registry book, can be found referring to such a thing as having been done.

I cannot with great deference think that the observation that until lately Englishmen have been law-abiding people, and have obeyed the law, is a satisfactory answer to these most striking deficiencies of any evidence of the alleged practice. Englishmen may have been law-abiding,

but they have not been unlitigious. And a beneficed clergyman, suspended from or deprived of his benefice, would be inclined to contest the law to the last, though he might not resist it by force, which is the sole meaning of this somewhat popular apothegm, hardly to be relied on as a maxim of law. But there is another authority which in my opinion is decisive of this controversy. No more learned assembly of English ecclesiastical lawyers could be brought together than those who were joined in the commission of 1832. They were directed to make "a full and diligent enquiry into the course of proceeding in suits and other matters instituted or carried on in the Ecclesiastical Courts from the first process and commencement to the termination thereof, and into the process, practice, pleading and other matters connected therewith; and to enquire whether any and what parts thereof may be conveniently and beneficially discontinued or altered, &c." If they had described this alleged practice I should have thought their assertion of it conclusive. But if they have totally omitted even to allude to it, it seems to me that such omission is absolutely fatal to the contention that such a practice existed. The importance of such a practice cannot be denied. That it was a practice worthy of consideration is surely obvious. The supposition that this part of ecclesiastical procedure, if it existed, could be overlooked on such an occasion, or was so familiar that it was thought unprofitable to allude to it, seems to me to be outrageous. If there be this total omission by such men on such an occasion, it seems to me that such an omission is negative evidence of the highest force. Now, having read that report with the utmost attention, I come to the conclusion that they have not even alluded to the existence of such a practice. They profess to deal with criminal as well as other suits. They speak expressly of suits for the correction of offences committed by the clergy. They say that "offences are punished by monition, penance, excommunication, suspension *ab ingressu ecclesie*, suspension from office, and deprivation." The first "punish-

Martin v. Mackonochie (App.), Q.B.

ment" here described is "monition." It is classed with all the other known punishments. It is not here described as a process leading to punishment, but as one of a set of punishments. The commissioners then in detail describe each successive step of a suit, civil or criminal, "from the first process and commencement to the termination thereof." The first step is said to be citation. Then follow the different steps of the intermediate process. "The mode of enforcing all process, in case of disobedience, is by pronouncing the party to be contumacious; and if the disobedience continues, a *significavit* issues upon which an attachment from Chancery is obtained to imprison the party till he obeys." So they proceed until the judgment. "The judgment of the Court, they say, is then pronounced upon the law and facts of the case," &c. "And that is done in open Court," &c. "And thus the matter in controversy between the parties becomes adjudged." We know from the argument of Dr. Stephens that this judgment in open Court has the force of a definitive sentence in writing.

And then follows this exhaustive statement. "The execution of the sentence is either completed by the Court itself, such as by granting probate or administration, or signing a sentence of separation; or remains to be completed by the act of the party, as by exhibiting an inventory and account, by payment of the tithes sued for, and other similar matters, in which cases execution is enforced by the compulsory process of contumacy, *significavit*, and attachment."

The instances are given as examples, not as an exhaustive list. The commissioners afterwards report the ancient mode of proceeding of bishops in order to enforce their authority over clerks on summary procedure. "This summary procedure was, they say, discontinued. Afterwards, Bishop Gibson was desirous of reviving it, but his clergy resisted, and it was ultimately found impossible to resist their demand." "Proceedings against clergymen for ecclesiastical offences have, accordingly, in modern practice been uniformly conducted by the same rules of proceeding as are observed in

other criminal cases in the spiritual Courts." They say afterwards, "We have already described the course of proceeding and the mode of punishment, in cases of correction."

Now the only course of procedure which they had described was that course ending with the sentence where it was complete; or if it was to be made complete by an act of the Court, then by the performance of that act by the Court; or if it was to be completed by the act of the party, then to be enforced by the compulsory process of contumacy, *significavit*, and attachment. But these are described as "compulsory process," that is, a process to compel the doing of something without the doing of which the sentence for the past offence is incomplete. Process is not punishment; but a monition is described as one of several punishments. A monition is the act of the Court. When the monition therefore is part of the sentence, the sentence is completed by the act of the Court, namely, by issuing the monition. There is no statement by the commissioners that, if after sentence of monition to abstain from repeating an offence, a benefited clerk repeat the offence, he can for that repetition be ordered by notice to appear, and can be pronounced contumacious, and be thereupon further sentenced to suspension *a beneficio* or to deprivation. But there is more. The commissioners were bound to suggest alterations if they thought them expedient, and they thought the powers of the Ecclesiastical Courts insufficient. "The power of enforcing their orders at present vested in the ecclesiastical tribunals is regulated by Statute, 53 Geo. 3. c. 27. The Court pronounces the individual who has failed to obey its orders in contempt, and afterwards signifies such contempt to the Court of Chancery; whereupon a writ *de contumace capiendo* issues, and the offender is committed to prison." "We think that in all cases of disobedience there should be a power to attach the party and distrain upon his property. It does appear wholly inconsistent with any sound principles of jurisprudence that exclusive right of adjudicating on certain subjects should be vested

Martin v. Mackonochie (App.), Q.B.

in any Court, and yet that Court be left without the means of carrying its decrees and orders into effect. It appears to me to be quite impossible that those who stated such want of power in the Ecclesiastical Courts, and advised such remedies, could have known of the power now claimed. And if those commissioners did not know of this power, it never existed. Considering then the total absence of any allusion to this power in ecclesiastical works, in which if it had existed it must certainly have been described, the total absence of any instance of its exercise in the ecclesiastical reports, the total absence of any report of a claim to prohibit its exercise, and the total absence of any mention of it by the Ecclesiastical Commissioners of 1832, it seems to me that the necessary inference from this want of evidence is, that this alleged power has never, till lately, been exercised. And again, I must say that in my opinion, unless it had been so exercised without objection, and so exercised as to shew that it had been submitted to, it is no part of ecclesiastical law adopted into the law of England. It seems to me that the result of the evidence as to the exercise of the alleged power is, that a monition to abstain from repeating the offence is sometimes decreed in a sentence as the punishment or part of the punishment for a past offence; and when it is so decreed and issued by the Court, the suit is entirely terminated; and that for a repetition, if any, of such offence there must be a new proceeding according to the nature of the offence. But against this it is said, that there can be no finality in a sentence of an ecclesiastical Court, because all ecclesiastical correctional procedure is *pro salute animæ*. In order to support this argument the meaning to be attributed to this maxim must be that the whole ecclesiastical procedure is used solely for the purpose of forcing the particular delinquent to do or cease from doing that which is charged as the offence. But surely a correctional suit can be maintained against a clergyman for past immorality, or drunkenness, or other past offences, though he has before the suit obviously ceased to offend in the like

way. And certainly deprivation cannot be a mode of forcing the individual offender to perform his clerical functions in the ordained way. This maxim is with deference too general to be a rule. It seems to me to be quite as applicable to lay as to ecclesiastical legal punishments. No legal punishment is inflicted for revenge; all are for correction of the individual delinquent or others. All are *pro salute animarum*. Another objection taken, as I understand it, is that such a monition as is under discussion is classed by ecclesiastical writers as a "censure" and not as a "punishment," and that a "censure" is in ecclesiastical nomenclature a warning only and not a punishment. But with deference, though some monitions are in ecclesiastical law only warnings, this monition, which is always part of a sentence, and is used nowhere but in a sentence, is classed under the terms "censures" with "suspension" and "deprivation," and deprivation cannot with any propriety be called a warning to the individual, though like every other punishment it is a warning to others who may be inclined to offend in the same way. Another objection, as I understand it, now taken is, that for such acts as are now in question, namely, acts of repetition of an offence after a sentence containing a monition to abstain from repeating the offence, the Court might proceed to excommunication, and that excommunication is a greater punishment than suspension or deprivation, and that it includes them, so that the power to excommunicate involves and includes the power to suspend or deprive. Now in my opinion, as I have said, the Court could not excommunicate for these acts without a new suit; but if it could, can it be said that excommunication involves suspension *a beneficio* or deprivation? It does *ex necessitate* involve suspension *ab officio*; but is it a recognised admitted fact in the law of England that an excommunicated clerk would thereby be deprived either for a time or for ever of the temporalities of his benefice? I think not. If not, excommunication does not include these other punishments. One cannot include the other, if when the greater is passed it does not necessarily

Martin v. Mackonochie (App.), Q.B.

involve the effect of the other. But further if in any sense excommunication could be said to include suspension *a beneficio* or deprivation, I cannot accede to the proposition that in England in penal jurisdiction the admitted power to award a particular punishment involves the power of awarding every lesser punishment. A power to imprison does not give a power to fine. The objection that without this power the Ecclesiastical Court has not sufficient means of enforcing its will has been often taken on behalf of claims made by the Ecclesiastical Courts, but has never availed in an English Court of Common Law. In conclusion, therefore, I am of opinion that the part of an ecclesiastical sentence which consists of a monition to abstain from repeating the offence is final, and no ulterior step of any kind can be taken in respect of it.

I must not omit to refer to the cases in the Privy Council. I must agree that we have not in them the matured view of the very learned Judges who sat there. I only wish sincerely we had.

It is necessary further to say that every reason I have given for coming to the conclusion that no ulterior step of any kind, except the issue of it, can properly be taken in respect of a monition such as is in question is still more forcible for saying that if any ulterior steps can be taken the only ones are excommunication, *significavit*, and imprisonment.

If no step could properly be taken in the original suit after the sentence, it follows that the acts complained of could only be punished as breaches of the Church Discipline Act. Then the proceedings should have been begun by citation; they were not; there has been a violation of the enactments of the statute; and it is not denied that prohibition will lie.

But if it were true, which I think it is not, that some proceeding could legally take place in the original suit in respect of the acts complained of, the only sentence which the Ecclesiastical Court had legal power to pronounce thereon was a sentence of excommunication to be followed by imprisonment. In such case the suit would have been properly com-

menced by citation, but the sentence would be one which the Court would have no power to pass against any one for what must then be admitted to be the offence, namely, contumacy in disobeying a monition. When a Court of limited jurisdiction, in a criminal suit properly brought before it, passes a sentence which it cannot legally pass against any one in respect of the offence it assumes to punish, I cannot doubt but that it exceeds its jurisdiction, and is liable to prohibition. Such a sentence is not one which the Court could by correct process pass in respect of the offence, but which it arrived at in the particular case by an erroneous process; it is a sentence which it cannot legally pass by any process in respect of the offence charged, and that because the Court has no power to pass such a sentence for such an offence. Doing that which is in excess of the power of the Court is doing something in excess of jurisdiction. Excess of jurisdiction is ground for prohibition. The case of *Ex parte Ross* (27) is not to the contrary of this. No one who has any knowledge of ecclesiastical decisions could doubt but that it had been the constant practice of the Ecclesiastical Courts to require the certificate therein questioned. The point taken was that however constantly it had been required, however often the power had been exercised, it was contrary to natural justice. This objection was overruled, and thereupon the prohibition was refused. The production of this certificate is an act to be done by the defendant in order to complete the original sentence. It must be produced, though the defendant should have committed no new offence.

It was argued that prohibition would not lie to the Ecclesiastical Court because it would not lie to the Privy Council. Whether in any case prohibition would lie to the Privy Council, or to any litigant or officer who should be about to execute an order made in council upon the advice of the members of the Judicial Committee, I think it is unnecessary to determine. It seems very difficult to say that it would lie. I am unwilling to say without further argument that it would not. But I cannot

Martin v. Mackonochie (App.), Q.B.

agree to the proposition that because there is an appeal to a Court which cannot be prohibited, therefore the Court of limited jurisdiction of first instance cannot be prohibited. There is an appeal from the county courts to a division of the High Court. The Division of the High Court cannot be prohibited. Can it be maintained that a County Court could not be prohibited? The argument that prohibition will not lie, though the sentence of the Court was wrong, comes to this: The Court could have summoned the defendant by notice to appear and answer for contempt, and could have punished him by imprisonment. The Court by citing the defendant according to Act of Parliament, could have punished him for an offence by suspension. Therefore you cannot prohibit the Court which summoned him for contempt, and punished him for an offence within the statute. I think that such a mixing up of powers is an excess of power.

I come to the conclusion that the sentence pronounced by Lord Penzance cannot be supported.

I think that the effect of supporting it would be to revive the exercise of the power of summary correction which Bishop Gibson tried to revive and failed to revive. I think we have no authority to impose this fetter upon the clergy of the Church of England. I do not feel entitled in a judicial decision to give any opinion as to whether it might or might not be expedient to impose it. This is a question for legislation, not for adjudication. I am of opinion, as matter of law, that the judgment of the Queen's Bench ought to be affirmed.

JAMES, L.J.—The conclusion which I have ultimately arrived at is on considerations which I am able to state and propose to state briefly.

I need not repeat the history of the case.

Mr. Mackonochie, in substance, complains that the proceedings before the Dean of Arches were in violation of the provisions of the Statute of Citations and the Church Discipline Act, inasmuch as the preliminary forms and proceedings required by the latter had not been taken,

and no letters of request had been addressed by the diocesan so as to give the archbishop's Judge jurisdiction in the matter.

To this it is answered that the proceedings were the legal consequence and continuation of a proceeding in a suit duly instituted against Mr. Mackonochie in the Arches Court—a consequence and continuation warranted by the established law and practice of the Courts Christian, and not forbidden by, or inconsistent with, any provision or principle of the general law of the land.

Are those propositions true? I cannot bring myself to doubt that the monition in the suit was properly inserted therein in accordance with uniform usage, whereof the memory of man runneth not to the contrary, and having the express sanction in comparatively modern times of the most eminent ecclesiastical Judges—men in learning and judicial authority surpassed by none. Nor can I accede to the suggestion that the monition was, or was intended to be, a mere reprimand and warning. I can understand a man's being let off with a reprimand or warning, but to append in a recorded sentence a reprimand or warning to a substantial and severe penalty would seem to me an unseemly joke more in place in *scena* than in *foro*. To my mind it is clear that the monition was intended to be an effective judicial sentence, in no wise differing from such monitions as the following, which have actually been made.

A monition to make good and discontinue waste and dilapidation in the church fabric; to remove idolatrous images, and discontinue superstitious processions; to restore to its proper condition and purpose, and duly to use a church which had been degraded into a farm outbuilding; or such a monition as the following, which I am sure would be made, to restrain an eccentric clerk who should be minded to fill his church by appearing in a series of theatrical costumes and giving theatrical imitations of distinguished preachers, orators and actors.

I conclude that the monition was a serious monition intended to be obeyed and be enforced like any other effective judicial sentence.

Martin v. Mackonochie (App.), Q.B.

Now in considering what is the proper legal result of such a monition, and of disobedience to it, it is necessary to bear in mind that the acts of Mr. Mackonochie complained of present themselves under a double aspect. They are ecclesiastical offences, aggravated by their being also a contempt of Court; they are a contempt of Court aggravated by their being ecclesiastical offences.

Now the jurisdiction to deal with the ecclesiastical offence undoubtedly belongs exclusively to the ordinary. Treating the matter as an ecclesiastical offence, it is for him to allow or not to allow the office of Judge to be promoted; it is for him to take or to abstain from taking the necessary preliminary steps; it is for him to determine whether he will allow the proceeding to be determined by his own Judge, or whether he will defer the proceedings and trial to the Judge of his metropolitan. But on the other hand, it is for the Court whose order has been disobeyed to enforce obedience or to punish disobedience. And the contempt of Court—the judicial contempt—is a matter wholly irrespective of the character of the acts in and by which that contempt has been shewn. That character may affect the quantity or nature of the coercive or punitive consequences just as the circumstances of a felony or a misdemeanour affect the punitive consequences thereof. But a contempt is not the less or more a contempt because it is a felony or a misdemeanour.

A murderous assault on a process server would be a contempt of this Court, but it would be for another tribunal to deal with it as a case of wounding with intent to do grievous bodily injury.

The fact that the contumacy or contempt was in acts being themselves substantive ecclesiastical offences appears to me, therefore, wholly immaterial. That fact could not give jurisdiction. It could not, on the other hand, take away the jurisdiction any more than the power of the Common Law Courts to deal summarily with a contempt of Court by fine and imprisonment is taken away by the fact that the contempt was shewn in and by an act being an indictable felony or misdemeanour.

Then the problem reduced to its simple and abstract form is this: Had the Court of Arches power to visit contempt with suspension? Or, to take a concrete case, as to which there can be no sectarian partizanship, passion or prejudice—the case of an order to a husband in a suit for restitution of conjugal rights, to take back his wife and treat her properly; or an order to a parson to discontinue using the church to stable his horses. Now, in considering this question it is to be borne in mind that the Court Christian had no sheriff, serjeant-at-arms, bailiff or constable, or other secular arm, and had to rely on its own inherent powers, its own powers to deal with the church privileges of its lay members and with the church functions of its ecclesiastical officers and ministers. The ecclesiastical coercions were, in the case of a layman, suspension *ab ingressu ecclesie*, of a clerk suspension *ab officio* and a *beneficio*, to be followed, if necessary, in both cases by the ultimate coercion of excommunication. I leave out deprivation and degradation, because I conceive them not to be so much coercions as final and irreversible sentences pronounced on offenders to whom no hope of restoration was left. It is to be noted here that suspension *ab ingressu* in the case of a clerk in truth necessarily involved suspension *ab officio*, for how could a clerk so suspended perform his office; and it is due only to the extreme and anomalous mildness and patience of the ecclesiastical procedure that suspension *ab officio* was not always followed by its logical consequence of suspension from the benefice which constituted the emoluments of the office. Excommunication, of course, was a disqualification for the performance of any ecclesiastical function. It was ecclesiastical outlawry, and to a great extent civil outlawry, and by the common law involved imprisonment until absolution. I cannot conceive it possible that a clerk so outlawed would be permitted to exercise any function or receive any emolument in his church. And it is to be observed that it was only after this extreme coercion of excommunication had been resorted to that the secular power in any way, directly or indirectly, lent its aid to enforce the

Martin v. Mackonochie (App.), Q.B.

process or orders of the Court Christian.

It appears to me to be made out clearly that the Court Christian had power to enforce its process or orders by its own means; and that to enforce obedience to any legal order, or to punish disobedience, or any other act of contempt or contumacy, in any suit at any stage, and as against any and every party or person whomsoever lawfully before it, it could use the whole or any part of its armoury of coercions according to its judicial view of the nature and exigency of the case, subject, of course, to appeal, which in their system was a suspensive appeal.

I derive this conclusion, it is true, more from authority than from what we call authorities. The wise saws of the ancient sages of the law are not illustrated by many modern instances. But how could many instances be found? A man must be very perversely obstinate, or very conscientiously prepared for martyrdom, who would disobey the order of an irresistible power, the consequence of disobedience being certain and condign punishment. It is certain that the disobedience to a prohibition would entail the punishment of contempt of the Court prohibiting. But how many instances are there to be found of archbishops, bishops or ecclesiastical judges attached for disobedience to a prohibition? Nor can I find a trace of any new suit having ever been instituted to enforce obedience or punish disobedience to a judicial order in another suit.

I will add to this, that to me on a question of what is ecclesiastical law or right ecclesiastical procedure, the decisions of the Queen in Council are absolutely conclusive and binding—as conclusive and binding as a decision of the same Queen in Council would be as to any matter of Canadian or other colonial law. It is the decision of the ultimate Court of Appeal in such matters. And I answer, therefore, the first of the two questions which I proposed to myself as follows: The order complained of was an order in the suit of *Martin v. Mackonochie* (3) warranted by the established law and practice ecclesiastical.

But of course there remains the second

question, whether such ecclesiastical law or procedure is forbidden by statute, or inconsistent with any principle of the English general law. I confess that it seemed to me, at first, that there was great difficulty in holding such law and practice, as applied to this case, to be in accordance with the statute and Common Law.

The acts complained of are not only ecclesiastical offences, but statutory misdemeanours, which by law may be dealt with in either the spiritual or temporal Court, but with this careful provision that the offender may plead his conviction in the one as a bar to proceedings in the other. But if an offence repeated after a monition can be dealt with as a contempt of Court, and visited as a contempt with the penal consequences due to the ecclesiastical offence, then, as in point of law and technically he is not punished for the offence, but for the contempt, he may be proceeded against for the very same acts, either in the Court of his bishop or the Court of Common Law.

It would seem, moreover, to be inconvenient and unreasonable if, where in addition to the positive law, there is a judicial monition to obey that law extending over a man's whole life he could be brought up from any part of the province at any distance of time to answer a charge of disregard of the monition without any of the safeguards and protections which are thrown around the clerk when he is charged with the breach of the law itself. And this not only in case of acts so clearly defined and so easily ascertained as in the present case, but of monitions against drunkenness, brawling, incontinence, or other immorality, or against heresy, or false teaching, or the like.

But the answer to all that is, in my judgment, to be found in what I have already stated, that what the Court is dealing with is judicial contempt and not the offence; that if the judicial contempt had occurred in any other suit, civil or criminal, it might have been dealt with in exactly the same way, and that the contumacious person cannot be heard to allege the character of his own misconduct as giving him impunity in respect of

Martin v. Mackonochie (App.), Q.B.

the contempt. Moreover, the suggestion that he might be in effect liable to be punished twice for the same matters, is, in my opinion, a suggestion of too remote a possibility to be of any practical effect. It is quite clear that any Court or Judge dealing with the misdemeanour, whether it were a common law or ecclesiastical offence, would take into consideration the punishment inflicted for the contempt, as a criminal Court would take into consideration in a conviction for an assault on a process server what the Civil Court had done by way of punishment for the contempt. And the other suggestion that it might be kept over a man's head all his lifetime seems to me sufficiently answered by this, that a Judge, whether of the High Court or the Court Christian, may be trusted and must be trusted that he will not allow the process of contempt to be used vexatiously or oppressively, and that the proper Court of Appeal may be trusted, and must be trusted, to control any such use of it. And, on the other hand, there is scarcely any act which a clerk is ordered to do or to abstain from doing which is not in itself an ecclesiastical offence, and if it were to be held that after his disobedience the whole machinery of application to the bishop, the commission, letters of request and formal trial were to be gone through, then there never could be any enforceable order of the Court of Arches.

I can see no distinction in this respect between the declaring the disobedient clerk contumacious and suspending him, and declaring him contumacious and issuing a *significavit*, to be followed by a writ *de contumace capiendo*. And it would seem hardly consistent with any jurisprudence or any system of law that a legal order of a competent tribunal is to be disobeyed with impunity or only to be enforced by a new suit, and then another suit, and so on *ad infinitum*.

It is further to be borne in mind that no one is obliged to accept either office or benefice in the Church. A man who becomes a solicitor of the Court knows that he is liable summarily to be deprived of his office and sole livelihood. A man who enters the army knows that he is liable to be summarily dismissed. So a

man who accepts an office and benefice in the Church knows that he is liable to be dealt with in respect of such office and benefice by his ecclesiastical superiors and their Judges according to the established law and practice of the Courts Christian, and he cannot be heard to complain to the lay Court of anything which is done to him according to such established law and practice. He is in the same position as a Wesleyan minister who is deprived in accordance with the law and constitution of that body.

I ought not to pass over a matter which for a long time appeared to me a great difficulty in the case, namely, that the suspension appears to be a punishment for the offence as well as for the contempt. But I have arrived at the conclusion that it is not really so; that Mr. Mackonochie was distinctly and clearly brought before the Court for the contumacy and punished for the contumacy, the character and dates of the acts being only referred to to shew the nature and persistency of the perverse disobedience. The application to the Court was as follows:—"That it may be declared by the Court that the Rev. A. H. Mackonochie has not obeyed the monition, and also the further monition in the particulars hereinbefore set forth, and will further ask that the monitions may be enforced as to the Court may seem meet, and that the Court may take such further or other steps in the matter as justice may require, and that the Rev. A. H. Mackonochie may be condemned in the costs of these proceedings."

This was the application of which Mr. Mackonochie had notice, and it was this on which the Judge proceeded.

I cannot help adding this, that except to the parties immediately concerned and their partisans, the whole matter seems to me of little practical moment. If the order of the Queen's Bench were affirmed the only result would, I should imagine, be that in any future case the Court would take care that its decisions should not be contemned with impunity. The sentence would be postponed to give the offender an opportunity of escaping with a light or nominal punishment on shewing his actual conformity to the law and

Martin v. Mackonochie (App.), Q.B.

promising due obedience for the future, or a sentence would be passed actually suspending the offending clerk *quousque*, that is to say, until he should have expressed to the Court and his ordinary his contrition for the past and his solemn promise as a Christian minister to be canonically obedient for the future. And this is practically what has been done here, for I cannot doubt that on application, accompanied by such expression and promise, the suspension could and would be relaxed.

In the result I give my voice for the appellants, and am of opinion that the order of the Court of Queen's Bench should be reversed, with the usual consequences as to costs in the Court below and in this Court.

LORD COLERIDGE, C.J.—It is necessary in this case to set forth the exact state of the facts upon which the suspension questioned by Mr. Mackonochie was decreed by Lord Penzance, because important as the case in some respects is, and great as may be the interest, in some minds at least, which the discussions upon it have excited, the decision of it turns upon the exact state of facts existing when the suspension issued and the exact legal forms with which its issuing was accompanied. I believe no member of the Court doubts that Mr. Mackonochie might have been quite rightly subjected to the sentence which is questioned, if the acts of which he is accused had been proved against him in a properly constituted suit, and by proper evidence.

There was such a suit brought before Sir Robert Phillimore, then Dean of the Arches, by letters of request from the Bishop of London, in 1874. In that suit he was pronounced guilty of having done certain acts in the celebration of divine worship which were ecclesiastical offences, was suspended *ab officio* for six weeks and admonished to abstain for the future from doing those specified acts. In June, 1875 (an appeal to the Privy Council which was abandoned, accounting for the delay), Mr. Mackonochie's suspension was published, and the monition was served upon him. In March, 1878, notice was given him that it was alleged

he had disobeyed the monition and repeated the forbidden acts, and that application would be made to the Court of Arches to enforce the monition as to the Court might seem meet. He did not appear before the Court upon the hearing, which took place on this notice. A second monition was issued on the 29th of March, 1878, by Lord Penzance, who had succeeded Sir Robert Phillimore as Dean of the Arches, declaring that Mr. Mackonochie had not obeyed the first monition, and further admonishing him to abstain for the future from the specified acts. On the 20th of April, 1878, he had a further notice, stating that he had repeated the forbidden acts subsequently to the last monition, i.e. on the 31st of March and 7th of April, 1878, and that the Court was to be asked on the 11th of May to enforce its monitions, as to it might seem meet. Copies of the affidavits in support of the allegation that he had repeated the forbidden acts, and generally in support of the application, were served with the notice. Mr. Mackonochie did not appear, and Lord Penzance, after reading the affidavits, and reserving judgment, finally decided that Mr. Mackonochie had disobeyed and contravened the monitions of the Court, decreed him to be suspended *ab officio et beneficio* for three years, and condemned him in costs. The majority of the Queen's Bench Division have granted a prohibition against this sentence, and the question before us is whether this prohibition is right.

Mr. Mackonochie is a clerk in holy orders; he has been charged before an Ecclesiastical Court with having committed a series of ecclesiastical offences, and the Court has passed a sentence on him for these offences, which, under certain circumstances, it was competent to pass. I express no opinion, and I have formed none, whether Mr. Mackonochie has or has not in fact defied the law. But if he or any other clergyman has deliberately refused obedience to the law of the Established Church, no lawyer can desire that he should go unpunished, or wish to be astute to preserve him in an office which he uses to defeat some of the chief objects for which the

Martin v. Mackonochie (App.), Q.B.

office was created. We have here, therefore, a person, an offence and a punishment, all within the jurisdiction of the Ecclesiastical Court. It follows that the Ecclesiastical Court ought not to be prohibited, unless in the course of its proceedings it has done, or attempted to do, "something manifestly out of its jurisdiction, or contrary to the law of the land." I use the words of Littledale, J., delivering the judgment of the Court in *Ex parte Smyth* (24), expressly approved of and adopted by Lord Wensleydale in *Ex parte Story* (51). If it has done or attempted to do either, then undoubtedly prohibition ought to go.

Three questions at least appear to me to arise, and to require solution in order to arrive at a decision in this case.

1. Is there still existing and depending in the Ecclesiastical Court a suit, in which the last monition, and the suspension consequent upon disobedience to it, can be regarded as a step or proceeding; or was this monition a fresh proceeding to correct, and the consequent suspension a punishment inflicted for, a fresh offence? Or, perhaps, this question may be also put thus: Is this alleged conduct of Mr. Mackonochie, though capable of being treated as a fresh ecclesiastical offence, also a contempt of the continuing order of the Court, and liable therefore to be punished as contempt or contumacy?

2. Next, assuming that it is a contempt and may be so treated, can contempt or contumacy, by the established law and practice of the Ecclesiastical Courts, be punished by suspension on summary process?

3. Supposing contempt or contumacy cannot be so punished according to the established law and practice of the Ecclesiastical Court, is the awarding of such a punishment to it an excess of jurisdiction, or an error in procedure only, corrigible upon appeal, and not ground for prohibition? I will endeavour as shortly as I can, to consider these questions in their order; though, in considering them, no doubt a number of other questions immediately arise and must be discussed.

Now upon the first hearing and deter-

mination of the case by Sir Robert Phillimore, in 1874, he undoubtedly appended to, or made part of his sentence of suspension (I do not think it material which form of words is used), a monition to Mr. Mackonochie to abstain for the future from the practices for which he was condemned and punished. What is the effect of this monition? Does it keep the suit alive for ever; or, at any rate, is it an order the duration of the force of which is indefinite, and disobedience to which is punishable in some shape by the Court, as long as the man lives upon whom it has been made?

No doubt the word "monition" in ecclesiastical procedure has various senses; and, in the whole discussion to which this word and this question give rise, it is important never to forget the peculiar character of the Court Christian—to use old language—the objects for which it existed and the purposes which, if it did its duty, it endeavoured to effect. It existed for the reformation of manners: and its object was the soul's health. "*Ecclesiasticæ jurisdictionis exercendæ nervi sunt pœnæ et censure ecclesiasticæ*," says Oughton, tit. cxxxvii. note, a 1," and in the language of the canonists there is a distinction to be observed between *pœnæ* and *censure*. In the *Bibliotheca* of Ferraris in the articles *Censura* and *Pœna* this distinction will be found carefully made. A *censure*, as I understand him, is something imposed or prohibited for the purpose of improving the subject of the sentence for the future—punishments or *pœnæ* are like a civil or criminal fine or punishment: "*Contra incorrigibiles a Jure canonico statutæ*." *Censures* are three: suspension, excommunication, and interdict; punishments are various, but they include suspension, deposition or deprivation, and degradation. Suspension may be either a *censure* or a punishment; if a *censure* it must be preceded by monition, but not so if a punishment. "*Suspensio enim ubi est censura requirit omnino monitiones; ubi est pœna eas minime requirit*."—Ferraris, *Suspensio*. This also is the result as it seems to me of much elaborate and minute disquisition to be seen, if any one cares to study the subject, in Van Espen, part iii. tit. xi.

Martin v. Mackonochie (App.), Q.B.

caps. 3 and 7 of his *Jus Ecclesiasticum*; and also in the second and third chapters of his *Tractatus Historico-Canonicus de Censuris Ecclesiasticis*, which, though chiefly occupied with the subject of ex-communication, yet when it uses general language is to be taken, I apprehend, as using it with respect to all ecclesiastical censures. It is so laid down also in Gibson, 1047, quoting two paragraphs, which I am unable to verify, according to his citation from the Extravagants, in one of which there is the statement that upon some offences suspension follows *ipso facto* (107). Monitions come under the head neither of censures nor of punishments, as far as I know, in the old canonists. In the days of Hostiensis and De Burgo, and even in the days of Barbosa and Van Espen, a monition was, what the very word implies, a warning to an offender that, if he did not reform his manners or cease his offence, the Church would visit him with censure. The trine monition, so often spoken of as founded upon Scripture, and as a condition precedent to the legality of certain censures, had this moral object, and was in accordance with the at least professedly moral character of the tribunals which issued it. No doubt the word now means something different; but I think the original meaning of the word, and the thing which it originally signified, should be steadily borne in mind. Indeed, I must repeat, at the risk of being wearisome, that the character of the Courts, and their objects, are in my mind cardinal to a right judgment on their procedure. So far as this procedure has been altered by or is subject to Acts of Parliament, the Acts must of course be construed like any other Act; but so far as it has not, analogies drawn from the procedure of ordinary civil courts, and even still more ordinary criminal courts, are sure I think to be misleading.

(107) Since the delivery of this judgment I have been informed by Mr. Droop that Gibson as well as Lyndwood cites as "Extra" the Decretal of Gregory; and in that Decretal I have since found and verified the passage. Gibson's inaccuracy is well known to those who have had much to do with his book, but in this instance it was my own knowledge and not his accuracy which was in fault.—C.

Monitions, then, giving an opportunity for repentance and amendment forewent originally sentences whether of censure or punishment, and were in many cases essential to their validity. Somewhat departing from its original sense, but yet with some of its original sense still preserved in it, the word came to mean steps in procedure, process in fact in the course of a suit. A monition issues to compel appearance, to produce a document, to file an answer, to undergo examination and cross-examination, and so forth. These monitions are described as instruments adopted by the Ecclesiastical Courts which require an act to be done; 3 *Burn*, 191, ed. 1842. They order the act to be done, speaking generally, "under pain of law and contempt thereof," and they are, what they purport to be, not sentences, or censures or punishments, but orders of the Court to be obeyed, and if they are obeyed (I shall consider by-and-by what is the consequence of disobedience), their force is over, and, like any other orders which have served their purpose, they are at an end.

Then there is another kind of monition forming part of or appended to a sentence, when the sentence itself inflicts a censure or a punishment. In these the form is the same; the person against whom the monition is directed is monished or warned to do or not to do something on pain of the law and contempt thereof; and this kind of monition requires to be more fully examined. First, this sort of monition does not appear to me to be correctly described as part of the censure or punishment. It is said, indeed, and by persons entitled to the utmost respect, that a monition is in itself sometimes a censure or a punishment. I venture, with great deference, to doubt this. Admonition is certainly spoken of as a punishment in the Report of the Ecclesiastical Commissioners in 1832, p. 54, and elsewhere, to which so much authority is not unjustly attributed. And in Mr. Coote's *Practice of the Ecclesiastical Courts*, pp. 110 and 197, monition is classed amongst censures or punishments. And it is so spoken of by Sir Robert Phillimore, professing in this matter to do no more than follow the

Martin v. Mackonochie (App.), Q.B.

writers who had preceded him. As to the report, without staying to discuss the authority of its statements in a Court of law, it is enough to say that, if the passage I have referred to be looked at, it will be clear that the commissioners are not affecting to speak with technical accuracy, and are using general or popular language. Nor do I at all question that, for purposes of popular intelligence, a man who is monished not to do what he has been doing, or to do what he has not been doing, and to pay costs (which is the almost universal addition to such a sentence), may very well be said, in popular language, to be censured or punished.

In Mr. Coote's book he places monition as the appropriate censure against four of the more ordinary offences for which clergymen are subjected to proceedings before an ecclesiastical Judge. The cases cited respectively in support of the assertion that monition is the appropriate censure in these four cases, are *Gates v. Chambers* (108), *Smith v. Lovegrove* (109), *Hodgson v. Dillon* (74), *Taylor v. Morley* (110). In neither of these cases is there a word in the sentence as to censure or punishment. The sentence in three of them is a warning not to repeat conduct, which has been ascertained to be illegal by the sentence itself. In *Gates v. Chambers* (108) there was no sentence at all, and Sir John Nicholl absolved the defendant from all kind of moral blame. In *Taylor v. Morley* (110) Sir Herbert Jenner expressly declines to inflict any punishment. The other two were cases of *bona fide* dispute as to the necessity for licenses. None of them justify the use which Mr. Coote has made of them. Nor does Oughton bear him out; Oughton, who is cited as "a great authority," and called one of the two "oracles of our own practice" (Godolphin being the other), by Lord Stowell in *Biggs v. Morgan* (111)—Oughton says that the things "*quæ tam ecclesiasticis quam laicis possunt infligi sunt monitio, quæ præparatoria est, plerumque precedens ecclesiasticas cen-*

suras" (vol. i. p. 213, ed. 1738), language, as I think, expressly and pointedly excluding and distinguishing monitions from those censures, which it prepares for and precedes. In the cases I have been able to refer to, which end in mere monition, there was almost always some real dispute; and the Judges who decided them appear to have thought that making the defendant, who was in the wrong in the dispute, pay the whole or (sometimes) a portion only of the costs, was punishment enough; and to have abstained of set purpose from anything which could be called in ecclesiastical law either punishment or censure. I have protested against analogies from our criminal law, as likely to mislead; but I am nevertheless tempted to ask whether, in any book of practice, or even in popular language, the setting a man free on his own recognisance to come up for judgment, if ever it should be required, has ever been called either a punishment or a censure?

What, then, is the true character of the monition which we have here to consider, not professing to be itself the sentence, but appended to the sentence, and at least in terms and apparently containing the orders of the Court, after the punishment inflicted by it has been fully undergone? It must be borne in mind that the Courts Christian, and they only, administered the procedure by which the Church conducted in public the discipline of its members. No one can read a treatise on ecclesiastical law without perceiving that the Courts owe their origin to the claim of the Church to regulate the life of those belonging to it, and to enforce upon them the moral and religious obligations resulting from their profession. The most perfunctory glance at the *Prolegomena* of Van Espen, at the Preface of Thomassinus or Thomassin, at the early chapters of the *Institutiones Canonice* of Devotus (especially the 3rd section), or indeed at any other writer of authority on canon law, will shew us that the law professed to be founded on Scripture, to be as the very word signifies, a rule of life, and that the Bishops and other Church authorities professed to enforce it for moral and religious objects,

(108) 2 Add. 177.

(109) 2 Lee, 162.

(110) 1 Curt. 470.

(111) 3 Phill. 329.

Martin v. Mackonochie (App.), Q.B.

and originally by sentences of moral and religious obligation only, which appealed entirely to the heart and conscience. Originally no Court Christian could inflict any temporal punishment. In principle, therefore, there is nothing to surprise us that a Church Court should proceed, after warning, to pass a sentence of censure or of punishment for something declared upon authority to be a breach of the Church law, and should add to its sentence an order to the party not to repeat conduct which had been declared to be wrong. Once admit (which I think cannot seriously be disputed) that Church Courts are, according to their idea, not Courts for settling temporal disputes between man and man, but organs of the Church for enforcing discipline, and it follows at once that the power to make such orders as we have before us here, to do or to abstain from doing something ascertained respectively to be right or wrong, is part of their very essence, and that without such power their use in many cases would be gone. Take, for example, the case of an incestuous marriage, a marriage I will suppose not incestuous only because within some of the more remote prohibited degrees, but because the sense of modern civilised mankind would universally recoil from it; say of a brother and a sister. Before Lord Lyndhurst's Act, I believe, such a marriage was voidable only by the decree of an Ecclesiastical Court. Suppose a suit to avoid it, and the marriage avoided, and suppose further some penance enjoined, and (what was done with great particularity by Lord Stowell in *Burgess v. Burgess* (30), an order made to cease for the future from the incestuous cohabitation, to prevent and to put an end to which, and not merely to punish which, was the very object of the suit. If I have rightly understood the arguments of Mr. Charles and Dr. Phillimore, when the penance had been performed, the cohabitation could be resumed with perfect impunity as far as the Court is concerned; the Court could be defied; and the only means anyone could take, who wished to put an end to the abomination, would be a series of fresh suits from time to

time, till the patience, or the purse, of the sinners was exhausted. Bearing in mind the object and the character of the Court, such a contention appears to me absolutely inconsistent with them. If an Act of Parliament said so, and if there were decisions of authority which established such a state of things, I could only submit to them; but it would require an Act of Parliament, or a decision direct in point, and binding on me judicially, to make me do so.

Nor from the point of view which I am endeavouring steadily to keep to, namely, the Church or ecclesiastical, is the consequence one whit less inconvenient or less inconsistent with the very character of the Court if the present prohibition is upheld. The question in the case before us in the Church Court was a question of ritual, whether certain acts were or were not permissible by the law of the Established Church in the most solemn ceremony of Christian worship. Ritual in itself may be, no doubt sometimes is, a matter of great indifference, or the difference respecting it may go no deeper than a difference of tastes. But it may be made to symbolise, and even to express, doctrines or practices of the utmost practical importance. The ritual acts done by Mr. Mackonochie were of the latter sort. They were done, and they were avowed by him to be done, as symbols or expressions of doctrines and practices which very large numbers of the members of the Established Church (I do not know, and I therefore do not express any opinion which way the absolute majority inclines; but at any rate which large numbers) regard as abject and mischievous superstition. Many persons wish to prevent, if possible, practices which they so regard from receiving the sanction of law within, and becoming part of the legal ceremonial of, the national Church of this country established and maintained by law. The highest Ecclesiastical Court in the country had deliberately determined the acts to be unlawful, whatever they signified. But Mr. Mackonochie repeated the acts, and steadily defied the law. He was told authoritatively what the law was by the Dean

Martin v. Maconochie (App.), Q.B.

of the Arches; he was punished lightly for disobeying it; but he was told that he must not repeat his acts of disobedience. If in matter of fact, there has ever existed a practice in the Courts Christian to append to their sentences monitions such as the monition here, capable of being enforced, as it is proposed to enforce this, it is surely a practice which it is desirable, if it be lawful, to uphold.

And if in any case it is desirable, surely it is in this case. If it cannot be upheld, it is hardly extravagant to say that, unless in every case the extremest sentence warranted by law is to be passed in the first instance, the discipline of the Church, so far as it depends upon its Courts, is practically at an end. The strong and sensible observations of Lord Stowell in *Mr. Stone's Case* (112) were indeed made in a case of doctrine; but they are to the full as true in a case of ritual practices, whether these ritual practices are or are not performed for the sake of the doctrine which they express. "That any clergyman," says Lord Stowell, "should assume the liberty of inculcating his own private opinions, in direct opposition to the doctrines of the Established Church, in a place set apart for its own public worship, is not more contrary to the nature of a national Church than to all honest and rational conduct. . . . It would be a gross contradiction of its fundamental purpose to say that it is liable to the reproach of persecution, if it does not pay its ministers for maintaining doctrines contrary to its own." The right and appropriate mode of dealing with a man who will not conform to the rules of the society to which he belongs, and from which he derives his status and his pay, is to remove him from the place he holds in it, and probably a person so removed would command no public sympathy in his removal. Here it is said that the right and appropriate punishment (if there is any, which is disputed) would have been by *significavit* and imprisonment; but as this is a punishment for obvious reasons in many cases impossible to enforce, though

the form of words varies, it is in sense and substance the same thing as saying that there is no right and appropriate punishment at all. Unless a man is to be sent to prison for disobedience, there are, if Mr. Charles and Dr. Phillimore be right (and if I understand my brother Brett, he thinks that they are right), no means of enforcing obedience in matters of ritual, however important, except the making every particular act or set of acts of alleged ritual irregularity, the subject of separate and distinct suits in Court; and as the exception is practically absurd, there are, in fact, according to this argument, no means. So that in the case of the setting up of an idolatrous image, or the conducting an idolatrous procession, a clerk cannot be compelled to take down one or discontinue the other, after he has undergone his sentence, without in every case a fresh suit with all its formalities; a conclusion which the sincere respect I entertain for those who have arrived at it alone prevents me from describing as I think it deserves.

But after all, this may be so; and it may be said with much truth, that all I have been saying, admitting it to be all true, comes to no more than this, that from a certain point of view, and for certain purposes, the procedure adopted by Sir Robert Phillimore and Lord Penzance is at all events desirable, and that it does not shew that it is lawful, or has been authorised. No doubt it does not. And there are objections, said to be formidable, to what has been done.

It has been questioned whether there is any right to append an order purporting to affect future conduct to the definitive sentence in a suit; and whether if it is appended it has any legal force. As to the fact, it has been done too often for me to entertain the slightest doubt that it is part of the established and recognised procedure of the Ecclesiastical Courts. It has been done in times comparatively modern by Dr. Lushington, by Sir Herbert Jenner, by Sir John Nicholl, by Lord Stowell. It has been done in times more ancient, as many of the precedents cited to us from the return of Mr. Rothery demonstrate. I

Martin v. Mackonochie (App.), Q.B.

agree in thinking that some of these latter cases are open to, and for myself I concur in, the disparaging remarks which have been made upon them. I think them, however, strong to shew that the practice existed; whether these cases are good and just examples of it, is another matter. Then, if the practice existed, was it a practice to append to sentences orders which seemed on the face of them to direct future conduct, which yet had and were intended and known to have no such power? It is to me incredible, I say so with true respect and deference for at least one great authority, who has come to an opposite conclusion, that Lord Stowell and Sir John Nicholl, for example, would have given the precise and definite directions they did for future conduct in the cases of *Burgess v. Burgess* (80), and *Blackmore v. Brider* (29), and Sir Herbert Jenner in *Burder v. Langley* (56), and *Newbery v. Goodwin* (34), if these directions were of no legal force or validity; if all these Judges intended was to give notice that in case of disobedience, and in case of a fresh suit for fresh acts of disobedience, *not otherwise*, and, of course, in case they happened respectively to be the Judges trying the fresh suits, the punishment to be awarded in those fresh suits would be or might be much heavier on the offenders. Such does not, I will own, appear to me to be the fair and reasonable construction of the language used by those Judges; there is nothing in their language to shew that they were making anything but ordinary and everyday decrees; and they seem to me to be witnesses who prove conclusively the constant prevalence in these Courts of a practice the very existence of which is disputed. I answer, therefore, my first question thus: whether the suit in which the monition before us was issued is kept alive by the monition or not I will not take upon me to determine; but I think there is abundance of authority to shew that the Courts Christian have, as far back as evidence reaches, asserted a jurisdiction over the future conduct of parties in a suit before them, where the conduct of those parties has been the subject of the suit; and as I

think this assertion a perfectly natural one for the Court Christian to make, so do I not believe that it was, or was ever intended to be, merely verbal and incapable of being enforced in act.

II. Then arises the second question, assuming that the course and practice of the Courts Christian do warrant the appending of a monition to a definitive sentence, can disobedience to such a monition be punished either at all, or at any rate, by suspension? It is said, and as the assertion has not been controverted at the bar, and I have no knowledge of my own which enables me to controvert it, I must take it to be true (subject to an observation on the case of *The Bishop of Lincoln v. Day* (15)), that there is no recorded instance till quite in recent time of anyone being brought summarily before the Court after the conclusion of a suit, and being punished for disobedience to this kind of monition. There are, no doubt, abundant instances of punishment for disobedience to monitions in the nature of process in the course of a suit, and for disobedience to monitions at the end of a civil suit, and forming part of a sentence ordering some specific act to be done; as, for example, payment of costs, or in a testamentary suit, the exhibiting of an inventory or an account. But it is agreed that such instances as these latter are not to the point; and it is said, and I will for the present so take it, that there are no instances which are.

Now I confess I am not so much impressed as others no doubt are by this absence of instances. Till the beginning of the present century there are, with the exception of Sir George Lee's two volumes, no regular ecclesiastical reports. The abstracts of cases furnished by Mr. Rothery's Return take us a good deal further back, and there are occasional and indeed not infrequent notices of the practice of the Ecclesiastical Courts in our own old reports and digests, where the subject is prohibition. But Mr. Rothery's Return is only of cases which were appealed to the Delegates; of these, seven only even remotely, as Mr. Rothery informs us, involved any question of doctrine or ritual, and if

Martin v. Mackonochie (App.), Q.B.

those seven be looked at there is not a single one which from its circumstances could give occasion, as in fact none did give occasion, to such a sentence as the one before us. But further, if our ecclesiastical records had been as rich as they are poor, it would not be the majority of cases in which we should expect to find these monitions. Further, as a rule, monitions are obeyed; in this country men are wont to submit to the law as declared by the Courts: and in these tolerant days it is only, I think, amongst the clergy of the Established Church that persons are to be found who disobey the law on principle, and claim credit for their disobedience as a virtue. I should not, therefore, expect to find many instances recorded of resistance to the orders of monitions, nor by consequence of proceedings taken, to punish or overcome such resistance.

There is, however, one such case at least, on which it is fit to say a word, because its exact import has been, I think, a little misconstrued by a great lawyer, generally most accurate in his account of the cases which he cites or examines. It is the case of *The Bishop of Lincoln v. Day* (15). It has been said that this is a case shewing clearly that there was no instance of deprivation for contumacy or contempt. But if the case is looked at it will be seen this is not so. Deprivation was prayed by counsel for the original offence, that of drunkenness, and Sir Herbert Jenner, saying that the case, not the contempt, was "most aggravated," declined to deprive for it, as there was no precedent for inflicting such a punishment on such an offence, i.e., drunkenness. The defendant was suspended *ab officio et beneficio* for three years; he underwent his full sentence, and some months after, on resuming his functions without a certificate of good conduct, during the three years of suspension, he was pronounced in contempt upon monition, and his contempt was signified. If the defendant had misconducted himself during the three years of suspension, he could never have obtained the certificate, and the principle of his case is, that at any time during his whole life, though he had undergone

his punishment, the sentence would have been sufficiently alive to bring him under the penalties of contempt (whatever those penalties were) if he disobeyed its order. I do not think it an answer to say, that as the sentence was actual suspension for three years, and then further until he produced a certificate of good conduct, the sentence was a continuing one of suspension. Sir Herbert Jenner clearly did not think so. He refused to deprive, which is but another word for perpetual suspension. And if it be said that the clerk by his own act turned a temporary sentence into a perpetual one, then it must be admitted that by acts done subsequent to the sentence the power of the Court is enlarged, and a sentence of one kind can, by a reservation made in it, or an addition made to it, after it had been pronounced, be changed into a sentence of another kind. But substantially that is the very thing which has been done in the case before us. The same thing had been done and was upheld by the Queen's Bench in *The Queen v. The Bishop of Oxford* (113), in which one of the Judges, not ignorant of ecclesiastical law, draws a pointed distinction between sentences *in pœnam* and sentences for reformation, a distinction which the arguments in favour of the prohibition altogether overlook, though a very slight acquaintance with the elements of ecclesiastical law would ascertain its existence and importance. I conclude, therefore, both on reason and on authority, that such a monition as we are concerned with is a perfectly lawful act in a Court Christian, and that disobedience to it may, in some form or other, be punished.

But then in what form? May it be by suspension? This is the next question, and one of the most important. Now, first, I am unable to see that this is or can be anything but a question of procedure in the strictest sense. It has been admitted from the beginning that this punishment might be inflicted on this defendant for this very offence charged against him, as the result of a fresh suit. It is not said that the punishment is inappropriate to or excessive for the offence

Martin v. Mackonochie (App.), Q.B.

as an offence; nor that Mr. Mackonochie had not the fullest notice; nor that he was deprived of any real or substantial advantage by the course pursued. I pass by, with the observation that it is the purest *petitio principii*, the argument that Mr. Mackonochie had no notice in fact, because he had no notice which he was bound to treat as one. He elected not to appear, and to take the consequences, whatever they might be. Still it is said that these consequences were, at the worst, imprisonment and not suspension, and therefore there should be prohibition. I will give my reasons presently for thinking that assuming the premise the conclusion does not follow; but I will first examine the premise. I will assume that there are no recorded cases, except the cases of *Martin v. Mackonochie* (3) and *Hebbert v. Purchas* (2) before the Privy Council, in which a clerk has been suspended for disobedience to a monition appended to a sentence delivered in a regularly instituted and prosecuted suit. This would not, I apprehend, be of itself sufficient to shew that the proceeding was unwarranted. Instances only of resistance to such a power as this, would be recorded in the books; and that, under circumstances which I need not repeat, no instance has been found of a recorded resistance to the power, does not at all shew that the power has not been exercised. The two cases in the Privy Council are said not to be sufficient to shew that it is warranted; and the enquiry therefore, I presume, becomes one in which principle is to be considered, and not authority. The principle supposed to be violated by the proceeding is this: that as deprivation of a clerk cannot take place, except with all the formalities of a plenary suit, and as suspension is temporary deprivation, it cannot be inflicted according to the course and practice of the Court Christian, as the result of a summary proceeding. Now the proceeding here was summary; and therefore one of the main principles according to which ecclesiastical jurisdiction is exercised has been, it is said, violated.

It was certainly to my mind very surprising to hear that a censure or punish-

ment applicable to clerks only could not be applied to clerks when they disobey the orders of the Church Courts. But in a subject-matter, with which I have no pretence to be familiar, this is nothing. It has, however, led me to look carefully into the supposed authorities on which the proposition is based. In my opinion the proposition is absolutely baseless; though I must observe that out of the voluminous writers on ecclesiastical law, ancient and modern, it is not difficult to find isolated passages, right in their context, intelligible to the ecclesiastical lawyers and Judges for whom they were written; but likely, unless a great deal more than the passages themselves is read and considered, to mislead a man not familiar with the subject, and convey to him an entirely false impression.

I do not think it necessary to examine at any length the argument founded upon the passage in Conset, part i. sec. 2; because I do not at all doubt that if this is a cause in the sense in which that word is used by Conset, the whole proceeding is absolutely void, as violating the provisions of the Church Discipline Act (3 & 4 Vict. c. 86). But then it is said that if it is not a fresh cause and fresh proceeding, and therefore void (as I agree in that case it would be), by virtue of the last mentioned statute, it is a proceeding against a clerk for contumacy, and that for contumacy suspension is not a lawful punishment. I am not of that opinion. In the first place suspension *eo nomine* is in canons and books of authority awarded as a censure or punishment for disobedience to authority, contempt, or contumacy. It is so in Lyndwood, p. 39. I do not forget the gloss upon this passage referred to by Mr. Charles, to which I will return. It is so in the 68th and the 122nd of the canons of 1604. It is so in numerous instances (I have myself counted above twenty) in the single collection of Johnson's English Canons, ranging from the Conquest to 1463. It is so in the 44th section of the Appendix to Godolphin, as to which I do not forget and will recur to Mr. Charles's observations. It is so in a constitution of Othobon, which may be found either in Gibson, 209, or in the

Martin v. Mackonochie (App.), Q.B.

second part of Lyndwood, 111. It will be found also described as a censure in many cases and many forms, in the first chapter of the second title in the first part of Lyndwood, where at pages 10, 11, 12, the whole subject is discussed at great length and with infinite minuteness. Indeed, I think it is impossible to look even carelessly through any collection of canons, or notes upon them, without being amazed at the statement that suspension in the days of those canons, and of the bishops and Judges who had to enforce them, was no appropriate punishment for the contempt or disobedience of a clerk.

But further, it is a punishment which has actually been inflicted. I think the case of *Harrison v. The Archbishop of Dublin* (19) is on this point conclusive, and has the authority of the House of Lords. I am on the single point whether suspension is an appropriate penalty for a contumacious clerk. The report shews either that the point now made was not taken by Sir E. Northey, and Mr. Lutwyche who argued for the prohibition, which if it could have availed them—remembering their characters and looking at their argument—I think incredible; or that it was taken (and this is I think the true view to be gathered from page 203), and was distinctly overruled. With great respect for those who differ, I do not think it relevant to the point I am upon to say that the suspension here was in a Court of visitation, and as the result of a suit. But in matter of fact I do not think it was the result of a suit; except so far as all discipline conducted by a bishop or a visitor in visitation may be said to be in a Court, and the persons visited may be called parties to a legal proceeding. I cannot find an indication in this case of a suit. In the earlier case of *The Bishop of Kildare v. The Archbishop of Dublin* (83), there is at the end of the declaration something which looks like it. I read it as the legal phraseology in which the ordinary proceedings at a visitation are described; but if I am wrong, the language in the later case, *Harrison v. The Archbishop of Dublin* (19), is very different, and it is possible, though I do not myself believe it, that

the Archbishop of Dublin may have treated the Bishop of Kildare, who was the Dean of Christ Church, with more formality than he treated Mr. Harrison; and it is to be observed that it nowhere appears what sentence the archbishop passed, if any, upon the Bishop of Kildare.

The same punishment or rather deprivation which is perpetual suspension was also inflicted in the case of Mr. Morrison, the sentence upon whom, setting out all the proceedings, is given at length by Gibson, p. 1547; but although contumacy was no doubt one of Mr. Morrison's offences, he was guilty also of persistent non-residence, and the sentence of deprivation is expressed to be passed in the interests of his parish. There are cases also in Mr. Rothery's Return which though they may be, probably are, open to comment, at least, as I have before said, bear witness to the existence of the practice.

It has been argued, however, that where the word "suspension" by itself is used in a canon, it is always to be taken as importing suspension *ab ingressu ecclesiæ* only. It is useless to complain of an argument which was I presume *bona fide* urged, but it is not a little astonishing. The whole foundation for it is a line in a gloss on a canon of Peccham, in the 39th page of the first part of Lyndwood, as to the proper supply of oil in baptism, *sub pena suspensionis*. The gloss lays down the very good general rule that in penal legislation general words are to be taken *in mitiori sensu*. And then it says: "Ex quibus videtur (no more) quod sententia suspensionis hic lata debet intelligi de minus pœnali, scilicet ab ingressu ecclesiæ. Et hoc puto verum, non obstante quod talis, de quali hic dicitur, deponendus esset secundum canones ut prædixi. Et sic sentire videtur J. de Atho in constitutione Othonis." It is not very easy to follow a reference in Lyndwood, but after the best study I can make of it I must say that John of Atho does not appear to me so to think. However this may be, nothing can be slighter and more uncertain than this gloss which is seriously put forward as laying down a general canon of construction for the word sus-

Martin v. Mackonochie (App.), Q.B.

pension. I observe that in a gloss of John of Atho himself, Lyndwood, part ii. p. 13, it is said there are no less than twenty-five different sorts of suspension, each with its sub-divisions; some of these suspensions far more trivial than suspension *ab ingressu*.

I need not point out the effect of this upon the argument that suspension *simpliciter* always means suspension *ab ingressu ecclesie*, because the word is to be taken in *mitiori sensu*. In the same page there is a discussion whether, if suspension *a beneficio* were not named, suspension *ab officio* would have included it, and it is decided in the affirmative. And in a constitution, p. 111, *De Oblationibus Capellarum Restituendis Ecclesie Matrici*, where a man is said in a canon of Otho's *si contempserit vinculo suspensionis inmodari*, the gloss of John de Atho is simply this, *scilicet ab officio*. The same authority also says, in a gloss to the *Constitutio de Habitu Clericorum* (p. 88), that a different principle is to be applied where suspension is inflicted by the law *ipso facto*, and where suspension is the sentence of a Judge; and the doctrine of the gloss on which so much reliance is placed, does not apply in the latter case. Further, though suspension *ab ingressu* may be, and sometimes is, inflicted on a clerk, it is a punishment in its nature far more appropriate to laymen. So little is it considered a clerical punishment that in the *locus classicus* in Oughton it is not even mentioned; in a long chapter on Ayliffe on suspension there is no allusion to it; it is not mentioned as a kind of suspension in Calvin's *Lexicon*; it is not mentioned in the chapter in Bingham on clerical punishments (xvii. 1). In Gibson, 1047, where several sorts of suspension are described, suspension *ab ingressu* is said to relate "to the laity chiefly." Godolphin speaks of suspension *ab ingressu ecclesie* as "inflicted upon lay persons for smaller crimes and contempts" (App. 48); and in the statute against brawling, 5 & 6 Edw. 6. c. 4. s. 1, the ordinary is for the same offence to suspend the offender if he be a layman *ab ingressu ecclesie*, if he be a clerk from the ministration of his office. Probably this disposes of the po-

sition founded only on a misunderstood fragment of a gloss upon two words in a single canon in Lyndwood that suspension always means, in canons applicable to clerks, suspension *ab ingressu ecclesie*, a sort of suspension which very rarely applies to them at all, and is not even mentioned in great and learned works which treat of punishments peculiar to them. Yet this astonishing proposition was apparently with perfect seriousness pressed upon the Court, and I must say that it is one of the inconveniences which follows the using of these Courts as in the nature of Courts of Appeal from the Courts Christian, that scraps of voluminous and indigested writers, necessarily unfamiliar to counsel, are cited to a Court also necessarily unfamiliar with them, and that it necessarily takes an amount of time and trouble wholly incommensurate with the result to shew their entire irrelevancy.

I will say only as to the authority of the appendix to Godolphin that I cannot find in any text-book, or in any judgment, any distinction drawn between it and the rest of the book; anything to disentitle it from receiving the deference which is due to a writer called by Lord Stowell "an oracle:" and if the passage has Godolphin's authority, then it is expressly in point in support of the present sentence. For myself, I believe that Godolphin meant it, for in the 27th chapter on Deprivation in the body of his book, in a part of it as to which no question of authenticity can possibly arise, he places "contempt" as the second of the three "causes of deprivation," the other two being want of capacity and crime. But deprivation is perpetual suspension, and what is true in principle of the greater must be true of the less. If a clerk may be deprived for contempt, it is to my mind quite impossible to deny that he may be suspended.

There remain to be considered the two cases in the Privy Council, *Martin v. Mackonochie* (3) and *Hebbert v. Purchas* (2), which the Lord Chief Justice in his judgment most truly states to be binding on Lord Penzance; but which he thinks were wrongly decided, and the authority of which is in his opinion not binding

Martin v. Mackonochie (App.), Q.B.

upon the Queen's Bench, nor, *a fortiori*, upon us. Binding in the sense in which that word is commonly understood in these Courts certainly these cases are not, because the Privy Council is not a Court of Appeal from any part of the Supreme Court. It is agreed, however, that the judgments of the Privy Council are entitled in every English Court to great deference; and I go in this case further, and being prepared to hold, for reasons which I shall presently assign, that this is a question of procedure, I think that the judgments of the highest Ecclesiastical Court in the country as to its own procedure do in a sense, and with some limitations, conclude such a question in every other Court in the kingdom. Such certainly appears to have been the opinion of the Court of King's Bench in *Ackerley v. Parkinson* (50), when in speaking of a decision of the Court of Delegates that a certain citation was a nullity, Le Blanc, J., says: "That I think is to be assumed from the ultimate decision of the Court of Delegates, which is a Court of competent jurisdiction, and whose sentence is to be considered as compulsory on us." Indeed, if the Judicial Committee cannot conclusively determine on the propriety of the steps in their own Court for arriving at a conclusion, which it is conceded they can arrive at by some steps, they will be the only tribunal in the country to which such a power is denied.

I am quite unable to accede to the position that the Judicial Committee of the Privy Council can be prohibited in the exercise of its functions by the Judges of any portion of the Supreme Court; yet this is a position almost essential (and quite rightly so treated by the Lord Chief Justice) to the maintenance of the judgment of the Court below. Still less am I able to accede to the reason for this opinion given by him in his very powerful judgment, namely, that the jurisdiction of the Court of Delegates was transferred to the Privy Council, and that as the delegates were so often prohibited as to shew that they were liable to prohibition, so is the Judicial Committee, so long as it is exercising the jurisdiction of the delegates, subject like-

wise to prohibition. With great deference, I do not think this consequence follows. The jurisdiction of the Courts Christian in matters testamentary and matrimonial was by 20 & 21 Vict. cc. 77, 85 respectively transferred to Her Majesty, to be exercised in the modern Courts of Probate and Divorce. The appeal, which had before been to the delegates and the Privy Council, was transferred to the House of Lords. No new jurisdiction was created; the old jurisdictions were transferred. Did the House of Lords, so long as it was exercising this final jurisdiction, become subject to the controlling jurisdiction of the Courts at Westminster, by way of prohibition? If the appeal from the Court of Probate had been given by statute to the Court of Common Pleas or the Court of Queen's Bench, would either Court have become subject to prohibition from the other? Surely not. The jurisdiction is transferred to a Court, and that Court exercises it as part of its own jurisdiction, subject to prohibition or not, according as the Court itself was or was not subject, before the transfer. Was then the Privy Council subject to prohibition before this transfer? It is true that in *Ex parte Smyth* (24), the point appears to have been assumed, but the Court decided against the application for prohibition without hearing any argument against it. The case of *The Bishop of Exeter v. Gorham* (114) was argued on both sides in the Court of Exchequer only, as the Courts of Queen's Bench and Common Pleas had previously refused the rule. In the Exchequer there is no doubt that Sir John Jervis, one of the acutest and ablest lawyers of modern time, while questioning the power of that particular Court to grant prohibition, appears to have conceded the existence of the power in the Queen's Bench and Common Pleas. In the judgment of the Court in 5th Exchequer the point is not noticed, nor does it appear to have been ever decided. This state of authority leaves me free to say that it seems to me very difficult, if not impossible, to maintain the existence of the power.

The Queen in Council is in many

Martin v. Mackonochie (App.), Q.B.

matters, including ecclesiastical matters, the Supreme Court of Appeal. The Judicial Committee of the Privy Council humbly advise Her Majesty, or report their opinion to Her Majesty, and probably all the members of this Court have been present when such reports have been presented to Her Majesty, and have been formally approved by her *ore tenus*, and as her own personal act. As she approves on the advice of a Minister, I entertain no doubt that on the same advice, and subject to the Minister's responsibility to Parliament, she could disapprove; and it seems equally difficult to prohibit Privy Councillors from giving advice, or to affect in the Queen's name to prohibit the Queen herself. Yet this is not an otiose or merely curious inquiry; because although it is not absolutely necessary to decide the point, and I do not presume to decide it, yet if the Judicial Committee cannot be prohibited, they may be appealed to in order to enforce Lord Penzance's order, if he refuses to enforce it in obedience to the prohibition of the Queen's Bench; and as the Judicial Committee have already decided that such an order is valid, there can be no reasonable doubt that they would enforce it, and the conflict of Courts would be at the least highly inconvenient. Nor could the conflict be avoided in this case, because the writ, as I understand it, is directed to the Court itself, and, if it could be, it is not directed to the party. No doubt, if a party to a cause takes any steps to enforce a prohibited decree or judgment, he may be punished by the Court which prohibits. But if he applies only to the Court which has been prohibited to enforce its order, and upon refusal appeals to a Court which cannot be prohibited, I much doubt if there is any authority for saying he would be guilty of contempt. And if he were, the spectacle would be presented of a person imprisoned for contempt in taking steps to enforce an order which a Court, not subject to prohibition, declared to be perfectly valid and proceeded to enforce. All this seems to me to shew the extreme inconvenience of holding that a procedure or practice (for I do not desire to assume a point in dispute), upheld by the

highest Ecclesiastical Court, is ground for prohibition when pursued by an inferior one. I admit, of course, that this consideration is not absolutely conclusive. But on the whole, I answer my second question by saying that there seems to me to be abundant authority for holding that the suspension in this case is warranted by the course and practice of the Ecclesiastical Courts.

It is said, however, that it cannot be regarded as procedure only. Now this is a very difficult question to discuss. What is procedure, and therefore, if wrong, matter of appeal only; and what is jurisdiction, and if wrongly asserted, matter for prohibition, it is almost impossible to define in general language. The same thing will often strike different minds, some as error in procedure, some as excess of jurisdiction. I do not pretend to speak with confidence in a matter where so many of my colleagues differ from me, but I am unable to see that this is anything but procedure.

The subject-matter is clearly within the jurisdiction of the Court Christian. It matters not that, as has been suggested, Mr. Mackonochie might be indicted for breach of the statute law in ministering contrary to the Act of Uniformity. He is accused of an ecclesiastical offence. The punishment is one which for this offence the Court Christian may inflict. It is said that it has been arrived at by wrong process. I do not think so; but if it has, what is arriving at a legitimate end by a wrong road but erroneous procedure? In *Ex parte Smyth* (24) the Court of Appeal decided something not matter of appeal, and on which the appellant had not been heard: Held procedure. In *Couch v. Toll* (46) the Court had proceeded then to sentence, without any citation of the person sentenced: Held that, whether citation was needful by the practice of the Court or not, it was error in procedure and not matter of prohibition. In *Shatter v. Friend* (47) the prohibition went because the Judges thought the matter a temporal one—it was a question of proof of payment by a single witness; but it was admitted that if it had been ecclesiastical the prohibition would have been refused; and Lord Holt

Martin v. Mackonochie (App.), Q. B.

doubted, though he ultimately concurred with the rest of the Court, and admitted that the resolution of all the Judges (reported by Lord Coke in 2nd Inst. 608) was "mighty strong" with his doubt, as indeed, says Sir Bartholomew Shower, the reporter, it certainly was. In *Breedon v. Gill* (48) Lord Holt lays down the principle in these terms: "When the Ecclesiastical Courts are possessed of a cause which is merely of spiritual consequence, the Courts at common law allow them to pursue their own methods in the determination of it." In *The King v. Payton* (49) one of the grounds of the prohibition (the other two not being material here) was, that the Ecclesiastical Court had pronounced a sentence not warranted by law or practice; but Lord Kenyon said, delivering the judgment of the Court (himself, Grose, J., and Lawrence, J.), "that is only a ground of appeal; it is merely that the Judge has not proceeded according to the proper forms of the Ecclesiastical Court." In *Ackerley v. Parkinson* (50) the question was not one directly of prohibition, but it was an action against ecclesiastical Judges for proceeding to sentence in a cause begun by a citation, which, as the delegates determined, was a nullity. It was held nevertheless that the proceedings, though erroneous, were not without jurisdiction; and Bayley, J., at page 428, makes these, to my mind, very pertinent remarks: "This is a matter which they must know as connected with their practice; but how are we as Judges of the Common Law to know whether these proceedings have been such as the writ or canon law requires? Our knowledge of what is conformable or not to that law is chiefly derived from our practice of exercising jurisdiction over those Courts in the matter of granting prohibitions. If it appears that the ecclesiastical Judge had either no jurisdiction, or has exceeded his jurisdiction, this Court is in the habit of interfering by granting a prohibition. But if the spiritual Court has jurisdiction" (Le Blanc, J., explains this by saying "over the subject-matter") "I am not aware of any instance in which this Court has granted a prohibition, except in cases where it proceeds to the

trial of a matter triable only by the Common Law, or allows a thing not allowed by the Common Law, or where the construction of a statute, which is peculiarly confined to the Common Law, comes in question." Subject to the argument arising upon the Church Discipline Act, every word of this appears to me in point in this case. In *Ex parte Story* (51) a prohibition was prayed for to restrain the Ecclesiastical Court from proceeding to punish a man for disobedience to decrees made behind his back and without notice. But Lord Wensleydale said: "There is no doubt that here the Ecclesiastical Court has jurisdiction over the suit; but if any proceeding of an irregular nature has taken place in that suit, it does not take away the jurisdiction of the Court, but merely gives the party a remedy by application to the Court itself, or by appeal. What has been done in this case does not amount to a contravention of natural justice."

In *re Crawford* (52) was not a case of prohibition, but of refusing or rather setting aside a *habeas corpus*; but it is worth notice as shewing that the Courts at Westminster will not interfere with the procedure of other Courts (the Court in question was the Chancery of the Isle of Man), although such procedure would not be lawful if pursued by themselves.

Of course in none of these cases were the circumstances exactly the same as the circumstances in the cases before us. If they were, the arguments of counsel and our judgments would have been short indeed; but I think they establish this, that where the subject-matter is for the Court Christian, and where the act done is something which in itself the Court Christian can do, the steps by which the Court arrives at the act, however erroneous they may be, are matter of appeal and not ground of prohibition. I have said that I think the steps in this case right, but if I thought them wrong, my conclusion would be the same.

It is said, however, that if the procedure involves something contrary to natural justice the Court will be prohibited; and I agree it will, and ought to be. In this case the argument for the prohibition is hardly pushed so far as this; but it is

Martin v. Mackonochie (App.), Q.B.

said that the consequences of the procedure are monstrous; so monstrous and unreasonable as to shew that it cannot be really a part of the course and practice of the Court Christian. The consequences cannot be stated with more force and cogency than they have been by the Lord Chief Justice in *Martin v. Mackonochie* (115). It is said that this assumed jurisdiction would clothe the Dean of the Arches with power over a man for his natural life, and in every diocese in the province of Canterbury. I am not sure, with deference, that the wide extent of space follows from the contention of the Solicitor-General; the indefinite duration of time no doubt does. Practically impossible cases also have been put of some perverse Judge punishing a clerk under his procedure for acts which, though unlawful at the time of the original sentence, have meanwhile been decided by a Court of Appeal on further argument to be lawful. I do not think I need deal with such cases till, if ever, they arise. But the fair and reasonable result of the contention does not startle me. It is to be remembered that the original suit ascertains once for all the lawfulness or unlawfulness of the specified acts. That is *res judicata*, and no clerk can be or would be permitted to re-argue it. The law of the Church has been declared, and an officer of the Church has been ordered to obey it.

It is no doubt my fault, but I am really unable to see the hardship or absurdity of an officer of the Church being forced his whole life long to obey, on a particular matter, the law of his society when it has once been declared to him by proper authority. The law might have clearly said, no doubt, that every repetition of an act in public worship already decided to be illegal, must be the subject of a fresh suit, with every formality, expense and delay incident thereto. But if it has not so said clearly, I see no absurdity, inconvenience or injustice in the practice before us, which should lead us to hold that it has said so by inference. Except the right of discussing the law anew, which, I think, would not be permitted him, even in a fresh suit, the clerk has

(115) *Ante*, p. 14.

every other substantial right as fully and completely as he would have in a suit regularly instituted and formally conducted. The question is one of fact; has he or has he not done certain specified acts? And upon that issue he has the fullest opportunity of making the fullest defence. The argument *ab inconvenienti* is not conclusive, but it is certain that the consequences of holding that every act of disobedience to a monition is a fresh offence, in the sense of requiring a fresh suit to establish its unlawful character, will be, I do not say to destroy, but very gravely to impede all reasonable ecclesiastical discipline; and that these consequences will at once arise there can be no doubt.

There is a matter on which little stress has been laid, I am not sure that it has been adverted to, but which seems to deserve a word of notice before I pass to the last point which I have to notice. It has been suggested, as something irregular and unheard of, that a man should be suspended for a repetition of his offence upon mere notice and without a regular suit. But excommunication, from the ecclesiastical point of view, was a worse punishment than suspension, and excommunication certainly might be so inflicted. "If," says Godolphin, page 626, "the same party for the same cause be excommunicated again, there needs not any previous citation or monition as before: *Nam excommunicatio quæ fit sæpius ex eadem causâ potest fieri nullâ citatione nullâque monitione prævid.* For, in truth, the excommunication in such case is not any new sentence of excommunication, but only a renovation of the former with an aggravation, for which reason it is that such excommunication as is again pronounced against the same person for the same cause repeated by him may be *nullâ citatione nullâque monitione præcedente*. Whence it doth appear that a person excommunicated may be excommunicated again, either for the same or some other new cause."

I answer, therefore, the third question, with which I started, by saying that, in my opinion, if what has been done were ever so erroneous, it is matter of procedure only, and no ground for prohibition.

Martin v. Mackonochie (App.), Q.B.

Lastly, however, it is said that this is a proceeding to punish a clerk for an ecclesiastical offence; that the proceeding has been taken otherwise than according to the provisions of the Church Discipline Act, and that, therefore, prohibition must go. The words of the Church Discipline Act (3 & 4 Vict. c. 86), s. 23, are perfectly clear. "No criminal suit or proceeding against a clerk for any offence against the laws ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted and provided." If this proceeding violates this statute, no doubt it must be prohibited. And on this point I have felt some hesitation, not so much from the words of the statute itself as from the language in which Lord Penzance has described his own proceeding in *Combe v. Edwards* (72). I was for some time disposed to think that he meant to say he had punished Mr. Mackonochie for fresh offences against the law ecclesiastical as fresh offences; and I must take the freedom to say that I still think his language is open to that construction. If he had done this, and if what he did could be regarded in no other light, I should think it wrong, as being contrary to the statute, and that he ought to be prohibited. But this is not, to my mind, the true interpretation of the paragraph of his judgment in *Combe v. Edwards* (72), to be found at p. 114, even taken by itself; still less is it, if read by the light thrown upon the passage by the whole judgment. Lord Penzance explains at some length earlier in his judgment, his view of the power of the Court to suspend for disobedience to the Court's monition; and thus in the passage just referred to he meant, I think, to say that he punished Mr. Mackonochie for disobedience and contempt, and that he punished by suspending him rather than in any other way, because the mode in which he shewed contempt was in the repetition of grave offences against the ecclesiastical law. This, which I think is the true view of the passage, and of the acts of the Court which the passage describes, makes both, in my opinion, perfectly correct. I doubt, besides, whether the words of Lord Penzance, even if I construe them wrongly, can be treated as

ascertaining conclusively the character of his act. That must be judged of by the formal proceedings themselves, and if the application made to him called on him only to do what the law and practice of his Court allows, and if he did no more than the application called on him to do, I think we are not called upon, possibly are not entitled, to enquire further.

Now I think the application did call on him to do no more than the law allowed, and I think he did no more than he was called on to do; and I think, therefore, that what Lord Penzance did was no more than the practice of his Court warranted, and the practice of his Court was not contrary to nor abrogated by the Church Discipline Act.

For these reasons:—First. The 23rd section only forbids proceedings to be instituted in an Ecclesiastical Court otherwise than is enacted and provided. But if I am right in the earlier portions of my judgment this proceeding was not instituted at all in any ordinary and fair sense of that word. It was a part of the procedure in a cause or proceeding, which cause or proceeding was instituted in 1874.

Second. The Act does not in any way affect the proceedings or practice of the Ecclesiastical Courts; it prescribes only certain forms of procedure by which clerks may either be corrected without being brought into the Courts at all, or if recourse is had to the Courts, it prescribes the mode in which, if I may be permitted the expression, the clerk is to be got into them. If the clerk submits to the bishop (section 9) sentence is to be "pronounced according to the ecclesiastical law." If he does not submit, and the bishop formally hears the case, he is (section 11) "to pronounce sentence thereupon according to the ecclesiastical law." All sentences pronounced under these two sections (sentences not of an old or known Court be it observed) are (section 12) to be "good and effectual in law; and such sentences may be enforced by the like means as a sentence pronounced by an Ecclesiastical Court of competent jurisdiction." But when the case is heard by letters of request (under section 13) in the Court of Arches, or in

Martin v. Mackonochie (App.), Q.B.

the Metropolitan Court of York (old-established Courts), then the words of the statute change, and the case is "to be there heard and determined according to the law and practice of such Court." The 15th section provides generally for appeals, and that they shall be heard in like manner, as is enacted in the 13th section as to cases sent by letters of request. The 20th section, which is one of limitation, is important as shewing what the term "instituted" means in this statute. I need not examine the whole section. It is not easy to construe, but its language underwent a most elaborate and minute dissection in the judgment of the Privy Council in *Ditcher v. Denison* (69) pronounced by Lord Justice Knight-Bruce. It results from the judgment that the institution or commencement of any suit or proceeding in a court is the issuing and service of a citation. The point before us was not before the Judicial Committee in that case, and of course they do not decide it; but it follows from what they do decide, that if this be a proceeding, then any step taken to enforce a monition is a proceeding likewise; and that to excommunicate and imprison for contumacy would equally require all the preliminary processes of the Act to be gone through, in order to arrive at a sentence because it is a *proceeding* against a clerk in an Ecclesiastical Court for an offence against the laws ecclesiastical, which can only be got into or initiated in an Ecclesiastical Court according to the provisions of the Act. It follows, also, that if every step taken to enforce a judgment is a "*proceeding*" within the meaning of the Act, then after two years from the original offence nothing by section 20 can be done in respect of it, a conclusion which seems to me certainly very difficult if not impossible to accept.

In truth a careful examination of the statute shews that the legislature had no intention of interfering in any way with, that on the contrary it took special pains to preserve the course and practice of the Ecclesiastical Courts, when once the case of a criminous clerk came before them. If therefore (and the discussion on this question I will not renew), what Lord Penzance has done was according to the

practice of his Court, I am of opinion that the Church Discipline Act has in no way affected his powers or limited his jurisdiction. I do not think it necessary to examine in detail the Statute of Citations, 32 Hen. 8. So far as it is inconsistent with the Church Discipline Act, the later statute repeals it, but it is not inconsistent with the later Act in anything material to be considered.

I may conveniently end this long judgment by stating, in much better language than my own, the opposite contention, and drawing from the negatives of that contention what I think is the right conclusion in the matter. "This," it is said, "is *prima facie* a proceeding to obtain punishment for a violation of the Act of Uniformity. This proceeding is *prima facie* a proceeding contrary to the terms of the Church Discipline Act. The answer suggested is that it is a legal consequence of the suit which had proceeded to a hearing and a definite sentence—a consequence warranted by the established law and practice of the Ecclesiastical Court, and not inconsistent with the common and statute law of the realm. But it is not shewn to have been so warranted, and it is shewn to be inconsistent with the statute." Nothing can be more clearly or tersely put, which I may say, because the language is not my own, but that of one of my colleagues to whom every deference is due. I venture to state what I conceive I have shewn, in the negatives of these propositions. I will not say what the proceeding may be *prima facie*, but I think it is shewn on a review of the authorities to be in truth *not* a proceeding to obtain punishment for a violation of the Act of Uniformity, *but* a proceeding to enforce obedience to a legal order of the Court, though it may be that the act of disobedience was an act which did violate the Act of Uniformity. Again, I will not say what the proceeding may be *prima facie*; but I say that on a true view of the provisions of the Church Discipline Act, the proceeding is not contrary to such provisions. If so no answer is required; but I say that it is a legal consequence of the suit which had proceeded to a hearing and definitive sentence, a consequence which is shewn

Martin v. Mackonochie (App.), Q.B.

to be warranted by the established law and practice of the Ecclesiastical Courts, and is also shewn to be not inconsistent with the common and statute law of the realm.

I need not say in the face of the disagreement in this Court, and remembering the great powers and eminence of the Judges in the Court below, that I arrive at these conclusions with unfeigned diffidence and self-distrust. But I have arrived at them, after much labour and reflection, clearly and distinctly. It is therefore my duty to express them, and to say that, in my opinion, the judgment of the Court below ought to be reversed.

Judgment reversed.

Solicitors—The Solicitor to the Treasury, for Lord Penzance; Moore & Currey, for promoter; Brooks, Jenkins & Co., for respondent.

Atty General - Mitchell 50 L.J. 2409

[IN THE HOUSE OF LORDS.]

1879. }
March 6, } CHARLTON AND OTHERS v. THE
7, 14. } ATTORNEY-GENERAL.
May 5. }

Succession Duty—Appointee under a Power—Predecessor—*Succession Duty Act*, 1853 (16 & 17 Vict. c. 51), ss. 2 & 4.

St. J., tenant for life in possession, and *W.*, tenant in tail in remainder of certain estates, barred the entail and settled the estates to such uses as they should jointly appoint. On the following day they appointed the estates to such uses as they should jointly appoint, and in default of appointment to *St. J.* for life, remainder to *W.* for life, remainder to the first and other sons of *W.* in tail male, remainder to such uses as *St. J.* and *T.* should jointly appoint, and in default of appointment to *T.* for life, remainder to the first and other sons of *T.* in tail male, with remainders over.

W. died in 1864, a bachelor, without having exercised his power of appointment. In 1866 *St. J.* and *T.* appointed the estates,

subject to the life estate of *St. J.*, in the events which happened, to the use that *A.*, the widow of *St. J.*, should receive an annuity, and subject thereto, and to an annuity given in certain events which have not happened to the wife of *T.*, to the use of *D.* during so much of a certain period as she should live.

St. J. died in 1873, and the uses limited in favour of *A.* and *D.* thereupon took effect:—

Held, that the case fell within section 2 and was not within section 4 of the *Succession Duty Act*.

And held, following *Lord Braybrooke v. The Attorney-General* (9 H.L. Cas. 150; 31 Law J. Rep. Exch. 177), *The Attorney-General v. Floyer* (9 H.L. Cas. 477; 31 Law J. Rep. Exch. 404), and *The Attorney-General v. Smythe* (9 H.L. Cas. 497; 31 Law J. Rep. Exch. 404), that duty was payable upon the interests of *A.* and *D.* as successions derived from *W.* as predecessor.

By a deed executed on the 22nd of March, 1854, *St. John Charlton* and his eldest son, *William*, being under a settlement made in 1820 respectively tenant for life in possession, and tenant in tail in remainder, of certain estates subject to incumbrances and to a rent-charge of 800*l.* a year in favour of *Anne Charlton*, wife of *St. John Charlton*, disentailed the estates and resettled them, subject to the incumbrances and rent-charge, to such uses as *St. John Charlton* and *William Charlton* should by deed jointly appoint, and in default of appointment to the use of *St. John Charlton* for life, with remainder to *William Charlton* in tail male, with remainder to *St. John Charlton* in fee simple. By a deed executed on the 23rd of March, 1854, *St. John Charlton* and *William Charlton* jointly appointed the estates subject to the incumbrances and rent-charge to such uses as they should by deed jointly appoint, and in default of appointment to the use that *William Charlton* should during the joint lives of himself and *St. John Charlton* receive a rent-charge of 800*l.* a year, and subject thereto to the use of *St. John Charlton* for life, with remainder to *William*

Charlton v. The Attorney-General, H.L.

Charlton for life, with remainder to his first and other sons successively in tail male, with remainder to such uses as St. John Charlton and his second son Thomas Meyrick (then Thomas Charlton) after he attained twenty-one, should, by deed, jointly appoint, and in default of appointment to Thomas Meyrick for life, with remainder to his first and other sons successively in tail male with divers remainders over.

Thomas Meyrick attained twenty-one in the year 1858. No appointment was ever made under the joint power vested in St. John and William Charlton. William Charlton died a bachelor in 1862.

By a deed executed on the 16th of February, 1866, St. John Charlton and Thomas Meyrick jointly appointed the estates, subject to the incumbrances and rent-charge and to the life estate of St. John Charlton, to such uses as St. John Charlton and Thomas Meyrick should jointly appoint, and in default of appointment to the use that Anne Charlton if she survived St. John Charlton should receive a rent-charge of 1,700*l.* a year for life, and subject thereto and to a rent-charge in certain contingencies in favour of the wife of Thomas Meyrick, to the use in the events which happened of Dora Meyrick for so much of an uncertain period in the deed specified as she should live.

St. John Charlton died on the 23rd of February, 1873, and Anne Charlton thereupon became entitled to the rent-charge of 1,700*l.* and Dora Meyrick to the estate limited to her by the deed of the 16th of February, 1866. The Crown claimed succession duty at the rate of 1*l.* per cent. in respect of the rent-charge and 3*l.* per cent. in respect of the estates as upon successions derived from William Charlton. Anne Charlton and Thomas Meyrick contended that duty was payable as upon successions from St. John Charlton and Thomas Meyrick, and offered 1*l.* per cent. upon one moiety of the rent-charge and 1*l.* per cent. upon the estates.

On the 19th of March, 1875, the Attorney-General filed an information praying that it might be declared that 1*l.* per

cent. was payable as duty upon the rent-charge and 3*l.* per cent. upon the estates. He further claimed, if the Court should be of opinion that the joint power created by the deed of the 23rd of March, 1854, and exercised by the deed of the 16th of February, 1866, was a general power of appointment within the meaning of the 4th section of the Succession Duty Act, 1853, that then St. John Charlton and Thomas Meyrick upon the exercise of that power should be deemed to have been jointly entitled to the property thereby appointed as a succession from William Charlton, and that duty attached thereon at 2*l.* per cent., being 1*l.* per cent. on the moiety of St. John Charlton and 3*l.* per cent. on that of Thomas Meyrick, and was payable in addition to the duties which attached on the succession of Anne Charlton and Dora Meyrick.

The Exchequer Division gave judgment in favour of the defendants, but that judgment was reversed by the Court of Appeal, which decided in accordance with the Attorney-General's first contention that duty was payable at the rate of 1*l.* per cent. on the rent-charge and 3*l.* per cent. on the estate of Dora Meyrick.

The judgments of the Courts below are reported 45 Law J. Rep. Exch. 354 and 46 Law J. Rep. Exch. 750; Law Rep. 1 Ex. D. 204, 2 Ex. D. 398.

The defendants appealed.

Bristowe and Law (Spencer Buller with them), for the appellants.—The case is governed by section 4 of the Succession Duty Act. The intention of that section was to treat the donees of a general power upon their exercising it as owners of the fee-simple. The appointees would then take as a succession derived from them in contradistinction to the appointees under a limited power whose succession is derived from the person who created the power. Here the power exercised by St. John Charlton and Thomas Meyrick was a general one, none the less because liable to be extinguished by the death of one of them, since the distinction between general and special or limited powers depends entirely on the

Charlton v. The Attorney-General, H.L.

number of the objects for which they may be exercised. (See *Sugden on Powers*, 8th ed. c. 8. s. 1. sub-sec. 4. p. 394.) Here the objects of the power were unlimited, and it was in fact used to extend the trustees' power of sale, and to create mortgages. The suggestion of James, L.J., that the word "person" in section 4 of the Act should be confined to the singular number, is opposed to 13 & 14 Vict. c. 21. s. 4, by which it is enacted that in all Acts the singular shall be deemed to include the plural, "unless the contrary . . . is expressly provided;" and a comparison of the corresponding section of the Legacy Duty Act, 36 Geo. 3. c. 52. s. 18, where the words "person or persons" are used, shews that the framers of the Succession Duty Act must have intended to include the plural.

It is said, however, that the cases of *Lord Braybrooke v. The Attorney-General* (1), *The Attorney-General v. Floyer* (2), and *The Attorney-General v. Smythe* (3) are decisive against the contention of the appellants. But it is to be observed, in the first place, that in none of those cases is there any reference in the judgments to section 4. The decisions were grounded entirely upon other sections. The reason may be that section 4 was held not to apply, because in each case the power in question "took effect" before the passing of the Act, according to the interpretation of the section in *In re Lovelace* (4). Again, those cases are distinguishable from the present in their circumstances. *Lord Braybrooke v. The Attorney-General* (1) was a decision under section 12, and the whole point of it was that the donee was also the creator of the power, and could not by resettling the estates alter his liability to succession duty. Besides, in all three cases, the eldest son had under the resettlement which created the power an estate of inheritance or what was equivalent thereto, and it was held

that the appointed estates were carved out of that. Here there was no estate of inheritance in either father or son under the resettlement in 1854. It may further be asked why, if it is necessary to refer back to the deeds of 1854 to find the predecessor, the Court should not go back to 1820, or even to earlier settlements and resettlements. If it did so, the succession would presumably be lineal, and the duty one per cent. *The Attorney-General v. Upton* (5), a decision upon section 4, and *The Attorney-General v. Cecil* (6), in which the power was as here a joint power, are authorities in support of the appellants' contention. It was held in favour of the Crown in both cases that the instrument executing the power was that which conferred the succession. See also the judgments of Romilly, M.R., in *In re Ramsay's Settlement* (7), and of Bramwell, B., in *In re Barker* (8).

It may be held that section 2 applies to this case. If so, it is unnecessary to consider the effect of section 4, since that would only apply where section 2 does not. It is contended for the appellants that, looking at section 2 only, the exercise of a joint general power is a "disposition" which confers a succession. The donees of the power are in a position equivalent to that of owners, and the creator of the power should no more be regarded as the predecessor of the appointees than would a vendor who had conveyed to uses to bar dower.

The Attorney-General also claims double duty if section 4 applies, that is to say, duty upon the succession of St. John Charlton and Thomas Meyrick accruing upon their exercise of the power of appointment, and duty upon the succession of the appellants from them. But the whole scheme of the Act is against double duty, and there is no case where it has been allowed, though it might equally have been claimed in *In re Love-*

(1) 9 H.L. Cas. 150; 31 Law J. Rep. Exch. 177.

(2) 9 H.L. Cas. 477; 31 Law J. Rep. Exch. 404.

(3) 9 H.L. Cas. 477; 31 Law J. Rep. Exch. 404.

(4) 4 De Gex & J. 340; 28 Law J. Rep. Chanc. 489.

(5) 4 Hurl. & C. 386; 35 Law J. Rep. Exch. 138; Law Rep. 1 Exch. 224.

(6) 30 Law J. Rep. Exch. 201; Law Rep. 5 Exch. 263.

(7) 30 Beav. 75; 30 Law J. Rep. Chanc. 849.

(8) 7 Hurl. & N. 109; 30 Law J. Rep. Exch. 404.

Charlton v. The Attorney-General, H.L.

lace (4), *Re Chapman's Trusts* (9), and still more in *Cooper v. Harlech* (10). Section 4 no doubt says that donees of a general power shall be deemed to be entitled at the time of exercising the power to the property as a succession derived from the creator of the power. This is intended to provide for the payment of duty on an appointment which does not confer a new succession, e.g. an appointment by the donees of the power to themselves or to a purchaser. See judgment of Martin, B., in *In re Barker* (8); and compare section 18 of the Legacy Duty Act. But the duty is not payable till the succession falls into possession. If the succession be alienated before it falls into possession section 15 is to be read with section 4, and the alienee pays duty at the same rate per cent. at which the alienor would have paid, but the life of the alienee fixes the value of the succession—*The Solicitor-General v. The Law Revisionary Society* (11), *The Attorney-General v. Sefton* (12), *Cooper v. Harlech* (10). If the appointment be such as to confer a new succession (as here) duty is payable on that, for it is the only succession which falls into possession—sections 20, 21, 42, 44, and see the judgment of Lord Westbury in *The Attorney-General v. Littledale* (13).

The Attorney-General (Sir J. Holker), and *W. W. Karlake*, for the respondent.—Duty is payable under section 2, and section 4 does not apply. There is nothing to distinguish this case in law from *Lord Braybrooke v. The Attorney-General* (1), *The Attorney-General v. Floyer* (2) and *The Attorney-General v. Smythe* (3); for as to the donee not being the same person as the donor of the power, that is a distinction without a difference. The case is therefore absolutely concluded by the decisions, and William Charlton, the last tenant in tail, must be treated as the predecessor from whom the succession is

derived. It has been urged that it might be necessary to go back for centuries to find the estate out of which a power takes effect, but practically that difficulty does not arise. In *Lord Braybrooke v. The Attorney-General* (1) it is true that section 4 could not have been held applicable, but it might have been in *The Attorney-General v. Floyer* (2), yet the case was decided upon section 2, although Lord Cranworth who moved the judgment referred to section 4 for another purpose, thereby shewing that it had not escaped his attention. The case of *The Attorney-General v. Lord Eustace Cecil* (6) is also an authority against the applicability of section 4. It is contended that the words "general power" in section 4 are not used technically, but import an absolute power of disposal. A power which is limited by the necessity of obtaining another's consent is not such an absolute power. Therefore by the force of the context, the word "person" when used in reference to a general power must be confined to the singular number, a joint power being necessarily limited.

But assuming that section 4 does apply, there will then be two duties payable because there will be two successions. The principle of section 4 is that a general power is equivalent to a fee simple, and it is provided that upon its exercise the property shall be a succession, which by the interpretation clause (section 1) means "any property chargeable with duty." It has been argued that duty is not payable till the property comes into possession, but the answer is that by section 4 it is deemed to be in possession upon the exercise of the power of appointment, and duty is at once payable under section 20. Section 15 has nothing to do with appointments under powers but applies to transfers of estate. It cannot therefore be read with section 4.

[LORD SELBORNE.—Suppose an exercise upon a sale of an absolute power of appointment, would not section 15 apply?]

Duty would attach to the purchase-money, and the land would be exonerated—*Dugdale v. Meadows* (14). The cases

(14) 39 Law J. Rep. Chanc. 180; affirmed on appeal 40 Law J. Rep. Chanc. 140; Law Rep. 9 Eq. 212 and 6 Ch. App. 501.

(9) 2 Hem. & M. 447.

(10) 46 Law J. Rep. Chanc. 133; Law Rep. 4 Ch. D. 802.

(11) 42 Law J. Rep. Exch. 146; Law Rep. 8 Exch. 233.

(12) 2 Hurl. & C. 362; 11 H.L. Cas. 257; 32 Law J. Rep. Exch. 230; 34 Law J. Rep. Exch. 98.

(13) 40 Law J. Rep. Exch. 241; Law Rep. 6 H.L. 290.

Charlton v. The Attorney-General, H.L.

cited against double duty are not authorities against the payment of two duties where there are two deaths, as here, that of William and that of St. John, and two separate successions. There was but one death in *Cooper v. Harlech* (10), and in *The Attorney-General v. Upton* (5); and in *The Attorney-General v. Littledale* (13) the death of Mrs. Dawkins took place twenty years before the passing of the Act. The Crown was not before the Court in *Cooper v. Harlech* (10) nor in *Fryer v. Morland* (15), and could not therefore be bound by the decisions. In *re Chapman's Trusts* (9) it is difficult to understand why duty was not claimed under the Legacy Duty Act.

Bristowe, in reply.

Our. adv. vult.

THE LORD CHANCELLOR (EARL CAIRNS).—The property which is subject to succession duty in this case was disentailed and re-settled by deeds of the 22nd and 23rd of March, 1854, which both sides have taken in their argument as the commencement of the title. At that time St. John Chiverton Charlton (whom I will call St. John Charlton) was tenant for life of the property, and his eldest son St. John William Charlton (whom I will call William) was the first tenant in tail male. By the deed of the 22nd of March, 1854, the property was settled to such uses as St. John Charlton and William Charlton should appoint; in default to St. John for life, with remainder to William in tail male, with remainder to St. John in fee.

By the deed of the 23rd of March, 1854, a settlement was made under the joint power of St. John and William to such uses as St. John and William should appoint; in default to secure an annuity of 800*l.* to William, during the joint lives of himself and St. John; remainder to St. John for life; remainder to William for life; remainder to William's first and other sons in tail male; remainder to such uses as St. John and Thomas, his second son, should appoint; remainder to Thomas for life; remainder to his first and other sons in tail male.

(15) 45 *LAW J. Rep. Chanc.* 817; *LAW REP.* 3 *CH. D.* 675.

By a re-settlement of the 16th of February, 1866, at which time William was dead without issue, St. John and Thomas re-settled the estate, subject to the life interest of St. John, to such uses as St. John and Thomas should appoint; remainder to secure a rent-charge of 1,700*l.* to the appellant Ann, the wife of St. John, for her life, and, subject thereto, to the appellant Dora Meyrick, for certain interests therein specified.

St. John, the tenant for life, died in 1873, and thereupon the succession to the appellants opened; and the question is, from whom do they take the succession, and what is the rate of duty payable? The Court of Appeal has held that they derive their succession from William Charlton, the tenant in tail, the son of the one appellant and the uncle of the other, and it is the correctness of this decision which is now in question.

If this question is to be decided by the 2nd section of the Succession Duty Act, I do not think the answer to it can admit of any doubt, either on principle or authority. The 2nd section, reading it shortly, enacts that every disposition of property by reason whereof any person shall become beneficially entitled to any property on the death of any person, shall be deemed to confer on the person entitled by reason of such a disposition, a succession; and the term "successor" shall denote the person so entitled, and the term "predecessor" shall denote the settlor or other person from whom the interest of the successor is derived.

The appellants undoubtedly became beneficially entitled to property upon the death of St. John Charlton, and they became so entitled by reason of a disposition of the property. What was the disposition of the property? I cannot doubt that it was that contained in the three deeds which I have already mentioned, the 22nd and 23rd of March, 1854, and the 16th of February, 1866. It was the first two of these which created the power in St. John and Thomas, and it was the third which exercised the power. Nor should I doubt that, in this disposition, William Charlton was the settlor. St. John Charlton had throughout nothing but an estate for life, and the first

Charlton v. The Attorney-General, H.L.

estate of inheritance was in William; and it was out of that estate of inheritance, and out of the fee into which it was expanded, that the interests given to the appellants came. But I look upon this construction of the 2nd section, as to cases coming within it, as completely and finally settled by the cases in this House, reported in 9th House of Lords Cases, and especially by the cases of *Braybrooke* (1) and *Floyer* (2), and as no longer open to controversy.

The contest, however, of the appellants at your Lordships' Bar was not so much founded on the 2nd section, as it was directed to shew that it was the 4th and not the 2nd section of the Act which applies to the present case, and I observe that in the Court of Appeal much difficulty was felt by some of the learned Judges with reference to the 4th section. Lord Justice Bramwell thought that the present case was within the very words of the 4th section. The Lord Chief Justice thought that the present case, and also the cases in this House which I have already referred to, all came within the 4th section; but he considered he was bound by the authority of the decisions referred to, however fatally wrong, as he said, he might deem them to be. Lord Justice Brett said that if the present case is to be treated as coming under section 2, then he could see no case to which section 4 could apply.

There is no doubt that the cases in this House, especially those of *Floyer* (1) and *Smythe* (3), did determine, not only that the construction of the 2nd section was such as I have mentioned, but also that it was the 2nd and not the 4th section which governed such cases. And I agree with what is said by Lord Justice James, that the only distinction suggested is, that in those cases the donors of the powers were the same as the donees of the power, that is, the tenant for life and the eldest son; and that in the present case the donees are the tenant for life and the second son, and that this creates "no more difference in law than the fact that the names are different does."

But the argument that the 4th section of the statute is applicable to a case like

the present, appears to me to be founded on a misconception of the meaning of that section. In the first place I must observe that the words "where any person shall have a general power of appointment over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed, as a succession derived from the donor of the power," appear to me to point to a general power possessed by one person, enabling him to dispose of property as an absolute owner, and not to a power given in a family settlement to a father and son where one is intended to be a check upon the other in the exercise of the power. It is true, as was observed in the argument, that words in the singular may be construed as if they were plural, but you must not turn one member of a sentence into the plural and leave the other in the singular. The argument of the appellant requires that you should construe the section thus, "where two persons shall have one general power of appointment," &c. But this would be absurd, for it would make both the donees of the power, in the event of an exercise of it, take a succession and be liable to pay duty for it, although the name of one might, as I have already said, have been inserted merely as a check, and without the idea of any beneficial interest.

The fact is the 4th section appears to have been inserted, although it is not necessary in the present case absolutely to decide its effect, for the purpose of meeting a case that might well occur, and which, but for the 4th section, would have been left uncovered. Property might be given after a life interest to various persons in succession, but subject to an absolute and general power in A. B. to dispose of the property as he pleased, or to a limited power in A. B. to dispose of the property amongst certain objects of the power. The power might not up to or at the time of the opening of the succession have been exercised, and it might for some time remain uncertain whether it would ever be exercised. If there was no enactment but the 2nd sec-

Charlton v. The Attorney-General, H.L.

tion, the succession would have to be determined upon the death, and there would, *in hoc statu*, be no means of dealing with the succession except as a succession in those taking in default of appointment. It is here that the 4th section appears to come into operation. It keeps open the question of a subsequent exercise of the power, and as soon as the power, if a general power, is exercised, it fixes the person exercising the power with the consequences of a succession as if the absolute property had come to him, and if it is a limited power and is exercised, it fixes those who take under it as if they had derived a succession from the person creating the power.

So far, therefore, as regards the construction of the 2nd and 4th sections of the Act, it appears to me that the case of the appellants must fail.

A farther argument was addressed to your Lordships which does not appear to have been used in the Courts below, namely, that there was here a transfer of interest within the meaning of the 15th section of the Succession Duty Act. As to this it is sufficient for me to say that the case appears to me to be covered by the decision in *The Attorney-General v. Lord Eustace Cecil* (6), the grounds of which seem to me to be satisfactory, and to be fatal to the argument of the appellants.

I therefore propose to move that the appeal in this case be dismissed with costs.

LORD HATHERLEY.—I heard the argument on this case, and I have had an opportunity of considering it since, but I have in substance nothing to add to what has fallen from my noble and learned friend on the woolsack, in whose opinion upon the case I entirely concur. It has been pointed out to me by my noble and learned friend on my left, that amongst the numerous cases which have been brought before the Courts upon the Succession Duty Act, the two sections which have been chiefly referred to in this case, namely, the 2nd and the 4th sections, seem to have been completely covered by a series of decisions. The and section has been open to question

upon the two branches which it contains, for there are two branches contained in that section, as there are in the 4th. The first branch of it deals with the case of disposition, the second branch of it deals with the case of devolution. The question as to how far the origin of a title should be attributed to devolution, and as to how far it should be attributed to disposition, was fully considered in this House in *Lord Saltoun's Case* (16) and again at a very recent period, in the case of *Lord Zetland v. The Lord Advocate* (17). In that case there was a sort of conjoint action, a disposition created the whole interest, and in that interest as created by the disposition a series of successions, if I may so term them, occurred by descent or otherwise, arising out of the original disposition. The question was whether you were to consider the devolution which had taken place in the course of pursuing the disposition which had been made as forming a devolution in every sense, so that the interest of the successor was to be calculated upon that ground, or whether you were to consider it a case of disposition within the 2nd section of the Act.

Now, the present case is a case in which we have to determine whether or not the disposition is to fall within the 2nd or within the 4th section of the Act only. The only difficulty arising upon that is this. As my noble and learned friend has just observed, there could be no doubt in anybody's mind that if you did not find the 4th section there at all, this would be a disposition, and a disposition under the 2nd section of the Act. It is a series of family settlements, the one following the other according to the usual course of conveyancing, by which the father and the son, when the son has become tenant in tail in possession, create an interest by which they take a joint power, limiting back the interest of the father usually for life, and also sometimes curtailing the son's interest (that may or may not be), but giving a joint power to the two. In regard to dispositions, there seems to have been in

(16) 3 Macq. Sc. App. C. 659.

(17) 3 App. Cas. 505.

Charlton v. The Attorney-General, H.L.

the minds of the framers of this Act a notion that it would be necessary to include certain other cases which they do not consider sufficiently included in the 2nd section of the Act. That is the only way in which we can account for the 4th section at all. Then the question would naturally arise whether that which is done by an exercise of the power being in every sense of the word a disposition, should fall within the 2nd section of the Act, or within the 4th, having a peculiar construction given to it in the case of such a disposition as we have before us. Like my noble and learned friend, I take the disposition here to be a disposition contained in the series of settlements which we find in the three deeds to which he has referred, under which there was first of all a joint power in St. John Charlton and William Charlton, the estate tail being in William, the eldest son, and afterwards, upon that limitation failing, there was a joint power of appointment by the father and by Thomas, the second son, and limitations over in default of appointment. Now, whatever difficulties might have surrounded this case (and I confess there are difficulties which at first sight are somewhat calculated to embarrass those who have to give an opinion upon the exact construction of the Act), as regards the first portion, namely, whether or not this case falls within the 2nd section or the 4th section, appear to me to be covered by the authorities which have been mentioned, that is to say, the three cases in this House, all of which are reported in the same volume of the House of Lords Cases, namely, *Lord Braybrooke's Case* (1), *Floyer's Case* (2), and *Smythe's Case* (3). As has been observed, I think by my noble and learned friend on the woolsack, and as will be observed also by my noble and learned friend who will presently address the House, and whose opinion I have had an opportunity of perusing, no doubt *Floyer's Case* (2) was not overlooked in the decision of subsequent cases. It is referred to in those decisions, and the case seems to have been altogether well considered. If that case be law, which we must hold it to be

as being a decision of this House, then I apprehend the matter is settled, this case falls within the 2nd section, and consequently, according to *Floyer's Case* (2) especially, does not fall within the 4th section.

My noble and learned friend on the woolsack has given his view of the reasons which may have induced the Legislature to frame those two sections, in order to meet certain cases which might not otherwise have been provided for at all, either by the 2nd or by any other section of the Act. I think there is sufficient ground for saying that we are not, on account of any supposed inutility of the 4th section (unless the construction be given which is contended for by the appellants), driven to the necessity of giving it that construction, but that we are in a position in which we can without embarrassment uphold, as one would undoubtedly wish to do, the doctrine which has once been established by this House, and I confess I for one should feel it scarcely competent in us to reverse that doctrine, which is so established, not only by one, but by two or three cases. It appears to me that if there had been such a difficulty as is suggested with reference to the 4th section, the only mode of curing it would have been by a subsequent application to the Legislature. I do not think, however, that any such difficulty arises. It seems to me, for the reasons which have already been urged, and which I will not repeat to your Lordships, that there is good ground for the existence of that 4th section, but that we are not driven to the necessity of applying it to this case. I am content to rest upon the three decisions which have well established that this is a case to which the 2nd section is applicable. The consequence is that the appellants cannot succeed.

LORD SELBORNE.—In the case of *Lord Braybrooke* (1), where the succession was taken under a joint appointment by father and son, the Lords who concurred in the judgment of this House (Lord Campbell and Lord Kingsdown) proceeded upon the principle that the appointment was to be read into the deed creating the power, according to the

Charlton v. The Attorney-General, H.L.

general rule of law applicable to the execution of powers. Lord Cranworth was of the same opinion in the two cases of *Floyer* (2) and of *Smythe* (3)—in *Floyer's Case* (2) not only as to the succession of George Bankes, but also as to those of his eldest son and his younger children; and Baron Martin was of the same opinion in *Lord Eustace Cecil's Case* (6). It is true that in *Floyer's* and *Smythe's* cases Lord Wensleydale, and in that of *Lord Eustace Cecil* the Lord Chief Baron, appear to have founded their judgments on a different principle, which Lord Wensleydale (erroneously, I think), considered to have been the principle adopted in *Lord Braybrooke's Case* (1), namely, that the interests of the appointees, under the joint power, were carved out of the new estate (being in all these cases, except one, an estate tail), which the eldest son took under the resettlement; and that the disposition to be looked to was that executing, not that creating, the power. The single case in which that new estate was not an estate tail was *Lord Braybrooke's*; but there the son had (subject to the joint power) a sole and absolute power of appointment by deed or will, which Lord Wensleydale may perhaps have considered equivalent to the inheritance.

Unless a distinction can be founded upon the 4th section of the Succession Duty Act, these cases must govern the present. But the result to which they would lead may possibly admit of some question, on account of the differences already mentioned between the views of the Judges, in and out of this House, who decided all but one of them.

In all these cases the same person who was first tenant in tail (or what was deemed equivalent to it) under the resettlement had also been first tenant-in-tail under the old settlement, so that it practically made no difference whether the successions were under the deed executing, or under that creating, the power. In either view they were "carved" or "derived" out of the estate (whether new or old) of that person, who was one of the two joint donees of the power. But in the present case it is otherwise. Here neither of the donees of the joint

power had, either before or after the resettlement, an estate of inheritance or anything equivalent to it. The father, both before and afterwards, was first tenant for life, and retained that estate throughout, unaffected by the exercise of the power. The life estate of the son and the subsequent remainders were displaced by the exercise of the power, all which had been derived, under the resettlement, from the prior estate tail of the elder brother, by his disposition.

It may be that, in a case in which one of the appointors has an estate, to be displaced by the appointment, commensurate with, or greater than, the interests appointed, the view of Lord Wensleydale and the Lord Chief Baron may be valid in law, as it would certainly be reasonable and convenient. But to such a case as the present it seems to be incapable of being applied. It is impossible to describe the interests of the present appellants as in any true sense "carved" or "derived" out of the life estate of Thomas Meyrick, because they would equally have taken effect by virtue of the joint appointment, though Thomas Meyrick had died before his father; and in the event, which has actually happened, of his surviving his father, they may endure after his death. No rule is laid down in the Act for such a case, unless it be that found in the 4th section; and in the absence of any such rule it seems necessary to fall back, as was done by this House in *Lord Braybrooke's Case* (1) and by Lord Cranworth and by Baron Martin in the subsequent cases (*Floyer's Case* (2) and *Lord Eustace Cecil's Case* (6)), upon the general principle of law applicable to the execution of powers. Unless, therefore, the present case can be brought within the first part of the 4th section, the appellants fail.

But the later authorities are also really decisive against the application of the first branch of the 4th section to this case. I will assume that Lord Justice Turner was right (though the proposition may well admit of doubt) when, connecting the words "taking effect" in the 4th section with a "general power of appointment" as their proper antecedent, he said (*In re Lovelace* (4)):

Charlton v. The Attorney-General, H.L.

"Looking at the context, the words of the section refer to the power coming into operation, and not to the appointment under it taking effect." A power must be held to come into operation either when it is actually executed, or when it is first capable of being executed. If, then, a joint power, such as that in the present case, were "general," and within the first branch of the 4th section, there would have been no possibility of escape from the conclusion that the successions of Edmund George Bankes and his younger brothers and sisters (in *Floyer's Case* (2)), and of Lord Eustace Cecil, were governed by that enactment; because in both those cases the joint power was created, became exercisable and was exercised after the time appointed for the commencement of the Succession Duty Act. But the decision of this House and of the Court of Exchequer in these two cases (and for this purpose it is immaterial whether the view of Lord Cranworth and Baron Martin, or that of Lord Wensleydale and the Lord Chief Baron was right) are absolutely irreconcilable with that conclusion.

In the judgment of Lord Cranworth upon that part of *Floyer's Case* (2) which related to the portions of George Bankes's younger children, the 4th section of the Act was not lost sight of. He said: "The circumstance of their arising under a power can make no difference. Indeed this seems to be expressly provided for by the 4th section of the Act. The interest created by the power must, on well-known principles, be treated as arising under the deed creating the power." Lord Cranworth, therefore, seems to have considered a joint power of this kind as falling under the second, and not under the first, branch of the 4th section, the effect of which is the same as if it had been left under the second section.

It is true that the distinction between general and limited powers in the common language of English law relates, not to conditions affecting the donees of a power, or otherwise antecedent to an appointment, but to the nature of the appointment which may be made under the

power, and for that reason, if the present case had been untouched by authority, I might have felt embarrassed by the use of that phraseology in the 4th section of this Act. I do not think that any stress can safely be laid upon the mere use of the word "person" in the singular number, and I cannot at present adopt the view that the whole section has reference to some rare and peculiar description of cases in which the power is only exercisable, or has been exercised, after a death, on which an appointment may take effect, has actually happened.

If, however, the substance of the first branch of the section is regarded, it certainly points to that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property, for the purpose of taxation. That is the case with a general power exercisable by a single person in any way which he may think fit. But it is not the case when a power cannot be exercised without the concurrence of two minds; the one donee having, and the other not having, an interest to be displaced by its exercise. Nothing could well be conceived more unreasonable, in a practical point of view, than to treat a joint power like that now in question, in a family settlement, as equivalent in substance to joint property in the two donees; and I am convinced that the decisions which have refused to give that effect to the 4th section are in accordance with the true intention of the Legislature, whatever difficulty there may be in the words "general" and "limited" as they there occur.

I have referred as to this point to the later authorities only, because in the earlier cases (those of *Sibthorp* (18), *Lord Braybrooke* (1), Bankes's succession in *Floyer's Case* (2), and *Smythe* (3)) the powers "took effect," according to Lord Justice Turner's view of the meaning of those words in the 4th section, before the time appointed for the commencement of the Succession Duty Act; and, therefore, could not be within the first branch of it. If that view is not correct, and if it ought rather to be held that a power

Charlton v. The Attorney-General, H.L.

"takes effect" when an appointment made under it becomes effective by coming into possession, the earlier as well as the later authorities would be equally adverse to the appellant.

I think for these reasons that the judgment appealed from ought to be affirmed.

*Judgment appealed against affirmed,
and appeal dismissed with costs.*

Solicitors—Law, Hussey & Hulbert, for appellants; Solicitor of Inland Revenue, for respondent.

[IN THE COURT OF APPEAL.]
(Appeal from the Common Pleas Division.)

1879. } SMITH v. WILSON.*
Nov. 11. }

Practice—Writ of Summons—Special Indorsement—Rules of Court, Order III. rule 6; Order XIV. rule 1.

The plaintiff applied to sign judgment under Order XIV. rule 1, on the following special indorsement:—

"The plaintiff's claim is 49l. 5s. 8d. The following are the particulars: 1879. Feb. 14. To goods, 16s. 1d." Several similar items followed, and the list ended with, "May 21. British Bank draft returned, 20l." Credit was given for certain cash payments, and also for 20l., "Credit by British Bank draft," and the amount claimed represented the balance on the whole account:—Held, affirming the judgment of the Common Pleas Division, that the indorsement was a sufficient special indorsement.

Appeal from a judgment of the Common Pleas Division, holding the following indorsement to be a good special indorsement.

The writ was indorsed—

"The plaintiff's claim is 49l. 5s. 8d."

The following are the particulars:—

"1879. Feb. 14, to goods, 16s. 1d."

Several items of a similar nature followed, and the list ended with—

"May 21. British Commercial Bank, draft returned, 20l.;

* *Coram* Jessel, M.R.; Bramwell, L.J.; Brett, L.J.

"Notary charges on same, 1s. 6d.," making in all a total of 99l. 0s. 8d.

Credit was given for 20l., the amount of the draft returned, and also for certain other sums of money, leaving a balance of 49l. 5s. 8d. due.

A Master made an order, allowing the plaintiff to sign judgment on the indorsement under Order XIV. rule 1. Field, J., affirmed that order, and the Common Pleas Division also affirmed it.

The defendant appealed.

Orr, for the appellant.—The indorsement is not good as a special indorsement. It is not sufficiently definite; it does not follow the form given in section vii. of Appendix A to the Rules of Court. It does not state the nature of the goods, nor whether they are goods sold or converted or detained. It does not give the defendant the information to which he is entitled; it is calculated to mislead him, and does not satisfy the requirements of the rules as laid down in *Walker v. Hicks* (1); the defendant cannot tell whether or not such an indorsement discloses a good cause of action.

Walton, for the respondent, was not heard.

JESSEL, M.R.—I think that this is a frivolous appeal, and should be dismissed. I agree entirely with what was said by Cockburn, C.J., in *Walker v. Hicks* (1), and I am of opinion that this indorsement is sufficient.

BRAMWELL, L.J.—I agree, and have nothing to add.

BRETT, L.J.—This ingenious contention cannot prevail.

Judgment affirmed (2).

Solicitors—George Johnson, for appellant; Dunn & Palmer, for respondent.

(1) 47 Law J. Rep. Q.B. 27; Law Rep. 3 Q.B. D. 8.

(2) It appeared that the plaintiff had died since the appeal was entered, that there had not been time to make application to have his successor in interest made a party to the action, and that therefore there was in fact no respondent. The Court directed that their judgment and order should be suspended until some one had been made a party to continue the action pursuant to the provisions of Order L. of the Rules of Court.

[IN THE COMMON PLEAS DIVISION.]

1878.

June 24. }

July 3. }

FOSTER v. WRIGHT.

Several Fishery—Non-tidal River—Gradual Change of River Course—Encroachment—Following Fishery.

Plaintiff, lord of the manor, claimed the exclusive right to fish in part of a river which was formerly locally situate within the manor, but which by gradual alteration of its course now flowed over land of the defendant.

The manor had been granted by the Crown to the predecessors in title of the plaintiff with the right of fishery in all its waters; afterwards certain lands of the manor were enfranchised and now became vested in the defendant. At the time of the enfranchisement the river flowed wholly within the manor, but since then its course had gradually changed, approaching nearer and nearer to the defendant's land until some portion of that land became part of the river bed. This part could be identified. The changing of the river course and consequent shifting of the bed was so gradual as not to be perceptible from day to day, but only by comparing its position of recent years with its position many years before:—Held, that the plaintiff had an exclusive right of fishery extending over that part of the river which flowed over the defendant's land.

This was an action of trespass brought by the plaintiff, who was lord of the manor of Hornby, in Lancashire, to try the right of fishing in the river Lune. This river, which was neither tidal nor navigable, originally flowed through the manor of Hornby. The manor originally belonged to the Crown, afterwards it passed into private hands, and an inquisition *post mortem* taken in the 13th year of Edward I. on the death of Geoffrey de Neville found that he held (*inter alia*) "the fishery of all the waters at Hornby"—"*pisarium omnium aquarum de Hornby item tenuit.*" From the Nevilles the manor passed to the Stanleys, then to Lord Morley, then to Lord Cardigan, who in 1711 enfranchised some land called

Wood's Ayre, within the manor but not abutting on the river. This land now belonged to the defendant.

The deed of enfranchisement by Lord Cardigan reserved "all manner of free warren and beasts and fowls of warren in as large and ample a manner as the said earl now hath, or he or any former earl or owner of the said manor at any time heretofore had, together also with the free liberty of hunting, hawking, fishing and fowling in and upon the said premises or any part thereof."

From Lord Cardigan the manor descended to Colonel Charteris, and on his attainder, the manor became forfeited to the Crown. It was, however, re-granted with free liberty of fishing in all the waters of the manor, and in 1873 it came into the hands of Mr. John Marsden. His heir at law, after establishing his right to it in the action of *Tatham v. Wright* (1) sold it to Mr. Pudsey Dawson, who afterwards sold it to the plaintiff, the present lord of the manor.

At the time of the re-grant of the manor and up to 1838 the river Lune flowed wholly within the manor. Between 1838 and 1843 the river gradually changed its course and approached nearer and nearer to the defendant's land until it encroached on his land. In this way a part of the defendant's land, which could be identified, became part of the river bed, and on this part defendant claimed the right to catch salmon, and in exercise of his alleged right committed the trespasses the subject of the action.

The action came on for trial at the Lancashire Spring Assizes, 1878, before Brett, L.J., and a special jury, when after the above facts had been either proved or admitted, the Judge directed a verdict for the plaintiff with 40s. damages, leaving the plaintiff to move the Divisional Court for judgment.

Herschell and Crompton (on June 24), for the plaintiff, now moved for judgment, and contended that the terms of the grant and re-grant of the manor con-

(1) 2 Russ. & M. 1.

Foster v. Wright, C.P.

ferred on the lord a several fishery in all the rivers of the manor, which could not be lost by the subsequent alteration of the river bed, and that the ownership of the soil of the river bed would follow a gradual alteration of the river course notwithstanding it encroached on other lands.

O. Russell and R. S. Wright, for the defendants, contended that as the boundaries of the encroachment could be ascertained the ownership of the soil of the river bed, would not follow an alteration of the river course into another's land; that a several fishery does not import ownership of the soil, nor can it follow into another's freehold; that when the defendant's land was enfranchised it ceased to be parcel of the manor, and that the terms of the grant and re-grant conferred on the grantee a right of fishing as incidental only to the ownership of the land.

In addition to those cited in the judgment the following authorities were referred to:—

Marshall v. The Ulleswater Steam Navigation Company (2), *Murphy v. Ryan* (3), *Malcolmson v. O'Dea* (4), *Year Book* (5), *Holford v. Bailey* (6), *Sowerby v. Smith* (7),^{*} *Bradshaw v. Lawson* (8), *Bailey v. Stevens* (9), *Wickham v. Hawker* (10), *Forman's Case* (11), *The Overseers of Hilton v. The Overseers of Bowes* (12), *Co. Lit.* 122, *Hargreaves' Note*, and *Smith v. Kemp* (13).

Our. adv. vult.

(2) 3 B. & S. 732; 32 Law J. Rep. Q.B. 139.

(3) 2 Ir. R. C.L. 143; 16 W.R. 678.

(4) 10 H.L. Cas. 593.

(5) 22 Ass. p. 106. pl. 93.

(6) 8 Q.B. Rep. 1000; 16 Law J. Rep. Q.B. 68; in error 13 Q.B. Rep. 426; 18 Law J. Rep. Q.B. 109.

(7) 42 Law J. Rep. C.P. 233; 43 Law J. Rep. C.P. 290; Law Rep. 8 C.P. 514; Law Rep. 9 C.P. 524.

(8) 4 Term Rep. 433.

(9) 12 Com. B. Rep. N.S. 91; 31 Law J. Rep. C.P. 226.

(10) 7 Mee. & W. 63.

(11) 1 Lennard 13.

(12) 35 Law J. Rep. M.C. 137; Law Rep. 1 Q.B. 359.

(13) 2 Salk. 637; Carth. 285.

LINDLEY, J. (on July 3).—The plaintiff in this case is Lord of the Manor of Hornby, and claims the exclusive right to fish in the river Lune between two points, where that river is neither tidal nor navigable; and before the enfranchisement hereafter mentioned the river between those points was locally situate within the Manor of Hornby.

This manor formerly belonged to the Crown. In the reign of Edward 3 it was granted, with the right to fish in all the waters of the manor; and it remained in private hands for several centuries. In the year 1711 certain lands held of the manor, but not abutting on the river, were enfranchised, and these lands now belong to the defendant. After this enfranchisement the manor became forfeited to the Crown; but it was re-granted, with the free liberty of fishing in all its waters, to the predecessors in title of the plaintiff.

From the earliest times the lands adjoining the river on both sides of it belonged to the lord; and such was the case both when the defendant's lands were enfranchised and when the manor was re-granted by the Crown as above mentioned. In other words, until comparatively modern times, the river did not abut on the lands of the defendant. Neither when the defendant's lands were enfranchised nor when the manor was re-granted did any part of the river either abut on or flow through the defendant's lands. Under these circumstances, I am unable to see that the deed of enfranchisement has any bearing on the case. That deed reserved to the lord whatever rights of fishing he had in any water flowing through or bounding the lands enfranchised; but it did no more; and at the date of the enfranchisement the Lune was not one of such waters. Neither did the re-grant from the Crown confer upon the grantee of the manor any right to fish in this river as distinguished from any other of the waters of the manor.

The counsel for the defendant suggested that the terms of the new grant did not confer on the grantee any right of fishery except as incidental to the

Foster v. Wright, C.P.

ownership of the land on the banks and under the river; but it was conceded that as the river was then situate the grantee from the Crown acquired such ownership; and in the view which I take of this case, it is not material to determine whether the grantee acquired his exclusive right to fish in the river as an incident to the ownership of the bed of the river, or whether he acquired an exclusive right to fish independently of such ownership.

Since the re-grant of the manor, the course of the river between the points above referred to has gradually changed: its bed has gradually approached nearer and nearer to the defendant's land; and now some portion of that land has become part of the river bed. This part can still be identified, and its boundary can be ascertained. The question we have to determine is, whether the plaintiff's exclusive right of fishing extends over so much of the water as flows over land which can be identified as forming part of the defendant's property.

I am of opinion that it does. The change of the bed of the river has been gradual; and although not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor, in fact, at all, except by comparing its position of late years with its position many years before. Under these circumstances, I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner.

Gradual accretions of land from water belong to the owner of the land gradually added to—*The Queen v. Yarborough* (14); and conversely, land gradually encroached upon by water, ceases to belong to the former owner—*Re The Hull and Selby Railway Company* (15). The law on this subject is based upon the impossibility of identifying from day to day small additions or subtractions from land caused by the constant action of running water. The history of the law

shews this to be the case. Our own law may be traced back through *Blackstone* (vol. 2. c. 16), *Hale (De Jure Maris, c. c. 1. 6)*, *Britton* (Book 2. c. 2), *Fleta* (Book 3. c. 2. ss. 6, &c.), and *Bracton* (Book 2. c. 2), to *The Institutes of Justinian* (Inst. ii. 1. 20), from which Bracton evidently took his exposition of the subject. Indeed, the general doctrine and its application to non-tidal and non-navigable rivers in cases where the old boundaries are not known was scarcely contested by the counsel for the defendant, and is well settled; see the authorities above cited. But it was contended that the doctrine does not apply to such rivers where the boundaries are not lost; and passages in *Britton (ubi supra)*, in the *Year Books* (22. Ass. p. 106. pl. 93), and in *Hale, de Jure Maris* (Book 1. c. 1, citing 22 Ass. pl. 93), were referred to in support of this view. *Ford v. Lacy* (16) was also relied upon in support of this distinction. Britton lays down as a general rule that gradual encroachments of a river enure to the benefit of the owner of the bed of the river; but he qualifies this doctrine by adding, "if certain boundaries are not found." The same qualification is found in 22 Ass. pl. 93, which case is referred to in *Hale (ubi supra)*. But, curiously enough, this qualification is omitted by Callis in his statement of the same case; see *Callis*, p. 51; and on its being brought to the attention of the Court in *Re The Hull and Selby Railway Company* (15) the Court declined to recognise it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord Tenterden's observations in *The Queen v. Yarborough* (14) are also in accordance with this view; and although Lord Chelmsford in *The Attorney-General v. Chambers* (17) doubted whether, where the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *Re The Hull and Selby Railway Company* (15), which decided the point so far as encroachments by the sea are concerned.

(14) 5 B. & C. 91; 5 Bing. 163.

(15) 5 Mee. & W. 327; 8 Law J. Rep. Exch. 260.

(16) 7 Hurl. & N. 151; 30 Law J. Rep. Exch. 351.

(17) 4 De Gex & J. 69-71.

Foster v. Wright, C.P.

Upon such a question as this I am wholly unable to see any difference between tidal and non-tidal or navigable and non-navigable rivers; and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters—*De Jure Maris*, p. 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on the more general reasons to which I have alluded above. In *Ford v. Lacy* (16) the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership, since the bed of the river had changed, than by reference to the doctrine of gradual accretion; and I do not regard that case as throwing any real light on the question I am considering.

Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river bed, I am of opinion that the plaintiff has that right; for if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title.

But, supposing the plaintiff's right of fishing not to have been the consequence of his ownership of the soil, supposing him to have had only a right to fish in the Lune, I am of opinion that he has the same right of fishing in the river in its present bed as he had of fishing in the river in its old bed. I am wholly unable to see upon what principle a change in the course of a river so gradual that it cannot be perceptible until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose; nor is there any authority for holding them to be affected thereby. *The Mayor of Carlisle v. Graham* (18) is no such authority; for in that case, the old and the new beds of the river existed as two distinct beds; the new bed was not, as here, formed by the old one gradually

shifting its place; there, the water gradually left the old bed, and followed an entirely new course always distinguishable from the old; whilst here, there has been and is only one bed, and its change of place has only become perceptible after the lapse of years. The physical changes are totally different in the two cases.

Whether, therefore, the exclusive right of the plaintiff to fish in the river in question is an incident to his ownership of the soil or is independent thereof, I am of opinion that he is still entitled to such exclusive right in the river as it now exists, and as it will exist if it continues gradually to change its course; and consequently I am of opinion that the judgment ought to be entered for the plaintiff.

LORD COLERIDGE, C.J.—I have had the advantage of reading the judgment prepared by my brother Lindley, and I entirely concur in the result at which he has arrived. Nor should I add anything, but that I am not satisfied to base my conclusion so much as he does upon the proposition that the grant of the fishery in such terms as are used in the two grants in this case carries with it the right of the soil, and that the soil therefore of the river Lune as it varies gradually from time to time, passes irrespective of the *medium flum* to the plaintiff. I do not say that it does not, but I am not satisfied that it does. If the whole soil over which the river Lune flowed passed by the first grant, and, after the death of Colonel Charteris, by the second to the predecessor in title of the plaintiff, I think the consequence as to gradual accretion which my brother Lindley draws from that premiss, does in legal reasoning flow from it. But I confess I somewhat doubt the premiss. The safer ground appears to me to be that the language as to the fishery in both the earlier and the later grants conveys what it expresses, a right to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, i. e., as I understand the phrase, a right to take fish *in alieno solo*,

Foster v. Wright, C.P.

and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river such as the changes of the Lune in this case are proved or admitted to have been.

I agree, for the reasons given by my brother Lindley, that the case of *The Mayor of Carlisle v. Graham* (18) is distinguishable from the case before us; and upon these grounds I concur in thinking that our judgment should be for the plaintiff.

Judgment for the plaintiff (19).

Solicitors—Speechly, Mumford & Co., agents for George E. Mumford, Bradford, for plaintiff; Tahourkins & Hargreaves, agents for Johnson & Tilly, Lancaster, for defendant.

*Lynn & Jackson 50/29 62/312.
Punnett & Roberts 51/29 62/312.*

[IN THE COMMON PLEAS DIVISION.]

1879. } DAVIES v. GOODMAN AND
Nov. 29. } ANOTHER.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8, 10—Invalid as against Grantor if not attested.

A bill of sale executed after the 1st of January, 1879, and to which the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), applies, if not attested under that Act is void, even as between the grantor and grantees thereof.

CASE stated on appeal from the decision of the Judge of the County Court of Worcestershire, holden at Dudley.

The case stated that the action was brought in such County Court to recover 50*l.* damages for an alleged wrong by the defendants in unlawfully taking certain goods and chattels of the plaintiff, and converting and disposing of the same to their own use.

The alleged wrongful acts were com-

(18) 38 Law J. Rep. Exch. 226; Law Rep. 4 Exch. 361.

(19) This decision was appealed against. The case came on for hearing during Trinity sittings, 1879, but was then settled by the parties.

mitted under a bill of sale, dated the 13th of February, 1879, and made between the plaintiff of the one part and the defendants of the other part.

At the hearing of the said action it was admitted that if the said bill of sale was valid as between the said parties the alleged wrongful acts of the defendants were lawful and justified by the said bill of sale, but that if as between the said parties the said bill of sale was not valid, then the defendants were guilty of the alleged wrongs committed by them.

It was further admitted by the said parties that the only question as to the validity of the said bill of sale depended upon the following question, that is to say—whether under the Bills of Sale Act, 1878, a bill of sale made after the coming into operation of the said Act is void as between the parties thereto, for not being registered and attested as by the said Act directed, it being admitted that the said bill of sale had never been registered nor attested under the said Act.

For the plaintiff it was contended that all bills of sale made after the coming into operation of the said Act are void unless attested and registered under the said Act.

For the defendants it was contended that bills of sale made after the coming into operation of the said Act, although not attested and registered thereunder, are not therefore void but only voidable in certain cases, and are valid as between the grantors and grantees thereof.

The County Court Judge held that the said bill of sale having been made after the coming into operation of the said Bills of Sale Act, 1878, and not having been attested as by the said Act directed was wholly void, and he ordered judgment to be entered for the plaintiff for 40*l.* (being the amount of damages agreed upon between the said parties) subject to this case for the opinion of the Court.

The question for the opinion of the Court was whether the said bill of sale as between the plaintiff and the defendant (the respective grantor and grantees thereunder) was void for want of due attestation under the Bills of Sale Act, 1878.

Davies v. Goodman, C.P.

Plumptre, for the appellants, the defendants in this action.—The decision of the County Court Judge was wrong. The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), does not make a bill of sale which is not attested and registered according to the Act void as between the parties to the same, but only as against other parties who are particularly specified in the Act. In that respect the Act does not differ from the Bills of Sale Act, 1854 (17 and 18 Vict. c. 36). Section 10 of the Act of 1878 begins by enacting that—"a bill of sale shall be attested and registered under this Act in the following manner" and sub-section 1 then proceeds as follows—"The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale, the effect thereof has been explained to the grantor by the attesting solicitor." This provision is new, but the consequence of not complying with it is only to be found in the 8th section, and that section is this—"Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale as against all trustees or assignees of the estate of the person whose chattels or any of them are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment or of executing

such process (as the case may be), and after the expiration of such seven days are in possession or apparent possession of the person making such bill of sale (or of any person against whom the process has been issued under or in the execution of which such bill has been made or given as the case may be)." This corresponds with section 1 of the Act of 1854, and in *Hills v. Shepherd* (1) and *Barker v. Aston* (2), it was held at Nisi Prius, by Williams, J., in the first case and by Coleridge, J., in the second, that though a defect of registration under the Bills of Sale Act, 1854, rendered the bill of sale void as against creditors, it did not do so as between the parties to such bill.

[LORD COLERIDGE, C.J.—Section 10, sub-section 1, is new, and how can it have been enacted for the benefit of any one else but the grantor?]

The registering a bill of sale under the Act makes the transaction notorious, and it may well be that before his credit be affected by a registered bill, it is only right that the grantor should clearly understand the effect of it, and it may be that when he knows it he may decline to give it, and this would therefore in that way become important to creditors. At all events, the only consequence of its not being duly attested is to make it void to the extent provided by section 8. Nowhere does the Act state that if not so attested it shall be void as between the parties, and knowing what had been held under the Act of 1854, if the Legislature had intended to have made it void as against the grantor, it might easily have said so.

Gore, for the plaintiff, in support of the decision of the County Court Judge.—The words of section 10 of the Act of 1879 are general in their application. "The execution of every bill of sale shall be attested by a solicitor," &c. That is imperative, and is, moreover, altogether independent of section 8. It is inserted clearly for the protection of the grantor, who may be an illiterate person, or at all events ignorant of the effect of the in-

(1) 1 *Fost. & Fin.* 191.

(2) 1 *Fost. & Fin.* 192.

Davies v. Goodman, C.P.

strument he is signing, and can this enactment be carried out in the way intended except by making a bill of sale which is not so attested void? If the bill of sale is to be valid, notwithstanding the requirements of this enactment have not been complied with, where is the protection to the grantor which it was intended he should have?

Plumpre replied.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the County Court Judge was right and ought to be affirmed. It is admitted that the bill of sale in this case was neither registered nor attested, and that the dispute as to its validity was between the grantor and grantees, and the question which the County Court Judge had to decide was, whether the bill not being attested as required by the Bills of Sale Act, 1878, was void against the grantor thereof. The County Court Judge decided that it was, and I think that he was right. The question depends on two clauses of the Bills of Sale Act, 1878, namely, section 8 and section 10. The 8th section is substantially identical with section 1 of the old Act, (the Bills of Sale Act, 1854,) which enacted that if the formalities for registration under that Act were not complied with, the bill of sale was void as against certain persons therein mentioned, and it has been concluded by authorities, and quite rightly, according to the rule *expressio unius est exclusio alterius* that as against the persons who are not there mentioned it was not void. Now section 8 in this Act of 1878 for the first time enacts that "every bill of sale to which the Act applies shall be duly attested," and on those words alone I think an argument in favour of the plaintiff arises, because the words are not "shall be duly attested and registered" otherwise such bill shall be void, but "shall be duly attested and shall be registered" otherwise such bill shall be void; and therefore as it appears to me we might hold the alternative with reference to the bill being void to be confined to the latter part, namely, to the part which enacts "shall be registered," and if that be the true construction the enactment "every bill of sale to which

that Act applies shall be duly attested" is mandatory, and must be complied with; but that section does not stand alone, and the construction, which to my mind it ought to receive if it stood alone, is confirmed by sub-section 1 of the 10th section. That sub-section is in terms mandatory, "the execution of every bill of sale" ("every" is a strong word) "shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." Now that is altogether a new provision, and it is manifestly inserted in the Act in order to guard the grantor against fraud being practised upon him. The clauses in the Act as to the registration of the bill of sale are important to execution creditors, and I can understand full effect being given to them by saying that if they are not performed the bill of sale shall be void as against such creditors so that they shall be protected, but I do not see how any protection can be given to the grantor under section 10 if it does not follow that non-compliance with it makes the bill of sale invalid, and invalid as between the parties to it, because such attestation is important to them and to them only. It can be of no consequence to the execution creditors that the bill of sale was not attested by a solicitor. The Act says that it shall be so attested, and that such solicitor shall explain its effect to the grantor before its execution, and I confess I am unable to give adequate effect to this enactment without holding that if it be not so done the bill of sale is void. I think, therefore, that the judgment of the County Court Judge ought to be affirmed.

LINDLEY, J.—I have come to the same opinion, though not without some hesitation.

Judgment affirmed.

Solicitors—Milne, Riddle & Mellor, agents for W. H. Tinsley, Dudley, for appellant; Harper, Broad & Battcock, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1879. }
Dec. 1. }

ROTHERAM v. PRIEST.

Practice—Writ specially indorsed—Affidavit for Leave to defend under Order XIV. rule 3—Affidavit in Reply.

Upon an application by the plaintiff for leave to sign final judgment under Order XIV., the plaintiff cannot, as matter of right, file an affidavit in reply to the defendant's answer; the admission of such affidavit is entirely within the discretion of the Court or Judge.

Appeal from chambers.

The writ of summons was specially indorsed under Order III. rule 6, for two quarters' rent of 15*l.* each, due from defendant as tenant to the plaintiff. The plaintiff having called on the defendant under Order XIV. rule 1, to shew cause why the plaintiff should not be at liberty to sign final judgment, the defendant shewed cause by an affidavit, on which the Master gave leave to defend unconditionally. On appeal the Master's order was confirmed by Lopes, J., at chambers. Against this latter decision appeal was now brought.

Pyke, for the plaintiff, in support of the appeal, proposed to read a fresh affidavit in reply to the defendant's affidavit.

Pocock, for the defendant, objected.

The following cases were referred to—*Girvin v. Grepe* (1), *Davis v. Spence* (2), *The North Central Waggon Company v. The North Wales Waggon Company* (3).

Grove, J.—I think the order appealed against should be varied to the extent of giving the defendant leave to defend on bringing 15*l.* into Court (4).

(1) *Law Rep. Weekly Notes*, 1879, p. 180.

(2) *Law Rep.* 1 C.P. D. 719.

(3) 39 *Law Times*, 628.

(4) On reading the defendant's affidavit the Court came to the conclusion that one quarter's rent was admitted to be due. The defendant also sought to bring forward a counter-claim for libel, but on reading the facts set out in this portion of the affidavit, the Court considered the counter-claim to be in no way connected with the original cause of action, and under the circumstances held that it should not be allowed in the present action, in accordance with *The Anglo-Italian Bank v. Wells*, 38 *Law Times*, 197.

I am of opinion that the affidavit in reply to defendant's affidavit should not be admitted. I do not say that affidavits in reply should never be admitted. The cases of *Davis v. Spence* (2) and *The North Central Waggon Company v. The North Wales Waggon Company* (3) shew their admission to be matter of discretion. If we were to allow this affidavit in reply, I do not see how we could shut out the defendant from filing a further affidavit, and so on, until we should be deciding the case on the affidavits. In holding as we do that the affidavit in reply should not be allowed, we are acting within our discretion and within the authority of the decided cases.

LOPES, J.—I agree that the order should be varied. With regard to the question whether the plaintiff's affidavit in reply—which it is to be observed was not used before the Master or the Judge at chambers—should be allowed, I wish to say that I entirely agree with the case of *The North Central Waggon Company v. The North Wales Waggon Company* (3), in which it was held that the plaintiffs had no right to file a counter-affidavit. I do not mean that there should be no discretion, for I can imagine circumstances where it would be desirable to allow affidavits in reply. But as a rule I think the affidavit of the defendant should be the last thing coming under the notice of the Judge, for to allow counter-affidavits would amount to trying the case on affidavits.

Affidavit not read.

Solicitors—Pyke & Minchin, for plaintiff; Winkworth, for defendant.

[IN THE COURT OF APPEAL.]

1879. } LAX AND ANOTHER v. THE
June 24, 25. } MAYOR, &c., OF DARLING-
Dec. 2. } TON.*

Negligence—Market—Dangerous Erection—Duty of Owner of Market to the Public.

The defendants, owners of a market for the sale of cattle, put up some railings round a statue in the market-place. One of the plaintiffs was in the habit of bringing his cattle to the market, and occupied, and paid toll to the defendants for, a site near the statue. A cow of the plaintiff's, in trying to jump the railings, was killed, and the plaintiffs sued the defendants to recover damages in respect of the loss. At the trial the jury found, in answer to the only question left to them, that the railings were kept negligently in not being of a sufficient height, and judgment was entered for the plaintiffs:—

Held, that the judgment was rightly entered, because the defendants were *prima facie* bound to provide a reasonably safe place for the receipt and storage of cattle brought into the market at the defendants' invitation and for their profit, and no question had been raised at the trial whether the dangerous character of the railings was obvious to persons using the market.

Appeal from a judgment of Lush, J., on further consideration, after trial with a jury.

The action was to recover damages for the loss of a cow belonging to the plaintiffs.

The defendants were the owners of a market for the sale of cattle held in a public street at Darlington, and, some three years before the plaintiffs' cow was injured, had put up spiked railings round a statue in the market-place. The plaintiff Bainbridge had brought his cattle to the market for many years, and was in the habit of occupying a site in the market near to the statue, and he paid toll to the defendants in respect of this site. The cow in question was killed in trying to jump the fence round the statue.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

At the trial, before Lush, J., and a jury at Newcastle Assizes, the only question left to the jury was whether the railings were kept negligently in not being of a sufficient height. The jury answered in the affirmative.

Lush, J., after further consideration, entered judgment for the agreed value of the cow.

The defendants appealed.

Oave and Edge, for the plaintiffs, and Herschell and Hugh Shield, for the defendants.

The points taken in argument and the authorities cited were substantially the same as before Lush, J. (48 Law J. Rep. Q.B. 143).

Our. adv. vult.

The following judgments were delivered on December 2 by

BRETT, L.J.—This action was brought against the defendants as owners of a market, and when the case was tried before my brother Lush, the only question that was discussed, and the only question that was left to the jury, was the question whether any part of the market was dangerous. The whole stress of the argument before the learned Judge was on the question whether the defendants are to be held to be liable to the persons who bring cattle into their market if that market is in any part dangerous, that is, whether such persons are entitled to have the market in a non-dangerous condition. The defendants are owners of this market; they have a franchise without doubt; but they are in brief owners of the land, they receive cattle and they gain profit thereby from the tolls which they receive. I am aware that the toll consists of various items, although those items are, in fact, paid in one lump sum; part of that toll is, without doubt, for storage, for the defendants do not merely own a franchise of a market, they also own the land, and as I have said, receive sums of money for the storage of cattle. I cannot doubt that the defendants are in this case *prima facie* bound to offer a safe place for the receipt and storage of cattle. Therefore on the main question, I think that the defendants were bound to offer a reason-

Lar v. Mayor, &c., of Darlington (App.), Q.B.

ably safe place to the plaintiffs for the storage of their cattle, and the jury have found that they did not do so. No other question was left to the jury. It is clear that this was done of purpose by both the parties, and this, therefore, is the only question with which we have to deal. It is of course clear that although the defendants are *prima facie* liable, still if the plaintiffs have been guilty of an unreasonable want of care, or have purposely undertaken a risk the extent of which was fully known to them, then they either contributed to or were themselves the sole cause of the injury which has happened. As, however, this question was not raised at the trial and no evidence was given so as to raise this contention against the plaintiffs, I am of opinion that the judgment of the learned Judge must be affirmed.

BRAMWELL, L.J.—My brother Brett has said that the plaintiffs are entitled to succeed on this appeal. I am glad that this is so, and I agree that they are so entitled. This appeal should, in my opinion, never have been brought. There is no question of principle at stake. I am not influenced by the fact that this is a case of a market. These defendants are persons who take the money of customers for profit, they invite the plaintiffs to come on to their land and to use their market for profit; they are, therefore, *prima facie* bound to have that land in a non-dangerous condition. It was either their folly or their misfortune that the rails round the statue were too low. I think the case would have been the same if the defendants themselves or some other authorised persons, such as a local board, had made a trench in this land. It would have been the duty of the defendants to warn the plaintiffs of the fact of this trench unless indeed the danger were obvious. A *prima facie* case, therefore, is made out against the defendants that they have not done their duty to their customer, who came to them for their profit, in warning him against a danger which was not obvious. It has been stoutly argued that the plaintiffs knew of the danger and incurred a risk which was obvious. Now I own that I should

not be without misgivings, if the question were properly before us, but it is not, and I am glad it is not, for if the plaintiffs had been volunteers and had run into a danger which was obvious, then I should hold that the defendants would not be liable.

I mention this because I think that the principle of these cases is often misunderstood. A passenger in a railway train is carried beyond the platform, he jumps out, is injured, and then he sues the company for damages for the injuries received. I think that is not the proper course to take. The passenger should remain in the train—allow himself to be carried on beyond his destination, and then sue the company for damages because they failed to do their duty in supplying proper accommodation at their station. I wish to say a word about the case of *Clayards v. Dethick* (1), for a phrase is found more than once in that case which seems to me to give countenance to a mischievous idea. It is said that a person is not bound to abstain from doing something. I agree; but bound to whom? the phrase is misleading. In that case the cabman was, without doubt, not bound to stay at home; but if he chose to go out when there was danger, then he must take all the consequences. So if a man were unlawfully detained by being shut up at the top of a house, he undoubtedly would not be bound to stay there, but if he were to jump out of a window and to break his leg he would not be entitled to recover for that injury.

Again, the word "prudent" is also misleading. A prudent man may lead a forlorn hope, a prudent man may, on a balance of chances and probabilities, do what in the result may not be a success. If the case of *Clayards v. Dethick* (1) is to be supported, I think it must be on a ground which is indicated in the judgment of Wightman, J., that is, that the danger in that case was not obvious, that the cabman was led into trouble by something which partook of the nature of a trap or pitfall. It has been said that *Clayards v. Dethick* (1) has been adopted in *Wyatt v. The Great Western Railway Company* (2).

(1) 12 Q.B. Rep. 439.

(2) 6 B. & S. 709; 34 Law J. Rep. Q.B. 204.

Lax v. Mayor, &c., of Darlington (App.), Q.B.

If that be so, then I must say that I think the authority of this last case also is shaken; but, as has been said, the question of contributory negligence does not arise in the case now before us, and, therefore, the appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. I agree with the reasons given by Brëtt, L.J., and I do not think it necessary now to discuss the authority of *Olayards v. Dethick* (1) or of *Wyatt v. The Great Western Railway Company* (2).

Judgment affirmed.

Solicitors—Chester & Co., agents for T. Clayhills, Darlington, for plaintiffs; A. S. Lawson, agent for Hugh Dunn & Watson, Darlington, for defendants.

McClure v. Rymer 652 L.R. 1125

[IN THE COMMON PLEAS DIVISION.]

1879. } BURKE v. THE SOUTH EASTERN
Nov. 26. } RAILWAY COMPANY.

Railway Company — Passenger — Contract to carry — Ticket with Conditions limiting Liability — Knowledge of Passenger.

The plaintiff took a return ticket issued to him by the defendants (an English railway company), for the journey from London to Paris and back. The ticket was in the form of a small book with a paper cover, on the outside of which were the words, "Cheap return ticket. London to Paris and back. Second class. Available by night service only." Inside, sewn up with the cover, were the coupons for the different stages of the journey, and a page containing, amongst notices relating to luggage, a notice that this company "incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being booked to travel over the railways of other companies, such through booking being for the convenience of the passenger." The plaintiff sustained an injury whilst being carried in France under this ticket on the railway of a French com-

pany. In an action against the defendants for such injury, the defendants relied on the said notice on the ticket relieving them from responsibility in the event which had occurred. The jury found that the plaintiff did not see or know of this notice, and further that the defendants had not done what was reasonably sufficient to bring it to the knowledge of the plaintiff:—

Held, that notwithstanding such findings the defendants were entitled to have judgment entered for them, as the whole of this ticket book and not merely what was on the outside formed the contract under which the defendants agreed to carry the plaintiff, and that, therefore, in the event which had occurred, the defendants were, according to the terms of the contract, relieved from responsibility.

The case of *Henderson v. Stevenson* (Law Rep. 2 Sc. App. 470) distinguished.

Action against the defendants, an English railway company, for an injury sustained by the plaintiff under the following circumstances:—

The plaintiff took a return ticket at the Charing Cross station of the defendants' railway for the journey from London to Paris and back. The ticket, which by arrangement between the defendants and the London, Chatham and Dover Railway Company, was available for the return journey by either of the companies' railways, was in the form of a little book with a paper cover, containing six coupons for the different stages of the journey. On the first page, being on the outside of the cover, were the words, "Cheap return ticket. London to Paris and back. Second class. Available by night service only;" and also the following notices:—"This ticket is available for fourteen days including the day of issue and expiry." "Available for the return journey by the South Eastern or London, Chatham and Dover Railways." On the second page, which was printed on the inside of the leaf which formed the cover, were various notices respecting luggage; a notice that the cover without the coupons or the coupons without the cover were of no value; a notice that passengers were requested to see that the proper coupons

Burke v. South Eastern Rail. Co., C.P.

were collected at each stage of the journey, as no allowance would be made for a missing coupon; and the following condition, namely: "Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being booked to travel over the railways of other companies, such through booking being only for the convenience of the passenger." The third page was the first of the coupons, being the coupon to Folkestone or Dover, which was to be given up at either of those places. The other coupons followed in their order. On the top of the outside cover there was printed a number, and the same number was on the top of each coupon.

With this ticket the plaintiff went to Paris, and on the return journey a collision took place on the line of the French railway company which caused the injury to the plaintiff for which this action was brought. The cause was tried before Cockburn, C.J., at the Trinity Sittings in Middlesex, when the defendants relied on the condition in the ticket above set out, relieving them from the responsibility when the passenger was travelling over the railway of another company. It was, however, not denied at the trial, that the plaintiff did not see or know of this condition, and the jury accordingly so found, and they also found, in answer to a question to that effect left to them by the Lord Chief Justice, that the defendants had not done what was reasonably sufficient to bring this condition to the notice of the plaintiff. A verdict was accordingly found for the plaintiff, damages 250*l.*

McIntyre (*Barnard* with him) now moved to have judgment entered for the plaintiff.—The Lord Chief Justice left the question to the jury in the form given by Mellish, L.J., which was approved of in *Parker v. The South Eastern Railway Company* (1), and the jury having found that the defendants had not done what was reasonably sufficient to bring the condition to the notice of the plaintiff, and

the plaintiff never having seen it or known of its existence, it is clear that the plaintiff is entitled to have judgment in his favour. The case is within that of *Henderson v. Stevenson* (2), which being the decision of the House of Lords is a binding authority, and is conclusive that a person who takes such a ticket as the present is not bound by conditions printed in the inside, of which he has no notice, and to which there is nothing on the outside cover to direct his attention. Both in *Parker v. The South Eastern Railway Company* (1) and in *Harris v. The Great Western Railway Company* (3), there was printed on the face of the ticket the words "see back," thereby directing the attention of the person who received it to what was printed on the back.

[LINDLEY, J.—Where is the contract to carry and take care of the plaintiff, if it be not the whole of his ticket book? The inside must be taken with the outside.]

The contract was on the outside, where it was stated to be a return ticket from London to Paris and back. The condition relieving the defendants from responsibility was a condition on which the defendants issued the ticket, but was no part of the contract, and according to the authorities it must be shewn that the plaintiff knew of it, or at least that the defendants had done what was reasonable to bring it to his notice.

The Solicitor-General appeared for the defendants, but was not called upon to argue (4).

LORD COLERIDGE, C.J.—This is a motion for judgment in an action which was brought by the plaintiff to recover damages against the defendants, the South Eastern Railway Company, for injuries the plaintiff sustained in France whilst he was being carried by a French railway company under a through ticket issued by the defendants in the form which we

(2) Law Rep. 2 Sc. App. 470.

(3) 45 Law J. Rep. Q.B. 729; Law Rep. 1Q.B.D. 516.

(4) The Court having enquired whether on this motion they could give judgment for the defendants, the Solicitor-General referred to Order XL. rule 10, and asked for such judgment accordingly.

(1) 46 Law J. Rep. C.P. 768; Law Rep. 2 C.P.D. 416.

Burke v. South Eastern Rail. Co., C.P.

have before us. It is in the form of a book, on the outside cover or page of which are the words—"Cheap return ticket. London to Paris and back. Second class. Available by night service only." Then on the following page there are various notices respecting luggage and the coupons; there is a statement that the cover without the coupons or the coupons without the cover are of no value; a condition limiting the liability of the English railway companies for loss of luggage; and this condition, on which the defendants rely, namely, "each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being booked to travel over the railways of other companies, such through booking being only for the convenience of the passenger." *Prima facie* that is a good answer to this action. The case, however, went to the jury, and they found that there was not sufficient reasonably done by the defendants to bring this condition to the notice of the plaintiff. Now I will take it that the plaintiff did not know of it. In point of fact no affirmative evidence was given that the plaintiff had read it or that he had known of it. In my opinion this is immaterial, but I am willing to assume that the plaintiff did not know of it, though whether I believe it or not is another thing. Then does this afford any answer? In my opinion it does not. The contract between the plaintiff and the defendants must be this book which is called a ticket, and it must be the whole of such book. In it are the terms and the terms alone on which the defendants agreed to take the plaintiff to Paris and back. In all ordinary cases there is no doubt but that this would be so, but it has been considered that there is a distinction in railway cases. The case of *Henderson v. Stevenson* (2), with which it has been attempted on the part of the plaintiff's counsel to assimilate the present case, is no doubt a decision binding on this Court. There there was a contract to take a person and his luggage from Dublin to Whitehaven. The contract there was complete on the face of the ticket, and the condition relieving the company in

case of loss was printed on the back of it, and on the face of the ticket there was no reference to what was printed on the other side. It was admitted in that case that if both sides of the ticket formed the contract, the defendants would have been entitled to rely on the condition as an answer to the action. But it was said that the plaintiff had a right to assume and that it was to be taken in that case that he had assumed that one side alone of the ticket contained the whole of the contract, and that that was a contract by the Steam Packet Company to take him and his luggage from Dublin to Whitehaven. There would then arise the ordinary Common Law liability as carriers.

The law in *Henderson v. Stevenson* (2) depends on the view the House of Lords took of the facts in that case, and there they assumed that the whole contract was on the face of the ticket. Here the facts are entirely different. Here the contract is contained in a small book, and it is admitted that the whole of its inside leaves which consist of the different coupons for the different stages of the journey are from time to time to be used by the passenger. It has been contended that he may turn over the first page and use the first coupon which forms the third page without his attention being directed to what is on the other side of the first page and which is page 2. But if page 1 and page 3 form part of the contract, on what ground is page 2 to be disregarded? The Solicitor-General would say that it is part of the contract. The plaintiff may not have read it or may not have chosen to read it, but there was no fraud or concealment, and there is no ground to reject this more than any other part of the contract. Therefore though *bona fide* accepting the doctrine in *Henderson v. Stevenson* (2), I am of opinion that the present case does not come within it, and therefore I decide this case in favour of the defendants without casting the shadow of a doubt upon the authority of the case of *Henderson v. Stevenson* (2).

LINDLEY, J.—I am of the same opinion. The decision of the present case depends on the answer to the question what was the contract which the parties entered

Burke v. South Eastern Rail. Co., C.P.

into. The answer here would be that the plaintiff only paid a sum of money for the journey from London to Paris and back, and that he received in exchange this ticket, being the book containing the coupons. The jury were not asked and have not found what was the contract. They found that the plaintiff did not read or know of the condition printed in this book, on which the defendants relied, and also that the defendants had not done what was sufficient to bring such condition to the notice of the plaintiff, but that still left it open what was the contract between the parties. Now could the plaintiff make out any other contract than that which is contained in the whole of this little book or ticket which was given when the money was paid? If the jury by their verdict had found that the contract was what appeared on the first page only, it would have been a verdict which could not have been sustained, but they did not find this, and manifestly the contract was not so limited. We have been pressed with the case of *Henderson v. Stevenson* (2). There, however, the House of Lords had in substance split the ticket in two, and had considered that in point of fact the contract was what appeared on the face of the ticket, and therefore the ignorance of the plaintiff of what was on the back of the ticket became all important. That is not, however, this case. It is impossible, I think, to deal with the book in this case as the House of Lords dealt with the ticket in *Henderson v. Stevenson* (2), and for the reasons already given I think that case does not apply, and that our judgment should be for the defendants.

Judgment for defendants.

Solicitors—J. A. Parry, for plaintiff; W. R. Stevens, for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1879. } JONES v. THE CWMORTHIN
Dec. 18, 19. } SLATE COMPANY (LDM.).*

Income Tax—Quarries—Mines—Profits, how to be Assessed—5 & 6 Vict. c. 35, Schedule A, Part III. Rules 1, 2.

A property in which slate is gotten by levels driven underground into a hill, is a quarry and not a mine for the purposes of the rules for assessing income tax, and ought as such to be assessed on the profit of the preceding year, under rule 1 of Part III. of schedule A of 5 & 6 Vict. c. 35:—

So held by the Court of Appeal, affirming the judgment of the Exchequer Division.

Appeal under 41 Vict. c. 15. s. 15, by the Cwmorthin Slate Company against a judgment of the Exchequer Division on a Case stated by the Commissioners of Income Tax.

The case is reported 48 Law J. Rep. Exch. 486.

The question was as to the way in which the slateworks of the appellant company ought to be rated. The property had been originally worked in the open; but for some years the slates had been gotten by means of levels driven into the side of a hill, so that the actual working was underground.

The Exchequer Division held that the property was a quarry, and ought to be rated as such.

The company appealed.

A. L. Smith, for the appellants.—The question is whether this property ought to be assessed according to the first or the second rule of Part III. of schedule A of 5 & 6 Vict. c. 35. The first rule directs that "quarries of stone, slate, limestone or chalk," shall be assessed "on the amount of profits in the preceding year;" and the second rule, that "mines of coal, tin, lead, copper, mundic and other mines" shall be assessed on an average of the five preceding years. The appellants contended that this is a mine. The question of what a mine is was fully

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

Jones v. Cwmorthin Slate Co. (App.), Excu.

discussed in *Bell v. Wilson* (1), and it has been held in the Court of Queen's Bench that this is a mine within the Metalliferous Mines Act (35 & 36 Vict. c. 77)—*Sims v. Evans* (2).

The Solicitor-General (*Sir H. Giffard*) (with him *Dicey*), for the Commissioners of Income Tax.—The decision in *Sims v. Evans* (2) is quite consistent with the fact that this property is for the purpose of assessment a quarry; the substance here won is not such as is won from mines; these works cannot be a mine *ejusdem generis* with those mentioned in rule 2 of the schedule; and although a quarry may be a mine in certain cases and for certain purposes, still, for the purpose of assessment, these workings are a quarry.

A. L. Smith, in reply.

Our. adv. vult.

The following judgments were (on Dec. 19) delivered:—

BRAMWELL, L.J.—I think that this judgment should be affirmed. It is in my opinion a clear case. The question is not as to the meaning of the words "mine" or "quarry" in the abstract, but as to the meaning of those words in this statute. I think that the statute means that the rule as to mines applies to such mines as are in that rule mentioned, and to others *ejusdem generis*; but the rule does not exclude all other mining operations whatever. Now the workings which are the subject of this appeal are not *ejusdem generis* with the mines mentioned in the second rule given in the statute. If the contention of the appellants be right, it appears to me that they could not be assessed at all, for if the workings in question are not within the rule as to quarries, they cannot come within any rule contained in this statute. I think that this is a quarry worked to a certain extent like a mine, but it is clearly a quarry. I do not pretend to define exactly what a quarry is; but I think that by that word one generally means a place from which something is cut out in large shapes or blocks, not a

place from which the material is got in small quantities, such as lumps of coal, ironstone and the like. It is true that one speaks differently of different kinds of stoneworks, one speaks of a stone-quarry and of a stone-pit; but I am of opinion that this is a quarry within the meaning of the second rule in this statute, and that the judgment of the Exchequer Division is right.

BRETT, L.J.—I agree. I thought that the appellants did shew that the slate was obtained from these workings by mining operations. I doubt whether anyone who looked at these workings would call them a quarry, for it would be seen that the operations are in the nature of mining operations, and therefore I think that our decision does not conflict with the judgment which was given in the Court of Queen's Bench in *Sims v. Evans* (2), for that was a decision on a statute passed for the protection of miners, and as the workers in these works are engaged in mining operations, it was held that they were entitled to the protection of that Act. Nevertheless, I think that these workings come within the first of the rules given in the schedule to the Act with which we have to deal. That statute imposes a tax on the substance worked, and not on the mode of working. The real intention is to fix the person on whom the tax is to be imposed, that is, to impose it on those who obtain the profits on certain produce in one way, and on those who obtain the profits on certain other produce in another way. It is a tax on profits; that therefore implies a sale, and the different average on which the profits are to be assessed is accounted for by the fact that in one case the rate of profits is fairly uniform; but that in the case of mines the rate of profit is very variable.

The word "quarry" is, in my opinion, used only to fix the place and the person on whom the tax is to be levied, and it does not at all refer to the mode of working. The question is whether these slate works are within the first rule or within things *ejusdem generis* with those mentioned in the second rule, and I think that they are within the first rule, and that the judgment was right.

(1) 35 Law J. Rep. Chanc. 337; Law Rep. 1 Chanc. App. 303.

(2) Not reported.

Jones v. Cwmorthin Slate Co. (App.), Exch.

COTTON, L.J.—I am of the same opinion. We have not to decide whether this is a mine or a quarry, but as to the manner in which the profits are to be assessed. I think that the first rule refers to such substances as these slates, and the second to other things, such as coal, tin, lead, copper, mundic.

The distinction is between the classes of things raised, and not between the mode of raising them.

The decision which has been referred to is not inconsistent with this judgment. The statute on which that decision proceeded was a statute passed to protect persons engaged in a certain kind of work, and not to fix a tax to be paid on a certain substance won for profit.

Judgment affirmed.

Solicitors—Gregory, Rowcliffes & Rawle, agents for Jones & Jones, Portmadoc, for the appellants; the Solicitor for the Inland Revenue, for the Commissioners.

[IN THE COMMON PLEAS DIVISION.]

1879. }
Nov. 28. } GODDEN v. COESTEN.

Practice—Order for Particulars—Particulars of Credits given by Plaintiff.

The rule which formerly existed not to compel a plaintiff to state the items of sums for which he has voluntarily given credit to the defendant in his particulars of demand, is, since the Judicature Act, no longer applicable, and the defendant can require the plaintiff to state such items, unless they are such as would be more within the knowledge of the defendant than of the plaintiff.

Therefore where, in an action on a builder's contract, the plaintiff in his particulars, on a specially indorsed writ, gave credit to the defendant for a lump sum "for work not performed," and for another lump sum for "bricks, goods and works," the Court held, that the defendant was entitled to have an account, with dates and items, as to these two lump sums.

The plaintiff's claim, as stated on a specially indorsed writ, was as follows:—

The plaintiff's claim is 131*l.* 3*s.* 9*d.*, upon the following account:—

	1878 and 1879.					
	£	s.	d.	£	s.	d.
For the building of six cottages and execution of other works at Borough Green, Wrotham, Kent, and materials for the same provided, according to a certain contract between the plaintiff and the defendant, dated 23rd of October, 1878	765	5	0			
Less allowed from the said contract for work not performed . . .	61	10	10			
				703	14	2
For extra work performed to the above-mentioned cottages and works, and materials for the same, not included in the above-mentioned contract . . .						49 1 8
February 2 to June 2, 1879.						
For work done by the plaintiff for the defendant in repairing old cottages at Borough Green, Kent, and materials for the same provided, and for making a cupboard and drawers, full particulars whereof have been delivered . . .						20 11 8
For other work, journeys taken, and services performed, and moneys paid and expended by the plaintiff for the defendant						45 4 0
	£	s.	d.	818	11	6
By cash on account . . .	507	4	10			
Bricks, goods and works	180	2	11			
				687	7	9
Balance . . .				131	3	9

The defendant applied for particulars of the items of the claim, and Lopes, J., made an order that the plaintiff should deliver an account in writing, with dates and items, as to the sums of 61*l.* 10*s.* 10*d.*, 45*l.* 4*s.* and 180*l.* 2*s.* 11*d.*

F. Turner, for the plaintiff, now moved that such order might be rescinded or varied. There is no objection to giving particulars of the matters in respect of which the 45*l.* 4*s.* is claimed, but the sums

Godden v. Corsten, C.P.

of 6*l.* 10*s.* 10*d.* and 180*l.* 2*s.* 11*d.* are sums for which the plaintiff has given credit to the defendant, and it has never been the practice to compel the plaintiff to furnish particulars of such sums. In *Myatt v. Green* (1), it was stated by the Court of Exchequer that the rule was not to compel a plaintiff to state items of sums for which he has voluntarily given credit to the defendant. There is nothing in the rules under the Judicature Act to alter this practice. The case of *Walker v. Hicks* (2) may be cited on the other side. The plaintiff there claimed by indorsement on his writ, "a contribution in payment of certain bills on which the defendant and plaintiff were jointly liable," and the Court held that it was not a specially indorsed writ, and though Cockburn, C.J., stated that the defendant was entitled to have sufficient particulars to enable him to determine whether he should pay or resist the claim, it is enough to say that this case is not like the present one, and really has no application to it. The defendant must know the items for which credit is given him, and his requiring the plaintiff to give these particulars would be to put him to unnecessary trouble and inconvenience.

English Harrison appeared for the defendant, but was not called on.

LORD COLERIDGE, C.J.—I am of opinion that the order of my brother Lopes is right, and should be confirmed. The plaintiff in the indorsement on the writ of summons in this action gives credit for two general sums, and so reduces a larger sum to the sum he claims to be entitled to recover. The defendant asks the plaintiff to tell him how these general sums are made up. The plaintiff declines to do so, on two grounds: first, he says it is not usual, and was not done under the old system; and, secondly, he says that the matters asked for are matters within the defendant's own knowledge. With every respect for the decision of the Court in *Myatt v. Green* (1), I do not

think that can guide us now. That case was decided when there existed a scientific system of pleading, and such a decision might have been well enough in those days. Now everything is different. The object is not now to have a scientific system of pleading, but that each party should fairly give all the requisite information to the other, to make him judge how he ought to act thereon, and the Judicature Act and forms of pleading thereunder, have, as I think, made the old decisions inapplicable, so that the principle which guided them can no longer form our guide. Then is the information which the defendant seeks matter which he does not want, inasmuch as it is within his own knowledge? I should think that if he were to ask the plaintiff to tell him what he himself knew better than the plaintiff, that would be a good reason why the plaintiff should not be put to the trouble of giving such information, but that is evidently not the present case. Manifestly, the defendant not only may not know, but most probably he does not know to what items these sums refer, still less does he know what are the particular items for which the plaintiff has given him credit. The want of this information might cause the defendant to set off and counter claim what the plaintiff might say he had given the defendant credit for, and might therefore seriously embarrass the defendant in the conduct of his defence. It is clear that the plaintiff must know how he has made up these precise sums, and he could state it correctly, and his doing so would not impose any hardship upon him, whilst, on the other hand, his not giving this information might cause a hardship upon the defendant. There is therefore no reason why such an order as this should not be made. All that can be said against it is that it is not in accordance with the old practice. That reason no longer applies; and if it be necessary to make a precedent for it I, for one, should have no difficulty in doing so. On principle, I think that the learned Judge's order was right, and that it should be affirmed.

LINDLEY, J.—I am of the same opinion. The defendant does not want to plead a set-off and counter-claim of sums for

Q

(1) 13 *Mee. & W.* 377; 14 *Law J. Rep. Exch.* 24.

(2) 47 *Law J. Rep. Q.B.* 27; *Law Rep.* 3 *Q.B. D.* 8.

VOL. 49.—Q.B., C.P. & EXCH.

Godden v. Corsten, Q.P.

which credit has been given him by the plaintiff. It is essential, therefore, that he should know the items for which credit has been so given.

Order affirmed.

Solicitors—F. A. Cole, for plaintiff; J. Barton, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1879. } M'ALLISTER v. THE BISHOP
Nov. 17, 24. } OF ROCHESTER AND OTHERS.

Church and Clergy—Presentation to Endowed Chapel—Rights of Vicar of Parish—Quare Impedit—14 & 15 Vict. c. 97. ss. 7, 11.

The vicar of a parish has not, as vicar, the right of presentation to any consecrated public chapel in his parish, unless such chapel is a chapel of ease; but he has the right to forbid any person to officiate therein unless deprived of such right by some statute or some arrangement assented to and binding on the bishop of his diocese, the patron of the mother church and the incumbent thereof.

The plaintiff, as vicar, claimed the right of presentation to an endowed chapel erected in the parish and consecrated for the administration of sacraments and all other divine offices.

The defendants also claimed the right of presentation, alleging that the chapel had been erected by the freeholders and endowed by the defendants, and conveyed to the Ecclesiastical Commissioners to make declaration of the right of nomination, pursuant to 14 & 15 Vict. c. 97; that before making any declaration, application had been made by the freeholders to the Commissioners, containing such information as is required by the said statute, and notice of the same had been sent to the plaintiff, both as patron and incumbent, as required by the said statute; that the plaintiff was not in fact patron, but that after notice he had allowed the defendants to endow the chapel and procure it to be consecrated in the belief that he was, and was therefore estopped from de-

nying he was patron; and that three months after such notice the right to nominate was duly declared to be for ever in the defendants:—

Held, that the plaintiff had not shewn any title to the right of presentation, but that if he had, the facts alleged by way of estoppel would not have been an answer to his claim, as a vicar's rights are not mere private rights which may be waived or renounced at his own will or pleasure.

Case argued on demurrer.

The pleadings, so far as material, were as follows:—

Statement of claim (1).

1. The plaintiff is vicar of the parish of Plumstead, in the county of Kent.

2. In 1863 certain persons erected a building or chapel, called the church of St. James, within the said parish.

3. On the 31st of July, 1878, an endowment fund for the said chapel having been provided towards the maintenance of the minister lawfully officiating therein, the said chapel was, without the plaintiff's consent, consecrated by the Bishop of the diocese for the administration of the holy sacraments and the performance of all other divine offices according to the rites of the Church of England.

4. No agreement was ever made with respect to the patronage of the said chapel between the said Bishop, the plaintiff, and the patron of the said parish and mother church of Plumstead, nor has any compensation been awarded to the plaintiff in respect thereof, nor has any agreement whatever been entered into or any consent whatever given by the plaintiff whereby the rights of the plaintiff as such vicar as aforesaid have been in any way diminished or affected.

(1) The statement of claim was directed to the Lord Bishop of the diocese, the Rev. W. Carus, the Rev. J. Venn, the Rev. E. Holland, the Rev. E. Auriol, and the Rev. W. Cadman, who claimed to be trustees of the chapel in whom the right of nomination was vested, and the Rev. S. Henning, who had been instituted in pursuance of such right of nomination. The proceedings were subsequently stayed against the Bishop and the Rev. S. Henning, and the statement of defence was made by the aforesaid trustees and the Ecclesiastical Commissioners, who were joined for the purpose of raising the defence therein set forth.

M'Allister v. The Bishop of Rochester, C.P.

5. The plaintiff is, as such vicar as aforesaid, entitled to nominate and present a fit clerk to officiate in the said chapel, and is further entitled to require the said Bishop to license, institute and admit such clerk nominated and presented as aforesaid to the said chapel.

6. In pursuance of such right, the plaintiff accordingly did, on the 20th of December, 1878 (the said church or chapel being then vacant, no clerk having been duly nominated or presented thereto or licensed to officiate therein), duly nominate and present to the defendant the said Bishop the Rev. George MacDonnell, clerk, being a fit and proper person in that behalf, requesting the said Bishop to license the said George MacDonnell to minister and officiate in the said chapel, and to institute and admit him thereto, and cause him to be inducted into the same.

7. The said Bishop thereupon refused, and still refuses, to license, institute and admit the said George MacDonnell to the said chapel, and unjustly hinders the plaintiff in the exercise of his said right, to the great damage of the plaintiff.

8. The Bishop has, in violation of the plaintiff's said right, without his consent licensed, instituted and admitted the defendant, the Rev. Stilton Henning, clerk, to the said church or chapel, on the pretended nomination and presentation of the defendants, the said William Carus, John Venn, Edward Hollond, Edward Auriol, and William Cadman.

9. The said defendants, William Carus, John Venn, Edward Hollond, Edward Auriol, and William Cadman claim the right to nominate and present a clerk to the said chapel, and claim to have lawfully nominated and presented the said Stilton Henning thereto, and they thereby hinder the plaintiff in the exercise of his said right, to the great damage of the plaintiff.

10. The said Stilton Henning claims to have been lawfully instituted and admitted to the said church or chapel, and to exercise parochial rights in a large portion or district of the said parish, in pursuance of the said pretended nomination and presentation, institution and admission, and thereby hinders the plaintiff

in the exercise of his said right, to the great damage of the plaintiff.

The plaintiff claims—

1. To have established and declared his right to nominate and present a fit clerk, and to have such clerk licensed to officiate therein, and instituted and admitted to the said church or chapel and the rights and appurtenances thereof.

2. To have the said George MacDonnell duly licensed and instituted and admitted as aforesaid by the said Bishop.

3. Damages for being hindered as aforesaid in the exercise of his said right.

Statement of defence of all the defendants other than the said Bishop of Rochester and Stilton Henning, and defence of Ecclesiastical Commissioners for England, pursuant to notice duly issued on the 28th day of March by order of the Master.

2. The defendants say that the said chapel was erected by the freeholders of the land upon which the same was erected at their expense.

3. In the year 1876 the said freeholders, with the sanction of the said Commissioners, conveyed to them the said building or chapel and the land on which the same was erected, for the purpose of having the same consecrated, and then to the satisfaction of the said Commissioners procured to be endowed the said chapel, and provided a competent fund for the repair of the same, in accordance with 14 & 15 Vict. c. 97 (2).

(2) 14 & 15 Vict. c. 97. s. 7, enacts, so far as is material to the present case, as follows:—"In all cases in which any body or person hereafter endows, to the satisfaction of the said [Ecclesiastical] Commissioners, any church, or building intended to be consecrated as a church, which has been purchased or acquired by such body or person, and where also in any case such body or person hereafter provides a competent fund for the repair of such church or building, it shall be lawful for the said Commissioners, subject to no restriction . . . (except as to notices to patron and incumbent, as hereinafter mentioned), with the consent of the bishop of the diocese, to declare by an instrument under their common seal the right of nominating a minister to such church or building to be for ever after the due consecration thereof in [such] body or person, &c."

Section 11: "Previous to such right of nomination being made by the said Commissioners, application in writing shall be made by the body or persons having built and endowed such church or

M'Allister v. The Bishop of Rochester, C.P.

4. The whole of such endowment was in fact provided at the request of the said freeholders by the defendants out of funds then belonging to them.

5. Before the making of any declaration of the right of nomination by the said Commissioners, as hereinafter mentioned and as by the said statute provided, such application was made to them by the said freeholders, and by all other persons providing the said endowment and repairing fund, as is in the said statute in that behalf required, containing such information and particulars as therein provided, and a copy of such application, containing the like information, was sent by the said Commissioners to the plaintiff, then being both patron and incumbent of the said parish of Plumstead.

6. At the time of sending the said copy of application to the plaintiff, the plaintiff was believed by the said Commissioners and by the defendants to be both the patron and incumbent of the said parish, and the said Commissioners and these defendants had not any notice or knowledge that he was not such patron, and the plaintiff did not then or at any time inform the said Commissioners or these defendants, nor had the said Commissioners or these defendants before the endowment or consecration of the church any notice or knowledge that he was not the patron of the said parish. The plaintiff had notice of the facts stated in this and the preceding and subsequent paragraphs of this statement of defence, and he stood by and knowingly allowed these defendants to endow the said church and procure the same to be consecrated, as

building . . . to the said Commissioners, setting forth [the amount of population of the parish in which such church or building is built, the accommodation provided by the other churches in the parish, its distance from the other churches, &c.] and copies of such application shall be sent by the said Commissioners to the patron and incumbent of the parish, &c., in order to afford such patron and incumbent the opportunity of laying before the said Commissioners, for their consideration, any statement or objections relating thereto . . . and the said Commissioners shall not declare such right of nomination until after the expiration of three months next after such copies or notices have been so sent."

hereinafter mentioned, in the belief then entertained by them, as the plaintiff well knew, that the said copy had been duly sent to him not only as incumbent but also as patron of the said parish, and that he was such a patron, and that the sending of such copy to him was in fact a sending of a copy both to the patron and incumbent, as required by the Act 14 & 15 Vict. c. 97. s. 11; and the defendants say that the plaintiff is, for the reasons in this paragraph appearing, estopped from denying that he was patron, or that the sending of the said copy to him was not a sending to both patron and incumbent, as required by the said statute, and he ought not now to be allowed to set up that he was not the patron, or that a copy was not duly sent to both patron and incumbent.

7. After the expiration of three months next after such copies had been so sent by the Commissioners, and after such conveyance and endowment and provision of such competent fund as hereinbefore mentioned, and after the said building had been completely finished and fitted up for the performance of divine service, the said Commissioners did, with the consent of the said defendant the Bishop, and at the request of the said freeholders and all other persons in any way contributing to or providing the said endowment and repairing fund, by an instrument executed by them under their common seal, the said Bishop, as a consenting party thereto, declared the right of nominating a minister to such building to be for ever after the due consecration thereof in the said defendants other than the said Lord Bishop and the said Stilton Henning and the said Commissioners.

8. On the 31st of July, 1878, and after the execution of such instrument as aforesaid, and before the nomination of the said Stilton Henning, the said chapel was duly consecrated by the said Bishop, and thereupon the said defendants nominated and presented the said Stilton Henning clerk to the said chapel, and they claim to have lawfully nominated and presented him.

Issue thereon and demurrer to the 6th paragraph of the statement of defence.

M'Allister v. The Bishop of Rochester, C.P.

Arthur Charles (Cousin with him), for the plaintiff, in support of the demurrer.—Whenever a chapel of ease is erected the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, and it is not competent to any clergyman to officiate in any church or chapel within the limits of a parish without the consent of the incumbent—*1 Stephens on Clergy*, 261; *Rogers' Ecclesiastical Law*, 141, note, 2nd ed.; *Phillimore's Ecclesiastical Law*, 1181; *Dixon v. Metcalfe* (3); *Farnworth v. The Bishop of Chester* (4). The vicar would have the right of presentation to this chapel unless the statute prevents him. *Quare impedit* is the right remedy—*The King v. The Bishop of Chester* (5); *The King v. The Marquis of Stafford* (6).

The common law right of presentation being in the vicar, the statute must be strictly followed before he can be deprived of such right. If the statute is complied with, there is no doubt the right of nomination is in the defendants. Here they have declared their right avowedly without the consent of the patron. This is a public statute for the benefit of the public, and cannot be waived for the benefit of the individual. It is necessary the statute be strictly followed, because the power of the Commissioners might otherwise be inconveniently exercised. *Bliss v. Wood* (7); *Williams v. Brown* (8) were also cited.

J. Dixon, for the defendants.—The statement of claim is bad in law. The action of *quare impedit* can only be maintained by the person having title to the advowson (*Comyns's Dig. Pleader, Q. Imp. D.*; 2 Inst. 356), and the statement of claim shews no such ground. The right of presentation is in the endower and builder—*Herbert v. The Dean and Chapter of Westminster* (9). It is true that at

common law no clergyman can officiate in the parish without the consent of the incumbent, but that is the extent of his rights—*The Attorney-General v. Brereton* (10). In *Dixon v. Metcalfe* (3) the nomination was held to be in the vicar solely because the chapel was a chapel of ease. See also *The Duke of Portland v. Bingham* (11); *Herbert v. The Dean and Chapter of Westminster* (9). In *The King v. The Bishop of Chester* (5) the chapel was a donative chapel. A chapel of ease is an appurtenance of the church, and the incumbent may preach there or appoint a curate—*Hobart*, 67, and *mandamus* lies to the Bishop to compel him to license—*The Queen v. Bloer* (12). But in the statement of claim there is nothing to shew that the chapel is a chapel of ease. There is no dedication of the chapel to the public, and nothing to shew it is not a private chapel. A man may build a private chapel for himself—*Herbert v. The Dean and Chapter of Westminster* (9); *Moysey v. Hilcoat* (13). Proprietors of a proprietary chapel may prevent persons from attending—*Boeanquet v. Heath* (14).

As regards paragraph 6 the well-known equitable doctrine of estoppel applies—*Savage v. Foster* (15), now included in *White & Tudor's Leading Cases*, 620, 5th ed.; *Dawn v. Spurrier* (16).

Arthur Charles, in reply.—*Dixon v. Metcalfe* (3) contradicts the arguments of the defendants that the vicar has no right to nominate. There is no magic in the term "chapel of ease;" it means a chapel in ease. The right of nomination being in the vicar, he is the right person to bring *quare impedit* against the person opposing the nomination. The fact of the endowment makes no difference, but makes the living presentative; *quare impedit* is the right remedy by virtue of the endowment. This is a public

(3) 2 Eden, 360, per Lord Northington, at p. 364; Amb. 523.

(4) 4 B. & C. 555.

(5) 1 Term Rep. 396.

(6) 3 Term Rep. 646.

(7) 2 Hag. 509.

(8) 1 Curt. 54.

(9) 1 P. Wms. 773.

(10) 2 Ves. sen. 425.

(11) 1 Hag. Cons. 168.

(12) 2 Burr. 1043.

(13) 2 Hag. 53; 1 Lee, 166.

(14) 9 W.R. 35.

(15) 9 Mod. 35.

(16) 7 Ves. 231.

M'Allister v. The Bishop of Rochester, C.P.

consecrated chapel, and the doctrine of acquiescence has no application.

Cur. adv. vult.

The judgment of the Court (17) was (on Nov. 21) delivered by

LINDLEY, J.—Before reading the judgment I have prepared it is material to consider the claim which is here set up by the plaintiff. It is to be observed that he does not claim an injunction. But he seeks to have it declared that he himself has the right of nominating a minister to officiate in this chapel. The question then to be determined is, whether on the grounds stated in the statement of claim he has such right. On looking into the authorities, I have come to the conclusions which I will now read.

[His Lordship proceeded to read as follows]:—

The plaintiff, as Vicar of Plumstead, is entitled to forbid any person to officiate in his parish in any public church or chapel consecrated by the Bishop for public worship according to the doctrines and rites of the Church of England, unless the plaintiff has been deprived of such right by some statute or some arrangement assented to and binding on the bishop of his diocese, the patron of the mother church and the incumbent thereof.

Moreover, if a chapel of ease were to be erected in his parish the plaintiff, as vicar, would be entitled with the sanction of the bishop to appoint a curate to officiate in it; and if such chapel were endowed the plaintiff, as vicar, would be entitled to present a duly qualified minister to such endowed chapel.

I think I cannot do better here than read from the judgment of Abbott, C.J., in *Farnworth v. The Bishop of Chester* (18).

(17) Grove, J., and Lindley, J.

(18) His Lordship here read from the judgment of Abbott, C.J., in *Farnworth v. The Bishop of Chester*, 4 B. & C., at p. 568, from the words "I have always understood it to be a general rule of law" down to the end of the judgment. This portion of the judgment is to the effect that it is a general rule of law that no person can be authorised to officiate within a public chapel erected for the ease of the inhabitants of a portion of the parish, without the consent of the vicar.

This appears to us to be a true view of the law, and is an authority for the above propositions, as are also the cases of *Dixon v. Kershaw or Metcalf* (3); *Farnworth v. The Bishop of Chester* (4); *Bliss v. Woods* (7); authorities for these propositions. But we can find no authority for holding that the vicar of a parish is entitled as such to present to every consecrated chapel in his parish unless such chapel is a chapel of ease; the passage in *Coke upon Littleton*, 119b, and the opinion of Lord Northington in *Herbert v. The Dean and Chapter of Westminster* (9), are entirely opposed to the existence of any such right. The dean and chapter were ultimately successful there, but they were in a very different position from the plaintiff as pointed out in *The Duke of Portland v. Bingham* (11).

In order, therefore, to entitle the plaintiff, as Vicar of Plumstead, to present to the chapel in question in this action, he must shew that the chapel is a chapel of ease.

This he has not done. He does not in his statement of claim even allege that the chapel is a chapel of ease; nor has he stated any facts from which it can be inferred to be such a chapel. From paragraph 3 in the statement of claim it is to be gathered that the chapel was consecrated in order that, *inter alia*, sacraments and burials might be administered and performed there. This shews that the chapel is not a mere chapel of ease; for a mere chapel of ease is only for prayers and preaching, 1 *Burn's Ecclesiastical Law*, p. 299; *The Attorney-General v. Brereton* (10). The chapel as described in the statement of claim appears to be an endowed parochial chapel, and although such a chapel may be a chapel of ease (see *Burn, ubi supra*), there is no presumption that it is so; and there is no presumption, therefore, that the vicar is entitled to present to it.

The plaintiff's title, as disclosed in his statement of claim, rests upon the assumption that the plaintiff, as Vicar of Plumstead, is entitled to present a proper person to any endowed consecrated chapel in the parish unless the contrary can be shewn. This, in our opinion, is a mistake. We are of opinion that the

M^r Allister v. The Bishop of Rochester, C.P.

plaintiff must shew something more to entitle him to present; he must shew that the chapel is a chapel of ease or that for some other reason he is entitled to present to it.

The statement of defence, if that can be looked at for this purpose, shews that the chapel was not erected or consecrated with the intent that it should become a chapel of ease in any sense dependent on the mother church. The object of those who erected and endowed the chapel was wholly different; and although by not observing the provisions of the statute, the founders may not yet have acquired all the rights they expected, see *Williams v. Brown* (8), we are not aware of any law which makes the chapel a chapel of ease or confers the right to present to it upon the plaintiff in spite of their intentions and wishes. In *Dixon v. Metcalfe or Kershaw* (3), the chapel, although not originally intended to be a chapel of ease, had in some way become so, and had been consecrated as a chapel of ease; and the decision in favour of the vicar's right of presentation is rested entirely on this ground; moreover, in that case there was no real controversy between the vicar and the founders and their heirs or assigns, but only between the vicar and the inhabitants of the parish.

In *Farnworth v. The Bishop of Ohester* (4) the chapel was not consecrated as a chapel of ease in so many words, but all the rights of the vicar were reserved; and the decision was that the founders had no right to present to the chapel without the vicar's consent. The Court did not there determine that the vicar had himself the right of presentation to the chapel; and both Abbott, C.J., and Bayley, J., expressly said that the Court had not to determine that the vicar had any such right.

In this case the plaintiff may be entitled to prevent the nominee of the founders from officiating in the chapel without his consent until the provisions of the 14 & 15 Vict. c. 97. ss. 7 & 11, were duly complied with; and *Farnworth v. The Bishop of Ohester* (4) and *Williams v. Brown* (8) are authorities to shew that on the facts stated in the pleadings he is so entitled. But neither

these cases nor any other that we can find shew that the vicar has acquired the right himself to present to the chapel, and that is the right which he claims in this action.

Treating this action as a *quare impedit*, and assuming that *quare impedit* would lie for a chapel of this kind, the plaintiff could not sustain such action on the facts stated in his claim, for no seisin of the advowson of the chapel is shewn in the plaintiff. See *Comyns's Digest*, Pleader (3 I. 4). The cases of *The King v. Stafford* (6) and *The King v. The Bishop of Chester* (5) are in no way inconsistent with this view, for they merely shew that if there is a seisin *quare impedit* is the proper remedy and not *mandamus*. But after all this is only repeating in technical language the objections already pointed out as fatal to the plaintiff's claim.

This being our opinion, it hardly becomes necessary to deal with the plaintiff's demurrer to the 6th paragraph of the statement of defence. But if the plaintiff had shewn a good title to present to the chapel, we do not think the facts set out in the 6th paragraph of the defence would be an answer to his claim. A vicar's rights are not mere private rights which can be waived or renounced at his own will and pleasure; they are accompanied by important spiritual and other duties, in the performance of which all his parishioners are interested; and he cannot divest himself of these duties or the rights which accompany them by any such conduct as is imputed to him.

We think, therefore, the well-known principle of equity on which the defence set up is based, is not applicable to a case of this description. If, therefore, there had been nothing else in the case we should have allowed the plaintiff's demurrer to this 6th paragraph of the statement of defence.

On the ground, however, that the plaintiff has shewn no title to present to the chapel, we give judgment for the defendants with costs, but with liberty to the plaintiff to amend his statement of claim. To hold the contrary would lead to great practical inconvenience, and would only postpone the decision of the present controversy to the next avoidance

M'Allister v. The Bishop of Rochester, C.P.

of Plumstead church. The plaintiff's successor would not be affected by the plaintiff's conduct.

Judgment accordingly.

Solicitors—Hewitt & Alexander, for plaintiff;
Sandilands, Humphrey & Armstrong, for defendants.

[IN THE COURT OF APPEAL.]

1879. }
Nov. 15. } STEVENS v. SAMPSON.*

Libel—Privilege—Malice—Fair Report of Proceedings in a Court of Justice—Whether protected if sent with Malice.

The defendant, a solicitor, conducted a case in a County Court, and sent a report of the proceedings containing matter defamatory of the plaintiff to several newspapers for publication. In an action for libel the jury found that the report was a fair one, but sent with malice:—

Held (affirming the judgment of COCKBURN, C.J.), that no absolute privilege attached to the publication of a report, though a fair one, of proceedings in a Court of justice, and that the defendant, having been actuated by malice in sending the report, was liable in the action.

Appeal from a judgment of Cockburn, C.J., at the trial with a special jury.

Statement of claim that the defendant falsely and maliciously published a libel of the plaintiff in certain newspapers.

Defence (so far as is material), "that the words alleged to be published were and are a true and correct account and report of a certain trial in a Court of justice, and of certain words spoken in and during the sitting of the said Court in the course of the said trial, and were published for the public benefit and without malice."

The following were the material facts

* *Coram* Lord Coleridge, C.J.; Bramwell, L.J.; and Brett, L.J.

proved in evidence or admitted at the trial.

The plaintiff had been a party to an action in the Marylebone County Court, and the defendant had acted as solicitor for the opposite side.

After the proceedings had terminated the defendant drew up and sent a report of what had occurred to various newspapers in and round London. This report contained imputations upon the plaintiff, and was the libel complained of.

At the trial Cockburn, C.J., left three questions to the jury. Was the report a fair one? Was it published maliciously? and what were the damages the plaintiff had sustained by reason of the publication? The jury retired, and on their return the foreman said that they found for the plaintiff; damages 40s.

In answer to the Lord Chief Justice, the foreman said that the jury considered the report in substance a fair one, but that there had been "a certain amount of irregularity in the way in which it was sent to the papers." The Lord Chief Justice then said, "that was not sufficient to justify a verdict for the plaintiff, for it might still be that the report was sent for the purpose of furnishing information to the public in a matter upon which the defendant thought they ought to be informed; and that would not necessarily shew any malice or intention to injure the plaintiff, or it might be sent from a desire to injure him." The question was, did the defendant send the report honestly or from a desire to injure the plaintiff? The foreman said the jury thought it was sent "with a certain amount of malice." The Lord Chief Justice said that was a verdict for the plaintiff—adding, "you find it is a fair report sent maliciously"—and thereupon directed judgment to be entered for the plaintiff for the amount found as damages.

The defendant appealed.

Harris and Poulter, for the defendant. —On the finding the judgment should have been entered for the defendant. A fair report of proceedings in a Court of justice is absolutely privileged. The rule stated in *Hoare v. Silverlock* (1) and

(1) 19 Law J. Rep. C.P. 215.

Stevens v. Sampson (App.), Q.B.

Lewis v. Levy (2) is that a fair and impartial report of a trial in a Court of justice is protected, unless comment or extraneous matter is introduced. There is no authority on facts precisely similar to those in the present case, where there is a finding of the jury that the report was fair, but sent with malice. It is for the public interest that fair reports of proceedings in our Courts of law should be protected. Every member of the public has a right to be present, and if not present, to have communicated to him what actually occurs. If the privilege of the person who so communicates the proceedings were not absolute, many anomalies would arise. Every reporter for the newspapers, who furnished a correct report of a trial, if he had formerly entertained some ill-will towards the plaintiff, would run the risk of a jury finding malice, and a verdict against him. Suppose a fair report commenced by one reporter without malice, and continued by another, who had ill-will to the plaintiff, the report would be a libel, in respect of which the second reporter would be liable, whilst the first would be protected.

So also a master, who felt ill-will towards a servant on account of his conduct, would be liable if he honestly and truly gave the servant a bad character.

They also referred to *Smith v. Scott* (3) and *Andrews v. Chapman* (4).

Palmer and Ladbury, for the plaintiff, were not called on to argue.

LORD COLERIDGE, C.J.—This is a case which has given rise to considerable argument from the particular form of the verdict. The questions were perfectly properly left to the jury, and having retired they returned and found a verdict for the plaintiff, saying, at the same time, that the report was a fair one. [His Lordship here repeated what took place when the jury returned to Court—*vide supra*.] The Lord Chief Justice suggested two possible views for the jury—that the report might be honestly sent for the purpose of giving information to the

public on a matter on which they ought to be informed, or that it might be sent with a desire to injure the plaintiff—implying that in the first case the verdict should be for the defendant; in the second for the plaintiff. I take it that he meant that the jury were to say what was the motive in the man's mind when he sent the report. In the event they say that it was sent "with a certain amount of malice." You cannot have shades and degrees in malice; they found therefore that it was sent maliciously. The Lord Chief Justice said that was a verdict for the plaintiff, and entered judgment accordingly; the question before us is whether that judgment was rightly entered upon the findings of the jury. I think that it was; I apprehend that although difficult and interesting questions have been discussed in argument, the principles of law on which we ought to decide are simple. Like every other case of privilege the occasion of publishing a report, containing untrue and defamatory matter, of proceedings in a Court of justice, must be shewn to be privileged. But not only must the occasion be privileged, but it must be made use of *bona fide* and without malice. Both these elements must concur, and if either of them is absent, privilege, except in certain cases which I will deal with presently, does not attach. In this case the jury have found that *bona fides* is absent and malice present. Privilege, therefore, does not attach. No doubt there are occasions—and they were considered in the case of *Seaman v. Netherclift* (5)—where the privilege is absolute. Thus the privilege of persons taking part in judicial proceedings, the parties, the Judge, the counsel, the witnesses, is absolute. In all these cases it is thought better for the public interest that defamatory matter should be stated than that the person protected should be fettered. It is now attempted for the first time to limit the liability of writers in newspapers in the same manner. Mr. Poulter can give us no authority in support of his contention. I am not disposed to extend the bounds of privilege

(2) 9 E. B. & E. 537; 27 Law J. Rep. Q.B. 282.

(3) 2 Car. & K. 580.

(4) 3 Car. & K. 286.

VOL. 49.—Q.B., C.P. & EXCH.

(5) 46 Law J. Rep. C.P. 128; Law Rep. 2 C.P. D. 68.

Stevens v. Sampson (App.), Q.B.

beyond the limits already defined by the law; and in the absence of any authority I can see no reason for extending the absolute privilege which attaches in the cases I have mentioned to cases like the present. I think the appeal should be dismissed.

BRAMWELL, L.J.—I am of the same opinion. The publication in this case is of a libel, a defamatory publication of the plaintiff, holding him up to hatred, contempt and ridicule. The defence set up is privilege—a word often used very loosely and inaccurately. However, one can understand what is meant by privilege in this case; it is said that this was a publication of proceedings in a Court of justice; that the public has a right of entry to the Court, and a right to a communication to them of the proceedings, and that the defendant, as one of the public, is entitled to communicate the proceedings to the others. That is the ground of the defence, but the defendant must shew that he acted within that privilege. In effect it has been found that he acted from some other motive. The jury, I think, have found that the defendant did not act under this privilege—that he had not in his mind, when he sent the report, the notion that the public had a right to have made known to them, and so did make known to them, the proceedings in the County Court, but that he acted from a desire to injure the plaintiff. Various cases have been put in argument. It is said, suppose a master is applied to for the character of his servant, and the master bearing ill-will to the servant because of his conduct, honestly and truly gives him a bad character. But I think that if what is said by the master is said *bona fide*, it must be taken to have been said under a privilege conferred by the servant himself, and that in that case, although there was ill-will—malice if you like—in the mind of the master, he must be taken to have said what he did say in consequence of the request made by the servant that his master should truly tell all he knew of him. No amount of ill-will would make the master liable if his answer to the enquiries was honest. Whether the privi-

lege would apply if he spoke the words after the servant was engaged is a different question which might receive a different answer. So in the case of a newspaper report, the author must act under the privilege he is claiming. I may say that this is not a question of the public press. If the defendant could justify himself here, he could justify himself just as well if the report complained of had been published in a pamphlet and distributed by him. He would be in the same plight then as now. I do not think the public press has any peculiar privilege. But it is said, suppose an ordinary reporter for the public press happened to entertain malice against a person who appeared in a Court of justice, would he be liable for the publication of a fair report of the proceedings? The answer is, I think, that in such a case he ought to be taken to have acted within the privilege—he has a duty to perform with respect to reporting the proceedings. I do not desire to decide the point, but I see a great distinction between such a case and the present one, where the defendant is an entire volunteer, and ought not, therefore, to be deemed to be acting within the privilege. The jury having found that he did not act within the privilege he claims, I am of opinion that he is liable to the plaintiff in this action. I have great misgivings whether the jury should have found the verdict they did, but having found it, I think the judgment should be affirmed.

BRETT, L.J.—I am of the same opinion. We must take this verdict to mean that the defendant did not send the report merely for the purpose of furnishing the public with information in respect of matters on which they ought to be informed, but that he sent it with a certain amount of malice in the sense that he desired to injure the plaintiff by sending it.

It seems to me that wherever privilege is relied upon in answer to an action for libel the defendant is bound to prove, first, that the occasion of publishing the libel was privileged, and secondly, that he used the occasion in the privileged way. He must shew that he used the

Stevens v. Sampson (App.), Q.B.

occasion *bona fide* and without malice. If he fails to shew that, he fails to shew that he used the occasion in the privileged way. If a report in a newspaper or elsewhere is on a subject of general interest to the public, the occasion of publishing it is privileged, but the defendant must still shew that he used it in the privileged way. The report must be a correct one, it must be made *bona fide*, but it is not sufficient merely to prove that; he must also shew that the report was made without malice in fact.

I think the present case comes within the general rule. No authority has been cited to shew why it should not. The only reason given for taking it out of the general rule is, that the case is an exceptional one, but there is no authority to shew that it comes within the exceptions which have been named where the privilege is absolute. I am therefore of opinion that the defendant has failed to prove the plea of privilege which he has placed upon the record.

Judgment affirmed.

Solicitors—T. Johnson, for plaintiff; the defendant in person.

average charges, covered by the policy, amounted to the sum of 3,178*l.* 11*s.* 7*d.* The plaintiff paid in addition 519*l.* for salvage and general average expenses. The value of the ship, which was an old one, was much greater after the repairs than before the damage was suffered. In an action on the policy, the defendants contended that the loss was to be estimated by the depreciation of the ship as a saleable chattel, and not by the cost of the repairs; and also that in the case of a partial loss the assurer could not be liable for more than a total loss with benefit of salvage:—

Held, that the measure of damages, where the shipowner elected to repair, was to be ascertained by the cost of repairs less the proper deduction of one-third new for old, even though the result might be to make the underwriters liable for more than a total loss with benefit of salvage. Held also, that salvage and general average expenses could not be recovered under the suing and labouring clause.

This was an appeal from a judgment of the Court of Appeal (reported 47 Law J. Rep. Q.B. 534), by which a judgment of the Queen's Bench Division (reported 46 Law J. Rep. Q.B. 715) was partly affirmed and partly reversed.

The facts were stated in a Special Case, which is set out at length in the report of the proceedings in the Queen's Bench Division. They also fully appear in the judgment of Lord Blackburn.

The Queen's Bench Division held that the measure of damages, where the shipowner elected to repair, was the cost of repairs less one-third new for old, even though the result were to make the underwriters liable for more than a total loss with benefit of salvage. They also held that salvage and general average expenses could not be recovered under the suing and labouring clause in addition to the full amount for which the ship was insured.

Both parties appealed; and the Court of Appeal affirmed the decision of the Queen's Bench Division on the first point, and reversed it on the second. The appeal of the defendants was dismissed, and that of the plaintiff allowed.

The defendants appealed.

Swan Whetworth 492962403.
The Eactano C. Maria 5729054.7.

[IN THE HOUSE OF LORDS.]

1879.

July 15, 18, 31.

AITCHISON AND ANOTHER
 v. LOHRE.

Marine Insurance—Policy—Partial Loss—Cost of Repairs to Ship—Measure of Damages—Suing and Labouring Clause—Salvage Expenses—Liability of Underwriter.

The plaintiff effected a policy for 1,200*l.* with the defendants on his ship, valued at 2,600*l.*, against the usual sea risks on an out and home voyage. The policy contained the usual suing and labouring clause. The vessel suffered damage on the voyage, and was repaired. The cost of the repairs, after the usual deduction of one-third new for old, together with certain particular

Aitchison v. Lohre, H.L.

Benjamin and J. C. Mathew, for the appellants.—The first question to be decided is whether an insurer can recover more on a partial than on a total loss. Can the full amount for which a ship is insured be recovered for repairs, the insurer not giving up the ship by way of salvage as upon a total loss?

Between the parties to a valued policy the agreed value is always to be taken as the real value. If it costs the whole of that amount to repair the ship, that is a total loss—*Phillips on Insurance*, Par. 1422, 1748.

The contract of insurance is a contract of indemnity, and any departure from the principle of indemnity by allowing the assured to make a profit out of his loss makes the interest of the assured opposed to that of the underwriters, and leads to bad results—*Émérigon, Traité des Assurances*, c. 1. s. 4.

If the assured elects not to repair, he can only recover what he has lost. If he elects to repair, there is the conventional rule which takes the cost of repairs, less one-third new for old, as the measure of his loss. But that rule has been laid down for the benefit of underwriters to prevent the assured, on the pretence that the ship was as good as new, claiming the whole cost of repairs. It is not to be applied for the benefit of the assured, so as to enable him to get more than an indemnity for what he has lost, especially when the cost of repairs is out of all proportion to the loss actually sustained. Besides, here the assured has not repaired the ship; he has practically made a new ship of a much better class, using the old one as materials for the construction. The true measure of the damage sustained will be the difference between the value of the ship before, and her value after the loss.

The other question is, whether the assured can recover for salvage under the suing and labouring clause, in addition to the full sum for which the ship was insured. That clause covers a great deal which the assured would be bound to do in its absence, but it also applies where after abandonment the assured incurs expense to recover the salvage for the

benefit of the underwriters—*Kidston v. The Empire Marine Insurance Company* (1). But where salvors bring a ship to port, and there is a partial loss, the salvage charges would be part of the partial loss, and could not be made additional—*Arnould on Marine Insurance*, p. 1004 (5th ed.). The underwriters derive no benefit from the payment. The salvors, too, are mere volunteers, in no sense the "factors, agents or assigns" of the assured. They have no claim against anyone for their services, but only a right *in rem*, a lien upon the ship in case they succeed in bringing her to harbour.

Cohen and Hollams, for the respondents, were directed to confine themselves to the question as to the suing and labouring clause.—There may be a liability in underwriters exceeding the amount of their subscription, when there is first a partial, and then a total, loss upon the same voyage—*Lidgett v. Secretan* (2).

If more can be recovered it must be under the suing and labouring clause, which has been held to cover payments for repairs—per Lord Ellenborough in *Livie v. Janson* (3). But if that clause applies to repairs, *a fortiori* it applies to salvage—*Phillips*, Par. 1472, and the American case there cited, *Barker v. The Phoenix Insurance Company* (4).

The ship was in the possession of the salvors, and could not be recovered from them without the payment of the salvage charges. Those charges were therefore expenses incurred in and about the "recovery" of the ship just as much as if she had been captured by an enemy. The suing and labouring clause is a separate contract, and should be looked at entirely apart from the rest of the policy.

Newman v. Walters (5) shows that salvage can be recovered at common law. As to whether success is necessary for its recovery, and also whether it falls within the suing and labouring clause, see the

(1) 35 Law J. Rep. C.P. 250; 36 Law J. Rep. C.P. 156; Law Rep. 1 C.P. 535, 2 C.P. 357.

(2) 40 Law J. Rep. C.P. 257; Law Rep. 6 C.P. 616.

(3) 12 East, 648, see p. 655.

(4) 8 John. N.Y. 307.

(5) 3 Bos. & P. 612.

Aitchison v. Lohre, H.L.

American case, *Watson v. The Marine Insurance Company* (6).

J. O. Mathew, in reply, referred to *Émérigon, Traité des Assurances*, c. 12. s. 41.

LORD BLACKBURN.—In this case the respondent insured 1,200*l.* on a ship, the *Crimea*, valued in the policy at 2,600*l.*, with the appellants' company, on a voyage out and home. The policy was against all the usual perils, and contained the usual suing and labouring clause.

The appellants paid into Court 1,080*l.*, being at the rate of ninety per cent. on 1,200*l.*, and the question was whether, under the circumstances stated in a Special Case, this sum was sufficient, or if not, how much more the plaintiff below (the respondent in this House) was entitled to recover. The Queen's Bench Division was of opinion that the amount recoverable was 1,200*l.*, or 100 per cent., and gave judgment for 120*l.* beyond the amount paid into Court. Both sides appealed, and the Court of Appeal was of opinion that the sum recoverable was 100 per cent. in respect of the direct damage to the ship, and a farther percentage in respect of the salvage and general average charges. The record was so imperfectly drawn up that it does not appear on it what was this farther percentage. The counsel at the bar of this House agreed that if the judgment of the Court of Appeal was affirmed, that percentage should be some rate which they agreed on between themselves. Some anxiety was expressed lest it should be supposed that in sanctioning this agreement this House would determine some question of principle which was given up by one side or the other as of no practical importance in this case, though it might be of importance in other cases. The House certainly determines no such point, and indeed was never informed what this point was.

It appears from the statements in the case that the *Crimea* on the voyage home during the month of January encountered a succession of stormy weather, and in consequence of the perils of the seas great damage was done to her, and she was re-

duced to a leaky and water-logged condition. It appears, incidentally, that some general average had arisen, for a proportion of which the ship was liable. The case then states that "On the 30th of January, the ship, being then in great danger of being completely lost, and being without fresh water or provisions, and in a helpless condition and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her in tow, without any agreement being come to as to remuneration for the service, and took her into Queenstown, and on or before the 11th of March she was placed in safety near the wharf of the Victoria Dry Dock Company."

It may be as well here to point out that the liability of the articles saved to contribute proportionally with the rest to general average and salvage in noways depends on the policy of insurance. It is a consequence of the perils of the sea, first imposed, as regards general average, by the Rhodian Law many centuries before insurance was known at all, and, as regards salvage, by the maritime law, not so early, but at least long before any policies of insurance in the present form were thought of. No claim for remuneration from the owner is given by the common law to those who preserve goods on shore, unless they interfered at the request of the owner—*Nicholson v. Chapman* (7). There Chief Justice Eyre, in delivering the considered judgment of the Court, says that in respect of salvage, "the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien on the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence, and the most strenuous exertions of the mariner, cannot protect them. When goods are thus

(6) 7 John. N.Y. 57.

(7) 2 H. Black. 254.

Aitchison v. Lohre, H.L.

in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilised and commercial countries not only the propriety but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service. . . . Such are the grounds upon which salvage stands; they are recognised by Lord Chief Justice Holt in *Hartford v. Jones* (8).

The *Crimea* had been, before these disasters, worth 3,000*l.*; as it then lay in a damaged condition it was of the value of 998*l.* The damaged ship was liable to make good its proportion of the general average and of the salvage incurred for the preservation of ship, freight and cargo, and that proportion of the two taken together amounted to 519*l.* 0*s.* 1*d.*

I think it convenient to pause here and enquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances. If such an uninsured owner chose to sell the hull as it lay, his position would be this: he would lose the value of the ship, 3,000*l.* He would receive 998*l.*, the value of the hull, less 519*l.*, the amount of general average and salvage which was a charge on the hull, or 479*l.*, and his loss would be 2,521*l.* And if the hull had been so damaged that to repair it would have cost more than the ship would, when repaired, have been worth, the prudent shipowner would have taken this course. But in fact he not only could but did repair it, and by an outlay of about 5,600*l.* (part of which, about 1,200*l.*, was for new works), he made the ship worth 7,000*l.*, and then (still assuming him to be uninsured) his position would have been this:—original value of ship, 3,000*l.*; salvage and average, 519*l.*; expenditure, 5,600*l.*; total, 9,119; value of repaired ship, 7,000*l.*; loss, 2,119*l.*, to which are to be added some particular charges amounting to apparently 235*l.*, bringing the loss up to 2,354*l.*

The contract of insurance is a contract

of indemnity, and if it could be worked out as a perfect indemnity, it would follow that ninety per cent., the sum paid into Court, which on 3,000*l.* amounts to 2,700*l.*, was more than sufficient. But, as was said in the opinion of the Judges in *Irving v. Manning* (9), "A policy of assurance is not a perfect contract of indemnity; it must be taken with some qualifications." One of those is commonly expressed as the allowance of one-third for new for old, and it is on the application of that to the present case that the first question arises.

The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so. But if the ship can be practically repaired within the meaning of that phrase, as explained by Mr. Justice Maule in *Moss v. Smith* (10), the assured has not the option to treat it as a total loss, and on the figures stated in the Special Case the respondent here had not that option. He may repair the damage done by the peril insured against, and if he does so the damage would, in general, be what would be the reasonable cost of making the ship as good as it was before. The actual outlay on the repairs, if *bona fide* made, would be strong evidence what the reasonable cost was, and if the ship was by that outlay made more valuable than it was before the accident, which would generally be the case with an old ship, there should be an allowance for this increased value. It is obvious that, applying this, there would be great room for disputes and litigation on the adjustment in every case where repairs were executed, whether the repairs were extensive or not.

In the present case, where the ship was fifteen or sixteen years old, and the damage was extensive, it is probable, as is said in the judgment of the Queen's

(9) 1 H.L. Cas. 287.

(10) 9 Com. B. Rep. 94; 19 Law J. Rep. C.P. 225.

(8) 1 Ld. Raym. 393.

Aitchison v. Lohre, H.L.

Bench Division, that the extent to which it was benefited by having new materials instead of old was much more than one-third of the expenditure, probably two-thirds might be nearer the fact. But I think that it is clearly established by a long course of practice, and by many decisions, that, for the purpose of avoiding the expense of litigation, a custom of trade has arisen which, though not written in the policy, is implied in it. The parties to a policy of insurance on a ship tacitly agree that, in case of repairs fairly executed to replace damage occasioned by one of the underwritten perils to a ship of the age and character to which the custom applies, the loss shall be estimated at two-thirds of the cost of the repairs, neither more or less. It is self-evident that this can very seldom be the accurate measure of the loss. In most cases the rule operates favourably for the underwriter, as the shipowner in spending money on repairs seldom benefits his ship to the extent of one-third, and in such cases the payment of the sum so fixed by custom falls short of a perfect indemnity. In some cases, and this is one, the benefit to the ship exceeds one-third, and there the assured receives more than a perfect indemnity. But if it were lawful to open up the question and depart from the rule in any case, the whole object of it, which is to avoid litigation and expense, would be frustrated. No authority has been cited, and as far as my knowledge goes, no authority exists, for any qualification of the general rule which would take this case out of it. If the rule applies, two-thirds of the expenses of repairing the sea damage are to be charged to the ship. The expenses of making additions to the ship are not of course to be charged; they are not in any way a consequence of the perils of the sea. The arbitrator has found that the expenses to which the rule is applicable were 4,414*l.* 18*s.* 11*d.* This finding is binding. Now two-thirds of this sum is in round numbers 2,943*l.*, or very nearly 100 per cent. on 3,000*l.* According to the finding in one paragraph there are other particular charges on the ship the nature of which is not stated, which bring up the loss to 3,178*l.* 11*s.* 7*d.*,

which is more than 100 per cent., and if the salvage and general average expenses are added, the loss will be very considerably more than 100 per cent.

In *Phillips on Insurance* (Par. 1743), that very experienced author finds great fault with the decision of the Court of Common Pleas in *Le Cheminant v. Pearson* (11) (so long ago as 1812), that more than the subscribed amount may be recovered where there are successive losses, which he seems to think can only be supported on the ground of inveterate practice. No question, however, of that kind arises here, for this is a case of one single loss, as to which he says that we know "the liability of insurers in a single loss is without question limited to the amount insured, and the expense of suing," &c. No authority in contradiction to this was cited, and I am not aware of any, and the position thus laid down in *Phillips* was adopted by all the Judges below, who consequently limited the amount recoverable under the policy, as far as it related to the indemnity for the underwritten perils, to 100 per cent., or in this case 1,200*l.*, or 120*l.* beyond the amount paid into Court. I think it clear that they were right both in going so far, and also (which I think was scarcely contested at the bar) in not going farther. On this, the first question, on which both the Courts were agreed, the judgment below should be affirmed.

But there is a second point on which the Courts below differed. The policy contains the usual clause as to suing and labouring. The Queen's Bench Division was of opinion that the salvage, or general average expenses, described in the case, did not come within that clause. The Court of Appeal was of a different opinion. In the judgment delivered by Lord Justice Brett, it is said that "the general construction of the clause is that if, by perils insured against, the subject-matter of insurance is brought into such danger that, without unusual or extraordinary labour or expense, a loss will very probably fall on the underwriters, and if the assured or his agents or servants exert unusual or extraordinary

Aitchison v. Lohre, H.L.

labour, or if the assured is made liable to unusual or extraordinary expense in or for efforts to avert a loss which, if it occurs, will fall on the underwriters, then each underwriter will" &c. Now if the part of this which is above emphasised is correct, there can be no question that both salvage and general average are unusual expenses to which the assured have become liable in consequence of efforts to avert a loss. And such seems to be the opinion of the editor of the last edition of *Arnould on Insurance*, who says (p. 778, 5th ed.) that salvage "is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the sue and labour clause;" but for that position he cites no authority, and though the Court of Appeal in this case agreed with him, I am unable to do so. With great deference to the Judges of the Court of Appeal, I think that general average and salvage do not come within either the words or the object of the suing and labouring clause, and that there is no authority for saying that they do. The words of the clause are that in case of any misfortune it shall be lawful "for the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of" the subject of insurance, "without prejudice to this insurance, to the charges whereof we the insurers will contribute." And the object of this is to encourage and induce the assured to exert themselves, and therefore the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents. It is all one whether the labour is by the assured or their agents themselves, or by persons whom they have hired for the purpose, but the object was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery by the assured of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour,

and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within the suing and labouring clause. But that is not this case. The owners of the *Texas* did the labour here, not as agents of the assured, and being to be paid by them wages for their labour, but as salvors acting on the maritime law, which, as explained by Lord Chief Justice Eyre in *Nicholson v. Chapman* (7), already cited, gives them a claim against the property saved by their exertions, and a lien on it, and that quite independently of whether there is an insurance or not; or whether, if there be a policy of insurance, it contains the suing and labouring clause or not. The amount of such salvage occasioned by a peril has always been recovered without dispute under an averment that there was a loss by that peril—see *Cary v. King* (12); and I have not been able to find any case in which it was recovered under a count for suing and labouring. I do not much rely on this, for it is very likely that such counts often were in the declaration, and that therefore no enquiry was made whether the loss was recoverable under one count or another; but at least there is no authority for the position that salvage (properly so called) was recoverable under that count.

There have been very few cases in our Courts in which it has become necessary to discuss the nature of the suing and labouring clause. *Kidston v. The Empire Marine Insurance Company* (1) is, I think, the only one in which there has been a recovery under it. There, however, all the extra labour was directly and voluntarily employed by the agents of the assured, and the charges were paid by them in consequence of this employment. In the very able and elaborate judgment of Mr. Justice Willes not a word can be found to countenance this extension of the construction of the clause beyond

Atchison v. Lohre, H.L.

what seems to me both its language and its object, and, except the passage introduced for the first time into Arnould by the present editor, I can find nothing in any text-book tending to support it. I therefore think that the judgment of the Court of Appeal should be reversed, and that of the Queen's Bench Division restored.

As there are cross-appeals, and neither party is completely successful, I should say that there should be no costs of either party either in the Court of Appeal or in this House, and that the respondent should have only the costs in the Queen's Bench Division as given by that judgment. I beg to move your Lordships to that effect.

THE LORD CHANCELLOR (EARL CAIRNS).—I have had the advantage of reading the observations which my noble and learned friend has just made in this case, and, concurring as I do entirely in the view which he has taken, I do not think it necessary to travel over the same ground again.

I will only make one observation with regard to salvage expenses. It appears to me to be quite clear that if any expenses were to be recoverable under the suing and laboursing clause, they must be expenses assessed upon the *quantum meruit* principle. Now salvage expenses are not assessed upon the *quantum meruit* principle; they are assessed upon the general principle of maritime law, which gives to the persons who bring in the ship a sum quite out of proportion to the actual expenses incurred and the actual service rendered, the largeness of the sum being based upon this consideration—that if the effort to save the ship (however laborious in itself and dangerous in its circumstances) had not been successful, nothing whatever would have been paid. If the payment were to be assessed and made under the suing and laboursing clause, it would be payment for service rendered, whether the service had succeeded in bringing the ship into port or not.

Now it may be said that that only goes to the amount sought to be recovered, but it appears to me to go

farther, and to go to the very principle upon which the attempt is made to recover the amount in question. It shews that the salvage expenses were not expenses incurred under the suing and laboursing clause by the owner of the ship, but were a payment which the ship, as an actual chattel, had to submit to by maritime law, and would be obliged to make good in proceedings against the ship *in rem*.

As regards the order which this House should be asked to make, I wish to point out to your Lordships that in the Court of Appeal there were an appeal and a cross-appeal against the decision of the Queen's Bench Division. There was an appeal by the underwriters, upon the ground that they ought not to have been made to pay the whole sum insured; and there was a cross-appeal by the shipowner in respect of these salvage expenses, which the Queen's Bench Division had not allowed. The appeal by the underwriters was dismissed with costs, and that decision appears to me to have been perfectly right. The cross-appeal by the shipowner in respect of salvage expenses succeeded, with costs, in the Court of Appeal. Your Lordships, I think, will reverse that decision, and of course that would dispose of the costs as to that cross-appeal. Then, inasmuch as there is only one appeal before this House—the appeal by the underwriters, who complain now both of the determination which has made them pay the 100 per cent., the full insurance, and also of that which has made them pay the salvage expenses; and as they will succeed, as I should think, upon one of those points, and fail upon the other, your Lordships will, I assume, think it right that there should be no costs of the appeal to this House. Therefore, what I should propose to your Lordships would be, that the judgment of the Court of Appeal, in so far as it varied the judgment of the Queen's Bench Division, should be reversed; that the judgment of the Court of Appeal, in so far as it dismissed the appellants' appeal against the judgment of the Queen's Bench Division, be affirmed; and that your Lordships should declare that the cross-appeal to the Court of

Aitchison v. Lohre, H.L.

Appeal ought to have been dismissed with costs, and order costs to be paid accordingly; and that there should be no costs of the appeal to this House.

LORD HATHERLEY.—I only desire to say that I entirely concur in the opinions which have been expressed by my noble and learned friends. I have had an opportunity of perusing the opinion which has just been delivered by my noble and learned friend opposite (Lord Blackburn), and having read it carefully, I may say that upon both the points of the appeal upon which he has touched I concur in the view he has taken, namely, that it is very clear that the damage done extends to 100 per cent., that is to say, extends to the whole amount of the money insured; and that it is equally clear, as it seems to me, that the suing and labouring clause was inserted by the underwriters for the purpose of securing the benefit of any pains that the shipowner might be inclined to take in preserving, for their benefit, as much as he possibly could preserve. But that does not apply to a case like the present, where the salvage seems to have been an ordinary sort of salvage, namely, a ship perceiving another at a distance and in a state of distress and coming to the rescue, no bargain being made. We were expressly told in the case that no bargain was made as to any remuneration which should be given, but it was rescued upon the simple and common principle of salvage. There does not appear to be any authority shewing it to be a case coming within the suing and labouring clause. I think, therefore, that the separation of the two points has been correctly made, and that your Lordships should concur on the one point in the judgment pronounced by both the Courts below, and on the other point in the judgment pronounced by the Queen's Bench Division, as distinguished from that pronounced by the Court of Appeal.

LORD O'HAGAN.—I also have had the advantage of perusing the very careful and exhaustive opinion which has been read by my noble and learned friend (Lord Blackburn). I entirely concur in

the substance of that opinion, and I feel that I could add nothing of material value to the reasonings and conclusions it has so well expressed.

I have had some grave doubts as to the second point, with reference to the operation of the suing and labouring clause, but upon the whole I do not see sufficient reason to differ from the views which have been adopted by your Lordships.

Ordered—That the judgment of the Court of Appeal, in so far as it varied the judgment of the Queen's Bench Division, be reversed.

That the judgment of the Court of Appeal, in so far as it dismissed the appellants' appeal against the judgment of the Queen's Bench Division, be affirmed.

Declared that the cross-appeal to the Court of Appeal ought to have been dismissed with costs; costs ordered to be paid accordingly.

No costs of appeal to this House.

Solicitors—Waltons, Bubb & Walton, for appellants; Hollams, Son & Coward, for respondent.

At Westminster 27th Nov. 1879. Commissioners 502.96.1488

[IN THE HOUSE OF LORDS.]

1878.	} PRYCE v. THE MONMOUTHSHIRE RAILWAY AND CANAL COMPANY.
Nov. 6.	
1879.	
April 7.	

Railway—Toll "not exceeding per ton per mile" so much—Right to charge for Fractions of Tons and Miles—Construction of Acts imposing Tolls on the Public—Practice of the House as to Costs when there is an Equality of Votes.

A railway company had power under their Act to impose tolls for the carriage of goods "not exceeding" a certain amount "per ton per mile." Where the distance traversed was over four miles, they were authorised to charge for each quarter of a mile in excess of integer miles, and to treat as a quarter of a mile any fraction beyond an exact number of quarters of a

Pryce v. Monmouthshire Rail. Co., H.L.

mile. There was no provision as to fractions where the distance traversed was less than four miles. The company was also authorised to make "a reasonable charge for the expense of stopping" where the distance traversed was less than four miles:—

Held, affirming the decision of the Court of Appeal, that the charge for stopping was not a toll within the meaning of the Railways Clauses Consolidation Act, 1845, ss. 93 and 95, requiring publication on a notice board.

Held, by the LORD CHANCELLOR (EARL CAIRNS) and LORD SELBORNE, in accordance with the decision of the Court of Appeal, that the company were entitled to charge rateably for fractions where the whole distance was less than four miles.

Per the LORD CHANCELLOR.—Where an Act grants a toll as payment for services rendered, it is not to be treated for purposes of construction as a taxing Act.

Held, by LORD PENZANCE and LORD O'HAGAN, that the Act ought to be treated as a taxing Act, and that the rule applied that in case of doubt that construction should be adopted which was most beneficial to the public; that power to charge for fractions, not having been expressly given, was not to be supplied by implication.

In cases of appeal to the House of Lords there are always two motions before the House, one, that the judgment under appeal be reversed, the other, that the judgment under appeal be affirmed, and the appeal dismissed with costs. When the votes are equal upon the first motion, the motion is lost. The second motion is not put, as it is assumed that it would be lost also. The judgment appealed from is therefore affirmed, but no costs are given.

This was an appeal from an order of the Court of Appeal affirming a decision of the Exchequer Division.

The action was brought by the respondent company to recover from the appellant and his partner, Theophilus Bevan, since deceased, the sum of 1,082*l.* 10*s.* 3*d.* for certain tonnages alleged to be due from the defendants to the company for the carriage of iron, coal and other merchandise on the plaintiffs' railway for various distances between

(amongst other places) Basselleg Junction and Newport, including a reasonable charge for "stopping;" such tonnages and charge being claimed by the plaintiffs under their Act of Parliament, 8 & 9 Vict. c. clxix. (Local and Personal), ss. 104, 105 and 134. The defendants tendered and paid into Court 515*l.* 14*s.* 6*d.*, and the action was continued to recover the balance, 566*l.* 15*s.* 9*d.*

The case was tried before Quain, J., at Gloucester on the 9th of April, 1875. The defendants by their counsel admitted for the purposes of the action that the amounts stated and claimed were correct, subject to the following contentions: first, that the plaintiffs were not, under the circumstances of the present case, entitled under their said Act to charge the defendants tolls for fractions of miles, and, second, that the plaintiffs were not entitled to charge tolls for "stopping" without having published the same on a toll board according to the Railways Clauses Consolidation Act, 1845, ss. 93, 95.

It appeared that the only toll-board exhibited, when the tolls and charges were demanded, contained on and after the 27th of May, 1873, but not before, the following notice:—

"Notice is hereby given, that on and after the 1st of June, 1873, a toll of 2½*l.* per ton, for the expense of 'stopping,' will be made in addition to the statutory maximum tolls payable for the distance traversed on all articles conveyed by the Monmouthshire Railway and Canal Company on their railway for a less distance than four miles, between the railway of the Brecon and Merthyr Railway at Basselleg and the second terminus of the Monmouthshire Railway and Canal Company at Newport, and that such toll is to be paid to the collector of tolls at this weighing machine."

It was admitted that if the plaintiffs were not entitled to charge for "stopping" before the date of the said notice, there was an overcharge in the amount stated by them to be due more than sufficient to cover the balance claimed. It was further admitted that if the plaintiffs were not entitled before the date of the said notice to charge for fractions of

Pryce v. Monmouthshire Rail. Co., H.L.

miles (the whole distance being under four miles), there was an overcharge sufficient very considerably to countervail, if not wholly to cover, the balance claimed.

By the company's Act, 8 & 9 Vict. c. clxix. (Local and Personal), s. 104, the company was authorised to demand any tolls for the use of the railway not exceeding the following (that is to say) :—

1. In respect of the tonnage of articles conveyed upon the railway, or any part thereof, as follows :—

For all sorts of manure, and all undressed materials for the repair of highways, and for all coals, culm, coke, ironstone and iron ore per ton per mile not exceeding three farthings, until the expiration of five years after the passing of this Act, and afterwards per ton per mile, not exceeding one half-penny."

Similar provisions followed relating to other goods, and to passengers and animals.

Sections 105 and 134 were as follows :

Section 105. "And be it enacted, that the following provisions and regulations shall be applicable to the fixing of such tolls, and also to the tolls payable for locomotive power; (that is to say)

"For articles or persons conveyed on the railway for a less distance than four miles, the company may demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading and unloading.

"For a fraction of a mile beyond four miles, or beyond any greater number of miles, the company may demand tolls on merchandise for such fraction in proportion to the number of quarters of a mile contained therein, and if there be a fraction of a quarter of a mile, such fraction shall be deemed a quarter of a mile; and in respect of passengers, every fraction of a mile beyond an integral number of miles shall be deemed a mile. For a fraction of a ton, the company may demand toll according to the number of quarters of a ton in such fraction, and if there be a fraction of a quarter of a ton, such fraction shall be deemed a quarter of a ton. With respect to all articles the

weight shall be determined according to the usual avoirdupois weight."

Section 134. "And be it enacted, that the company may demand for the use of steam-engines or other moving power, when provided by them for propelling carriages, whether on their own railways or on any other railway, any tolls not exceeding the following;" (that is to say,)

"For each passenger or animal, two (*sic*) per mile; for coals, culm, coke, ironstone and iron ore, and for iron, lead, tin and tin plates (except nails, utensils or other articles of merchandise), three-eighths of a penny per ton per mile; and for other goods, one halfpenny per ton per mile; provided nevertheless that the company may demand and receive any tolls they may think fit for such moving power in respect of such small parcels, for which they are hereinbefore authorised to take tolls for the use of the railway without limitation as to amount."

Section 146, so far as material, was as follows :—

"And it be enacted, that, unless there be something in the subject or context repugnant to such construction, the following words, whenever they may be found in this Act, shall have the meanings hereby assigned to them; (that is to say,)

"The word 'toll' shall include any charge or payment for any passenger, animal or goods conveyed upon any canal or railway, whether for the use of the canal or railway, or for moving power, or for the use of carriages."

Quain, J., decided in favour of the plaintiffs on both points, and directed a verdict for them for 566*l.* 15*s.* 9*d.* A further point was taken by the plaintiffs, that the defendants were estopped from raising the question as to fractions of miles by the judgments of the Courts of Exchequer and Exchequer Chamber, in which the same question had been decided on a special case between the same parties amongst others. But this point was left undecided.

A rule for a new trial was obtained on the 21st of April, 1875, in the Court of Exchequer, which came on for argument before the Exchequer Division in January

Pryce v. Monmouthshire Rail. Co., H.L.

1876. The Court held that the defendants were estopped from raising the question of fractions of miles, and also that the "stopping" charge was not a toll within the Railways Clauses Consolidation Act, 1845, ss. 93 and 95; and they discharged the rule with costs.

On appeal to the Court of Appeal it was held by James, L.J., Baggallay, L.J., and Mellish, L.J., that the defendants were not estopped from raising their contention as to fractions of miles, but upon the merits by James, L.J., and Baggallay, L.J., *dissentiente* Mellish, L.J., that the plaintiffs were entitled to charge for such fractions. All three Judges were in favour of the plaintiffs on the other point. The judgment of the Exchequer Division was therefore affirmed.

Theophilus Bevan subsequently died. The other defendant appealed.

H. Matthews and Jelf, for the appellant. —The company can only charge for integer miles on a distance of less than four miles. *Rice v. The Dublin and Wicklow Railway Company* (1) is an authority in the appellant's favour. That was a decision on 7 & 8 Vict. c. 85, sect. 6, which authorised a charge "not exceeding one penny for each mile." In section 12 of the same Act the words "per" and "for each," are used interchangeably. The Act, 21 & 22 Vict. c. 75, was passed in consequence, to enable the companies to charge rateably for fractions. Where it was intended that the companies should be entitled to charge for fractions, power was expressly conferred in 27 & 28 Vict. c. 121, schedule, and the fractions they might charge for specified. The same is done in the Act here in question with respect to distances greater than four miles. So in the schedule to 5 & 6 Vict. c. 79, which imposes the railway passengers' duty, the words used are "a duty at and after the rate of 5*l.* for 100*l.*" The rule of law contended for has been uniformly applied to contracts—*Rea v. Burns* (2), *Ingledew v. Cripps* (3). The

Act here is a private Act obtained by the company, and imposing a burden upon the public; and the rule in interpreting such Acts is, in case of doubt, to adopt the construction which is most beneficial to the public—*The Stockton and Darlington Railway Company v. Barrett* (4). The charges for stopping only apply for distances under four miles, and serve as a compensation for the absence of power to charge for fractions. As to the objection, that the company might be required to carry for a distance less than one mile for nothing, it is to be observed that the company are common carriers for hire, and are not bound to carry except for hire, and, secondly, that they may place their stations where they please; and, in fact, there are no two stations on the part of the line in question which are less than a mile apart. The case of *The Medway Navigation v. Brook* (5) is distinguishable in that respect, because barges might be loaded at any part of the canal, but though a presumption thus arose as to distance, as was said in the judgment of Blackburn, J., "it required language to be used with reference to the quantity to make it clear and intelligible," and the company were expressly authorised to charge, "so in proportion for any greater or less quantity." If proportional charging is allowed, the company might charge per inch, per yard, and the freighter would be required to tender the exact amount, *e.g.* $\frac{1}{1780}$ of a penny.

Then the "stopping" toll ought to have been set out on the notice board. It is true that the Act says the company may make a "reasonable charge," and does not call it a "toll." But the company were entitled to make their charge by way of a toll, and have chosen to do so. If so, they were bound to give notice of it, as of other tolls.

Benjamin and A. T. Lawrence, for the respondents.—The object of the provisions making a distinction between distances over and distances under four miles, was to prevent the company from losing on short distances. They are accordingly allowed

(1) 8 Ir. C.L. Rep. 160.

(2) 2 Lev. 124.

(3) 2 Lord Raym. 814.

(4) 7 Man. & G. 870; 11 Cl. & F. 500.

(5) 33 Law Times, N.S. 843.

Pyper v. Monmouthshire Rail. Co., H.L.

to charge for the expense of stopping where the distance is less than four miles. In long distances the profit will be sufficient to cover that expense; but the Act adds, as a further compensation, the right to charge for fractions of quarters of a mile as a quarter of a mile. For distances under four miles the company may only charge for the actual distance traversed.

The words "not exceeding" imply that there is to be a rateable charge, and in section 106 the toll is called a "rate." As to the question of the notice board, the stopping charge is not a toll but merely a payment for expense incurred.

H. Matthews, in reply.

Cur. adv. vult.

THE LORD CHANCELLOR (EARL CAIENS).—The cases which have decided that taxing Acts are to be construed with strictness, and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably amount little more than this, that, inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the tax-payer had a right to stand upon a literal construction of the words used, whatever might be the consequence. I cannot think that this principle applies to any considerable extent, where the payment spoken of in the Act of Parliament is a payment to be made in return for services rendered, and above all in a case where Parliament does not stop in to give the right to payment, but rather to moderate and limit a right to payment which otherwise might exist without limit, or, at all events, with only such limits as would be placed upon it by a *proportionate assessment*.

Approaching the construction of the 104th section of the Act of the respondents from this point of view, it is obvious that it intended to deal with the remuneration of the company for service per-

formed, namely, the supplying and maintaining a railway for the passage of carriages, and, farther, the conveyance of articles of merchandise upon the railway in carriages belonging to the company itself. The first words are affirmative: "It shall be lawful for the company to demand;" but these are immediately followed by negative words, "not exceeding," and the result of the whole is to substitute for the remuneration which the respondents might have obtained, either by agreement in particular cases, or by asserting a right to be paid for the value of their services a maximum payment for the use of their railway and their service as carriers, which payment they are not to be at liberty to exceed. The payment fixed by the Act of Parliament must, therefore, be in its nature analogous to and of the same character as that which the respondents would have required if the amount of their demand had not been limited, and it is obvious that they would have required and would have been entitled to require payment for a part of a mile as well as for a completed mile. It appears to me, therefore, that unless the right to require payment for a part is excluded by words which are reasonably free from doubt, it must be assumed that it has not been excluded. It would be foreign to the whole object of such clauses to require that a company should carry merchandise for a part of a mile, not for a sum limited in amount, but for no sum whatever. The words of the section, however, appear to me in no wise to justify the contest of the appellants. They point, as it seems to me, to a rateable charge, rateable *quoad* the ton and rateable *quoad* the mile; and although the word "rate" is not expressly used in the 104th section, it is used in the 106th, where the words are the "rate of tolls hereby prescribed," that is, prescribed in the 104th section.

This, I think, being the reasonable construction of the 104th section, the 106th section does not in any way cut it down or alter it. It certainly does not in words profess to do so, and with regard to the distance beyond four miles, the power is not to charge for fractions, but for fractions in proportion to quarters,

Pryce v. Monmouthshire Rail. Co., H.L.

and to charge for a fraction of a quarter as a whole quarter. To authorise this to be done express words were clearly necessary.

On this part of the case, which was the only part on which at the time of the argument your Lordships entertained any doubt, I think the decision of the Court of Appeal was right, and that the appeal should be dismissed.

LORD PENZANCE.—There were two questions raised in this case.

As to one of them, namely, the right of the company to make a reasonable charge for stopping, loading and unloading without publishing such charge on their toll-board, there was no difference of opinion in the Court below, and is none, I believe, in your Lordships' House.

The other point is one of more difficulty. The respondents were empowered by Act of Parliament (8 & 9 Vict. c. clxix.) to charge tolls for the carriage of goods at charges to be fixed by them, not exceeding a certain sum per ton per mile, and the question is whether this power enables them so to fix these charges as to include a rateable payment for fractions of a mile when the distance travelled is within four miles.

The argument mainly urged in favour of this right was this—that if this right be not accorded, the company might carry a number of tons for some distance less than a full mile, or complete number of miles, without being entitled to any remuneration for so doing. And your Lordships are asked to conclude that the Legislature could not possibly have intended such a result. The weight of this reasoning was perhaps diminished in the course of the argument, during which it was pointed out that the respondents are not really bound to carry any goods, except as carriers “for hire,” and that if any work is done by them as carriers, in respect to which no toll as such is payable, they would be entitled to payment for it on a “quantum meruit,” and farther, that there is a clause in the general Act relating to railways under which they might in such cases have relief.

But however this may be, on which I give no opinion, I think the principle on which clauses such as those now in question have hitherto been construed in Courts of justice is undoubted.

That principle was stated very clearly in your Lordships' House in the case of *The Stockton Railway Company v. Barrett* (4) by Lord Brougham as follows:—“It must be observed that ‘in dubio’ you are always to lean against the construction which imposes a burden on the subject, the intention of the Legislature to impose a tax must be clear; it was so held in the case of *The Hull Dock Company v. Broune* (6), which both parties in this case relied on for other purposes, and which the plaintiffs in error especially cited in support of their view. ‘These rates,’ said Lord Tenterden, ‘are a tax upon the subject, and it is a sound general rule that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the Legislature to impose it.’ The like law had been laid down by the Court of King’s Bench in the case of a company claiming against the public, *Gildart v. Gladstone* (7), where Lord Ellenborough said, ‘If the words would fairly admit of different meanings, it would be right to adopt that which would be more favourable to the interests of the public and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they were to receive, and because the public ought not to be charged unless it was clear that it was so intended. Many other cases might be cited which concur in the same reasonable view.’ Lord Lyndhurst, the only other peer addressing the House, relied upon the same principle of construction, and in like manner based his judgment upon it.

No doubt, in times now past, there was a much greater tendency in Courts of justice than at present, to frame and act upon abstract rules for the construction of statutes, and the change has probably

(6) 2 B. & Ad. 43, 58.

(7) 11 East, 675, 685.

Pryce v. Monmouthshire Rail. Co., H.L.

been beneficial. But I am unwilling to accept the gradual relaxation of some highly technical rules as a reason for abandoning a principle such as that above quoted, which rests, I think, on a sound basis of reason and fairness. Acts of Parliament such as that under consideration are framed and offered to Parliament by the companies who are asking for powers and privileges which the common law does not give them. They take power to make a railway and other works over the lands of other people, and that power is only conceded to them upon the footing that it is for the benefit of the public as well as themselves. This benefit they profess to secure to the public by giving the use of the line to all comers, or undertaking to carry their goods, upon payment of certain charges or tolls. The nature and limits of these tolls and charges they fix for themselves, and submit them to the Legislature in their bill expressed in their own language, and I think it is a fair and reasonable thing to say to them, that by the language of that bill, when it becomes law, they are strictly bound.

If the language of their clauses, strictly construed, puts them at any disadvantage in their dealings with the public which the Legislature did not intend, it is the fault of those who had the opportunity of insisting upon language which would adequately express that intention; and they are asking Courts of justice to tread on dangerous ground, as it seems to me, when they seek to supply a deficiency in the actual language of legislation by what they assert to be a reasonable intendment to be inferred from the probabilities of the case. It may well be that in dealing with the Legislature a charge, reasonable enough in itself in one direction, was surrendered by the company in consideration of benefits secured in lieu of it in some other direction; and in this state of things, unless the clauses as they stand do not admit of any reasonable meaning at all, without the addition of something else which has not been expressed, I think the rule hitherto established and acted upon of giving effect to the language strictly construed, and nothing more, is one that ought to be adhered to.

What, then, is the language of the clauses in question? The 104th section of 8 & 9 Vict. c. clxix., confers upon the company power to demand any tolls "not exceeding the following (that is to say), in respect of the tonnage of articles conveyed upon the railway or any part thereof, for all coals per ton per mile not exceeding three farthings."

The form which this clause takes, therefore, is that of a permission to fix their own tolls, followed by the expression of a limit which they are not to exceed. In construing such a clause no difficulty can arise, except such as may be found in construing the limit intended to be expressed. That limit is declared to be this, that the toll shall not exceed, "in respect of the tonnage" of the goods, a certain sum "per ton per mile."

It is obvious that there are no words here which are expressly applicable to anything but tons and miles. It is not said "at the rate of" so much per ton per mile, which would be the natural and obvious method of expressing a rateable charge, and there is no express mention of any payment for fractions. The toll which is not to be exceeded is expressed as a toll "per ton per mile," without more; and the question is, whether a toll which, in addition to a sum "per ton per mile," provides payment for parts or fractions of a mile, does not exceed such a toll? I confess that I think that it does. I have not failed to consider with great care the distinction put forward by Lord Justice James in the Court of Appeal. He expressed himself satisfied that "if the words had been giving them for the use of the railway 'a penny per ton per mile,' they could not probably have charged a *pro rata* sum for a fraction; there would have been no words in the grant giving them a halfpenny for half a mile, and the absence of those words could not probably have been supplied by implication." So far, then, the Lord Justice's opinion coincides with that which I have just expressed as to the exclusion of any rateable charge in the definition, strictly construed, of the toll which is not to be exceeded. "But," says the Lord Justice, "the words enable them to fix their own charge within certain limits for

Pryor v. Monmouthshire Rail. Co., H.L.

the use of any part of their railway. Can it be said that in fixing a halfpenny for half a mile they have exceeded a penny per mile?" And he then goes on to express his opinion that in this view of the matter the limit had not been exceeded by the imposition of a fractional charge.

The Lord Justice's reasoning, as I understand it, is based upon the introduction into the clause of the words "or any part thereof," when speaking of the railway, which words he considers sufficient to confer upon the company the right to make a charge for part of a mile. But if the true meaning of the words "per ton per mile" does not include fractions of tons or miles, the application of these words by the context of the clause to the railway, "or any part thereof," can only, as it seems to me, extend the toll to such "part thereof" as consists of completed miles. In other words, it is, I think, more reasonable to limit the generality of the words "or any part thereof" by the definition of the toll which is precisely described, than to extend the toll beyond that description by words which may be easily so read as to conform to it.

In the course of the argument another distinction was insisted upon. It was urged that although power to take a specific toll described as "per ton per mile" would not include fractions, yet that a power to fix a toll which did not exceed a toll "per ton per mile" might be lawfully exercised by fixing a toll which did not include fractions. I feel unable to rest upon what seems to me so thin a distinction. Whatever a toll "per ton per mile" may mean, it must, I think, mean the same thing, whether it is expressed as a toll which may be taken, or as a toll which may not be exceeded; and agreeing as I do with the Lord Justice James, that such a definition, if found in the grant of a toll, would not carry with it a right to charge for fractions, so neither has it that effect when used as the description of a toll the limits of which are not to be exceeded.

So far upon the construction of section 104, if it had stood alone. But section 105 appears to me to point strongly in the same direction. In section 105 cer-

tain regulations are declared to be applicable to the fixing of the tolls under section 104. These regulations are, that for goods carried on the railway for a less distance than four miles the company may make certain special charges for stopping, loading and unloading, and that "for a fraction of a mile beyond four miles" the company may demand "for such fraction of a mile in proportion to the number of quarters of a mile contained therein; and if there be a fraction of a quarter of a mile, such fraction shall be deemed to be a quarter of a mile."

A broad distinction is therefore taken between a distance of four miles or less and any distance beyond four miles. For the longer distance power to charge for fractions of a mile is expressly given in the form which is usual in Acts relating to railways, while for the shorter distance no provision of the kind is made.

When to this it is added, that in the previous Acts of Parliament by which the works ultimately represented by this railway company have been authorised a provision has been uniformly inserted for fractions of weight or distance, and express powers granted for making them the subject of charge, the omission to confer any such power for this particular short distance of four miles, in respect of which other and unusual charges are authorised, looks very like an intention on the part of Parliament to withhold it. The Acts to which I refer are the 32 Geo. 2. c. 102. s. 91, which gives power to charge per ton per mile, "and so in proportion," &c., and the statute 42 Geo. 3. c. 115, which by section 28 gives express power to charge for fractions of a mile in a similar form to that which is found as applicable to distances beyond four miles in the statute now under discussion.

The conclusion, therefore, at which I arrive is this, that no express power has been conferred upon this company to fix a toll for fractions of a mile within the distance of four miles, and that such a power ought not to be supplied by intendment or implication.

This appeal ought, therefore, in my opinion, to be allowed, and the judgment of the Court below reversed.

T

Pryce v. Monmouthshire Rail. Co., H.L.

LORD O'HAGAN.—On the question as to the right to enforce charges for stoppage, loading and unloading, without previous publication, the Exchequer, the Exchequer Chamber and the Court of Appeal were of the same mind, and I believe your Lordships all agree with them. The shifting and uncertain nature of those charges makes previous specification of them manifestly impracticable. The obligation to publish must apply to claims capable of being appreciated and prescribed beforehand, and the words of the statute are not inconsistent with the reasonable view that it should be limited to them. On this point I need say no more.

The more difficult question arises as to the construction of the 104th and 105th sections of the respondents' Act, and on the one point really in controversy we are not assisted to a conclusion by any unanimity or even preponderance of opinion amongst the learned Judges who have had occasion to consider it. For although the formal judgment of the Exchequer and the Exchequer Chamber has been in favour of the respondents, and that judgment has been sustained in the Court of Appeal by Lord Justice James and Lord Justice Baggallay, the adverse view of Lord Justice Mellish is not encountered by any previous decision—the former rulings having been made merely on concession and consent—whilst it is supported by Mr. Baron Bramwell, who appears to have held that, under the legislation with which we have to deal, the respondents were not entitled to charge for a fractional part of a mile. For that learned Judge I have much respect, and before I proceed to state briefly the grounds of my concurrence with him and Lord Justice Mellish, I shall cite a passage from his judgment in the Court of Exchequer, to which attention was not called in the course of the argument. After disposing of questions not now in dispute, he says, "Now we come to the answer to the second question, which is, 'whether the plaintiffs are entitled to charge the defendants the railway toll and locomotive toll, or either, and which of them, for any, and if so, what fractional part of a mile traversed by the defend-

ants' trucks?' If I had to answer that question as it is put, without reference to the admission that is to be made, I should be under a difficulty; and I really must state it, because it is a difficulty I feel, and it is right I should give expression to it. I should not be stating the truth if I said I thought they were." After reading the 105th section, he adds, "One would think that this power, given to them where it was beyond four miles, was not given to them, or was taken away from them, if it otherwise was given to them when it was under four miles; and when you come to consider that in the previous part of the Act of Parliament, where they have power to charge tolls, the power is not to charge at the rate of so much per mile, but to charge so much per mile, it would certainly look very much as though they were not entitled to charge anything for fractions, but only for whole miles." "I am by no means sure that the reasonable charge for the expense of stopping, which is applicable to where it is under four miles, was not intended to be given to them as a compensation for their not being able to charge for the fractional part of a mile." The other Judges of the Exchequer acted on the concession of the defendants, and did not pronounce any considered judgment of their own, although the reasoning of the Chief Baron would seem to me to lean to the result accepted by Mr. Baron Bramwell.

In approaching the interpretation of the statute, I do not feel affected by two considerations which appear to have exerted much influence on the judgment of the Court of Appeal. The first of these rests on the undoubted fact that the construction of the respondents has been accepted and acted on for many years, as well by freighters and merchants, who have paid the fractional toll, as by Courts of justice in some cases to which we have been referred. But it is admitted that the matter had not been *res judicata*; and when, on consent and without discussion, it was arranged according to the present contention of the respondents, the expression of judicial protest which I have read accompanied the pronouncement of the formal ruling. We have no

Pryce v. Monmouthshire Rail. Co., H.L.

means of knowing from what motives the traders made the concession on which the Courts proceeded; and we must not forget, as I shall make appear more fully hereafter, that the antecedent statutes, which affected the company's railway and canal, contained clauses expressly authorising the fractional charges. Under them the payment of those charges must have become habitual, and they may, not unnaturally, have induced the supposition that it might also be held leviable under the latest Act.

The second consideration, which is repeatedly relied on in the judgment of the Lords Justices, is the unreasonableness of supposing that the Legislature could have intended quantities of goods to be carried for nothing, as they must sometimes be, if fractional charges are not legally claimable. But, at most, the presumption raised by that consideration can only make us more careful in ascertaining the real meaning of the Act; and though that meaning, rightly appreciated, should involve such a result, we are not at liberty to reject it on that ground only.

The respondents had the preparation of their own measure, and were bound to see that it fitly expressed the purposes of Parliament. They were not forced to adopt the Act if they had reason to complain of its harshness or injustice; and it behoved them to have any terms, favourable to themselves and involving burthens on the public, explicitly and unequivocally stated. If they have not done so the fault is theirs, and they must take the consequences.

But besides, as has been observed both by Lord Justice Mellish and by Mr. Baron Bramwell, the insertion of the clause as to claiming for stoppages, &c., in the company's interest, may have been made to compensate for the denial of the fractional charges under the four miles, within which they were to enjoy that new and important privilege. The suggested substitution might perhaps have been fairly made by Parliament and wisely assented to by the company, and we have no ground for saying that it was not. I do not think we need to discuss or decide the question as to recovery on a *quantum meruit*. I prefer to rest on the

grounds I have stated, as showing that this second consideration is not decisive on the legal issue as to the construction of the clauses.

But there is a third consideration which seems to me of much materiality with reference to that construction. The statute immediately before us is only, as I have said, the last of a series, all *in pari materia*, and all directly dealing with the works of the respondents and their relations to the public. They should, therefore, according to a familiar principle, be read together; and when we find the right to make fractional charges and take proportionate tolls, expressly given in all of them but the last, we are bound, I think, to notice the significant omission. We must find, if we can, some better reason for it than the oversight or error of the Legislature; and we may recognise such a reason when we see, in the added provision for stoppage, an apparent compensation for the lost power of charging for less than a mile.

If, after the words "per ton per mile not exceeding three farthings," the words "and so in proportion" had been introduced, as in the preceding Acts, the controverted right would have been beyond dispute; and is it unreasonable to presume that they were not inserted, because the proportionate claim was not meant to be allowed?

Reading, then, the 104th section in connection with the previous legislation, and the provisions of the 105th, and finding that it gives power to charge merely "per ton per mile," there appears to me to be nothing startling in the assertion that the charge was to be for an entire mile, and not rateably or for a portion of a mile; and I do not think it is made so by the preceding words "not exceeding the following" and "upon the railway or any part thereof;" for if it was intended that the subject-matter of the charge should be merely carriage for a full mile, the excess forbidden would apply only to that mile, and "the part of the railway" must be such a part as would comprise at least a mile. In one sense, by fixing a halfpenny for half-a-mile, the respondents would not exceed a penny per mile, but if their power to

Pryce v. Monmouthshire Rail. Co., H.L.

charge only extended to the whole mile, and only to a part of the line comprising a mile, they could not exercise it as to smaller portions merely because they might halve the toll. Whether or no the power was so limited is the question; and it seems to me very like a *petitio principii* to reason on the assumption that it was not.

I do not affirm that the construction of the 104th section is free from difficulty. On the contrary, I agree with Lord Justice Mellish that there is "considerable ambiguity" about it, and I cannot say that, to my mind, that ambiguity has been removed by the argument we have heard on the use of the preposition "per." In certain instances its meaning may involve rateability or proportion, but Lord Justice James, who relies upon this point, seems to me to supply an answer to it when he admits that if the section had merely given for the use of the railway "a penny per ton per mile," the company could not probably have charged a "*pro rata*" sum for a fraction. If so, the word "per" alone would not found the claim to charge, and the Lord Justice is therefore obliged to call in aid the words "not exceeding" and "part of the railway," on the effect of which I have already observed. For the reasons I have given they do not appear to me at all conclusive in favour of the fractional charge.

But assuming that the 104th section is ambiguous and might be difficult of construction, if we had nothing else to guide us, I think we are assisted to a reasonable interpretation by the section which succeeds. It provides expressly "for a fraction of a mile beyond four miles or beyond any greater number of miles." It gives the respondents power to demand tolls on merchandise "for such fraction in proportion to the number of quarters of miles contained therein;" and as to the carriage of goods for a less distance than four miles, it authorises them to make a reasonable charge for stopping, loading and unloading, but leaves them without any claim for fractions of a mile. Does not this express bestowal of the power to charge beyond the four miles involve the denial of it

within that distance? "The words seem to me," says Lord Justice Mellish, "obviously to assume that the company had not been enabled to charge for a fraction of a mile by the previous section." Those words make a clear distinction between the distances within and beyond the four miles, which the construction of the respondents would nullify, and they give different rights in connexion with those differences, which it would appear to confound. The specific grant of the power of fractional charge in the 105th section makes it improbable that if such a grant had been designed by the 104th, it would not have been as clearly as it might have been easily given; and the argument I have derived from the presence of such a provision in previous statutes, and the absence of it in that with which we have to do, appears to me to acquire accumulated force from the contract of the sections in this respect.

If the 104th section had given the right of fractional charges in clear and express terms, it might have been difficult to say that the 105th section took it away by implication. But, as I have said, I do not think it was so given. At the utmost, the first section seems to me ambiguous, and open to two constructions; and we have from Lord Justice James the admission, as to the second, that "the implication (relied on by the appellants) is no doubt very strong." It is plainly so, and I cannot believe that its strength is diminished by the suggestion that "superfluous words" may have been "carelessly and blunderingly thrown in or left in," or by the argument from "unreasonableness," with which I have endeavoured to deal already. We are, I repeat, to take the language as we find it. We are not, sitting here judicially, "to presume the intentions of the Legislature, but to collect them from the words of the statutes."—*Dwarris on Statutes*, p. 703 (2nd ed.).

Keeping in mind this established canon of construction, I cannot see that the "very strong implication" is encountered by any argument, either from the reason of the thing or the language of the Act, which should make us refuse to accept it; whilst the introduction of the

Pryce v. Monmouthshire Rail. Co., H.L.

power to charge for stoppages, &c., within the four miles, which it would relieve from proportional tolls, goes far in my opinion to confirm it and explain the motive on which it may have been grounded.

I believe that the ambiguity of the 104th section has been very much removed by the clearness of the 105th; but if it still partially remained, I should say that the rule relied on by my noble and learned friend who last addressed your Lordships, which requires the imposition of a tax or toll to be clear and distinct, and, in cases of doubt, compels the adoption of the meaning most beneficial to the public, should be applied to this case. The respondents sought the Act, directed the preparation of it, obtained large powers and privileges under it, had the option to accept it or reject it, and may fairly be bound by a strict construction of its words in favour of the general community. I think that the doctrine which would so bind them, even if the legislation had been ambiguous, settled as it is by many cases, is wise and reasonable and ought to be maintained.

For these reasons I am of opinion that the appeal should be allowed and the judgment reversed.

LORD SELBORNE.—I am of opinion, on the first point, that the office of the 104th section of the Act of 1845 is, not to fix a ton and a mile as separate units for the purpose of charge, but to enable the respondents to charge such tolls, and at such rates as they may think fit, in respect of the conveyance of the different classes of goods therein mentioned, so long as they do not exceed the maximum rates to which they are thereby entitled. Therefore, according to the distinction taken in the authorities cited from Levinz and Lord Raymond, it is *secundum ratam*, and not only on a fixed quantity or distance, that they may charge; and so interpreting the section, those authorities are against the appellants. I will not dwell upon the mere reason of the thing, which does not seem to me to be at all favourable to the appellant's construction, I am content to rely upon what I consider the proper and

natural meaning of the words used. The governing words are, that "it shall be lawful for the company to demand any tolls for the use of the railway not exceeding the following." The consideration for those tolls, here expressed, is not the conveyance of each separate ton of goods, but is "the use of the railway" by the person whose goods are conveyed; and what the respondents may demand are "any tolls," so long as they do not exceed the prescribed limits. Lord Justice Mellish agreed with the other Judges of the Court of Appeal in holding that the charge actually made by the company did not exceed the prescribed limits; and it cannot be disputed that the railway is used as much when goods are conveyed over a fraction of a mile as when they are conveyed over an entire mile. These governing words are followed by others which immediately introduce the enumeration of the maximum rates, viz., "in respect of the tonnage of articles conveyed upon the railway, or any part thereof, as follows," shewing (I think) that a maximum scale of tonnage rates was intended. A tonnage rate is (as it seems to me) as much applicable to half-a-ton as to a whole ton; and the same principle of interpretation which in this context is applicable to quantity, must (I conceive) be equally applicable to distance. And I agree with Lord Justice James that the Latin preposition "per," as it is adopted into our popular language, and as it is here used, properly and primarily signifies the distribution of the charge over the whole aggregate weight of goods for the whole aggregate distance that they are conveyed, tons and miles being mentioned only as common measures of weight and distance convenient for the purpose of the measurements which this maximum scale would necessarily require. Further proof of the same proposition seems to me to be derived (as the respondents' junior counsel pointed out) from the words "the rate of tolls" in section 106.

The next question is, whether the 105th section operates by implication, to take away the right which (without it) the 104th section would, in my opinion, confer, to charge in respect of distances less

Pryce v. Monmouthshire Rail. Co., H.L.

than four miles, for any fraction of a mile.

To raise such an implication without necessity could not, I think, be right. It might be necessary, if the 105th section would not be sensible and officious without it; but it is both sensible and officious, though no such implication is made. The object of that section is not to cut down the tolls authorised to be taken by section 104, but to superadd certain "provisions and regulations," which "shall be applicable to the fixing of such tolls, and also to the tolls payable for locomotive power." So far as these "provisions and regulations" are applicable they are (of course) to be applied, but they leave untouched everything authorised by the preceding section to which they are not applicable. Their express words are not applicable to any charge of tolls for a fraction of a mile when the whole distance travelled over is less than four miles. They do not regulate or provide for it, but neither do they prohibit it. They regulate four special cases, and that always in such a way as to enable the respondents to charge more in those cases than they could have done under the 104th section standing alone. First, if the distance travelled over is less than four miles, there may be a charge for stopping, loading and unloading, besides the tolls authorised by the 104th section. The words are, "in addition to the prescribed tolls for conveyance," which is plainly inconsistent with the supposition that the prescribed tolls were (in any case in which this additional charge might be made) to be less than they otherwise might have been. The next case is that of conveyance of goods for any distance beyond four miles, in which case the company are by this clause enabled to charge for a fraction of a quarter of a mile as if it were a full quarter of a mile—a benefit which, of course, they cannot claim in a case (such as that before the House) to which that provision is inapplicable; but it does not, therefore, follow that the right to charge for a fraction of a mile according to the distance (being less than four miles in the whole) over which any goods may have been actually conveyed is thereby taken away if given by the pre-

vious section. The third case is that of passengers, as to whom the company is, by this clause, enabled to charge for every fraction of a mile beyond an integral number of miles as if it had been a whole mile. The fourth provision relates to the measurement of the quantity of goods conveyed; it enables the company to charge for every fraction less than a quarter of a ton as if it were a whole quarter of a ton, without reference to the distance over which the goods may have been conveyed. All these provisions, therefore, are in favour of the company, and they will all receive full effect in the cases to which they may apply, though they are not held to govern, directly or by implication, the case now before the House.

Upon the second point, I think it is sufficient to say that I agree with the judgments of the Court below.

My opinion therefore is, that this appeal should be dismissed. Perhaps it may be proper to add, that I cannot think it right to refuse to the 104th section what appears to me to be its proper effect, according to the true and reasonable construction of its words, merely because it may have been usual in other Acts of Parliament (some of them relating to undertakings now incorporated with this railway) to provide for the right to charge for fractions of miles in express terms, which is not here done, except in the particular cases regulated by the 105th section. And with respect to the principle laid down in some authorities, that statutes of this kind, authorising tolls to be taken by undertakers of public works, are to be construed as if they were Taxing Acts, imposing a burden on the subject, and therefore not to be extended so as to increase that burden beyond the strict meaning of their words. I have already stated that I think it would be necessary, in the present case, to place upon the words of the Act, not their strict and natural, but a forced and unnatural construction, in order to arrive at a conclusion in the appellant's favour. If those authorities were to be understood as meaning more than that express powers of taking tolls conferred by the legislature are not to be extended by any unnecessary

Pryce v. Monmouthshire Rail. Co., H.L.

implication beyond the fair and natural import of the words used, I should doubt whether they were sound in principle, or binding on this House.

THE LORD CHANCELLOR.—Your Lordships being equally divided in opinion, of course, according to the ancient rule, the question that the decree appealed against be reversed, will be determined in the negative. I am anxious to say a word upon the subject of costs, more particularly because I observe that in a case in this House a few years ago, the case of *Anderson v. Morice* (8), a question was raised as to costs in the case of an appeal, where the numbers for affirming and for reversing the judgment appealed against were equal. I did not myself take part in that decision, but I observe that what was ultimately done was that nothing was said in the order upon the subject of costs. Some observations, however, then fell from some members of your Lordships' House, which appear to give countenance to the idea that the reason why nothing is said about costs when there is an equal division of votes is, that it is somewhat contrary to justice or to the practice of the House, to give costs where there is any division of opinion. Now, I apprehend that that is not at all the principle upon which your Lordships proceed in a case like the present. There are upon these occasions always two separate motions proposed to the House. The first is the motion that the decree appealed against be reversed. That motion may be rejected by a majority, or it may be carried by a majority, or the numbers of contents and not-contents may be equal, and thereupon the decree stands affirmed. But in all these cases, if anything is to be said about costs, a second motion is necessary. For example, if a decree stands affirmed and the appeal is dismissed, and if it is desired that the appellant should be ordered to pay costs, a further motion must then be made that the appeal be dismissed with costs, not for the purpose of obtaining the dismissal of the appeal, for that

has been done by the first motion, but for the purpose of ordering the costs to be paid for by the appellant. Now it is obvious that if your Lordships are divided upon the first motion, and the votes for reversing the decree and for affirming it are equal, and the decree stands affirmed merely on account of the ancient rule that the presumption is in favour of the negative, the result of a second motion that the appeal be dismissed with costs, would be (unless, which is not to be supposed, the minds of some of your Lordships were to change in the interval) that the numbers would again be equally divided upon the second motion, and the presumption would again be in favour of the negative, and therefore the motion for ordering the costs to be paid by the appellant would not be carried, consequently the effect would be the same as if nothing were said about costs. I am anxious to guard against the idea going abroad among the public that the reason is the division of opinion, for there might well be a division of opinion amongst your Lordships, and yet be an order that the appellant was to pay the costs. The true reason is that, in such a case as I have supposed, a motion ordering the appellant to pay costs could not be carried.

LORD SELBORNE.—It is not necessary for me to say anything in addition to what my noble and learned friend has just stated; but perhaps it may be convenient for me to observe that that is precisely what I myself understood. I was a party to that discussion to which my noble and learned friend has alluded, and while I should not have been unwilling, if I had been very much pressed to do so, to waive my particular vote so as to create a majority, yet I was not anxious to do so, and I pointed out that which my noble and learned friend has now said, namely, that there are two motions, and that the rule that, where the votes are equal, the presumption is in favour of the negative, would apply to the motion ordering costs to be paid, as well as to the motion for the reversal of the judgment, and would have effects which are really consistent in principle, though a

(8) 46 Law J. Rep. C.P. 11; Law Rep. 1 App. Cas. 713.

Proce v. Monmouthshire Rail. Co., H.L.

first sight they might appear otherwise, namely, that the judgment under appeal is affirmed on the first motion, but that the costs are not given as against the appellants on the second.

Judgment appealed against affirmed and appeal dismissed.

Solicitors—Hunt & Son, agents for C. B. Fox, Newport, for appellants; Thomas White & Sons, agents for H. S. Gustard, Newport, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE MAYOR, ETC., OF LONDON
Nov. 18, 21. } v. LOW AND ANOTHER.

Ancient Market—Cattle—Tolls—Lairs for Reception of Cattle—Right to collect Tolls within Limits of Market—Metropolitan Market Act, 1857 (20 & 21 Vict. c. 135), s. 15—Opening of "new Market"—Disturbance—Right by Prescription.

The plaintiffs were, down to 1855, seised in fee of an ancient market for the sale of cattle, known as Smithfield Market, and were entitled to certain tolls in respect of cattle exposed for sale in the market. In 1855 the Smithfield Market was, under the authority of an Act of Parliament, removed to Islington; but all privileges were expressly preserved to the plaintiffs, and it was enacted that no new market for the sale of cattle should be opened within a distance of seven miles from St. Paul's Cathedral, in the City of London. One of the defendants became in 1854 lessee of certain premises about six hundred yards distant from the Islington market, and within the distance of seven miles from St. Paul's Cathedral, and converted them into lairs and receptacles for cattle, containing accommodation for about four hundred head. Some of the cattle were from time to time sold by the defendants upon the premises between the market days, which were held on Mondays and Thursdays. Beyond a uniform charge for lirage, there was nothing in the nature of a toll upon sales effected by other persons than the defendants; but where the defendants themselves acted as sales-

men, they charged the same commission as if the cattle had been sold in the plaintiffs' market. The cattle thus sold in the interval between the two markets would, if there had been no opportunity for sale between the two markets, have found their way to and have been sold in the market of the plaintiffs:—

Held, on the above facts, that an action was maintainable against the defendants for a disturbance of the plaintiffs' market.

This was an action brought by the plaintiffs, as owners of a market for the sale of cattle, against the defendants, for an alleged breach of the 15th section of the Metropolitan Market Act, 1857, and for alleged disturbance of a market of the plaintiffs. The case came on for trial before the Lord Chief Baron on the 12th of July, 1878, when by consent a verdict was found for the plaintiffs, subject to a Special Case, of which the following is the material portion:—

The plaintiffs were from time whereof the memory of man runneth not to the contrary, and down to the 12th of June, 1855, seised in fee of an ancient market for the sale of live cattle, horses, sheep and pigs, called Smithfield Market.

King Edward the Third, by a charter dated the 6th of March, 1226 (1 Edw. 3), made and passed with the consent of Parliament, granted and confirmed unto the citizens of the City of London, that no market from thenceforth should be granted by his said Majesty or his heirs to any within seven miles in circuit of the said city.

This charter has been confirmed by subsequent charters, and recognised and confirmed by Acts of Parliament.

By an Act of 14 & 15 Vict. c. 61, after reciting that for preventing the evils attendant on the holding of the market now holden in Smithfield, it is desirable that in lieu thereof a more spacious cattle market, with a meat market and conveniences connected therewith, should be provided in a suitable place more distant from the centre of the metropolis, it was enacted (section 1) that it should "be lawful for her Majesty, after the expiration of six calendar

Mayor, &c. of London v. Low, Q.B.

months from the passing of this Act, in case the mayor, aldermen and commons of the City of London have not in the meantime signified in manner herein-after mentioned their desire to undertake the execution of this Act" to appoint commissioners for the purpose.

By section 3 it was enacted, "It shall be lawful for the commissioners to provide, build and maintain in such situation as may appear to them convenient for the purpose, and as may be approved of by one of her Majesty's principal Secretaries of State, places for holding a cattle market in lieu of the market now holden in Smithfield, and a meat market, with slaughterhouses and lairs for cattle brought to such cattle market, or intended to be slaughtered in such slaughterhouses, and to provide, build and maintain such pen stalls, shops, buildings and conveniences for the purposes of the said markets, slaughterhouses and lairs, as the commissioners may think necessary.

By section 6 it was enacted, "It shall be lawful for the commissioners from time to time to make bye-laws for fixing or altering the days upon which the market is to be holden under this Act shall and may be held," and for a variety of other specified purposes. Such bye-laws were to be approved by a Secretary of State, and published in the manner directed.

By sections 37 and 38 provisions were made as to the manner in which the mayor, aldermen and commons of the City of London should signify their desire to undertake the execution of the Act, and with certain modifications not now material, it was enacted that in case of their so doing, the powers and duties which under that Act would be vested in the commissioners, if appointed, should be exercised and performed by the said mayor, aldermen and commons.

The plaintiffs, within the prescribed period and in the prescribed manner, signified their desire to undertake the execution of the Act, and in pursuance thereof and in conformity with the powers and provisions of the Act, purchased a site for and erected and established a cattle market for the metropolis

in lieu of the market theretofore held at Smithfield, together with a meat market and slaughterhouses and lairs for cattle brought to such cattle market, or intended to be slaughtered in such slaughterhouses, and expended in the formation of the said markets, and in the erection of lairs and slaughterhouses, of taverns, public-houses and other buildings and conveniences connected with the said market, the sum of 440,000*l.*, which they borrowed upon the credit of the several tolls, dues, rents and payments receivable under the said Act, and upon the estates and revenues of the plaintiffs.

The new market, being the market now held at Islington, was opened on the first market-day after the 12th of June, 1855.

By the 20 & 21 Vict. c. 135 (Metropolitan Market Act, 1857), the Act of 14 & 15 Vict. c. 61 was repealed, and further powers for the management and control of the market and its accessories, and for the making of bye-laws, were vested in the plaintiffs.

Section 15 of the same Act is as follows:—"Smithfield Market having under the provisions of the first recited Act (14 & 15 Vict. c. 61) ceased to be a market for the sale of cattle and horses, the repeal of such Act shall not authorise or empower, or be deemed or construed to authorise or empower, the using of the site thereof or of any part thereof as a market for the sale of cattle and horses, and no new market for the sale of cattle or horses shall be opened in the cities of London or Westminster or the liberties thereof, or in the borough of Southwark, or at any place distant less than seven miles in a straight line from St. Paul's Cathedral, in the city of London."

The bye-laws at present in force, made under the Act of 1857, accompany and form part of this case. They provide that a market for the sale of cattle shall be held in the market provided by the plaintiffs under the Metropolitan Market Act, 1857, on Monday and Thursday in every week, and on Friday in every week for the sale of horses, mules and asses. It is provided by one of such bye-laws (the 11th) that it shall be lawful

U

Mayor, &c. of London v. Low, Q.B.

for the clerk of the market, at his discretion, to allow cattle in the lairs of the said market to be sold there on non-market-days, and sales of cattle have frequently taken place under this bye-law, in respect of which the plaintiffs have received the same tolls as if the sales had taken place in the regular market.

The plaintiffs have provided sufficient accommodation in the way of lairage and other conveniences for all the cattle coming for the purpose of sale within the area of the franchise of the plaintiffs, and for the wants of drovers, salesmen and others concerned in such transactions.

In the month of September, 1854, the defendant, John Low the elder, became lessee for the term now unexpired of certain premises in the York Road, Belle Isle, situate at a distance of about 600 yards from the Islington market of the plaintiffs, and within seven miles of St. Paul's Cathedral. These premises comprised a large area upon which were then some unfinished buildings, which he converted into lairs and receptacles for cattle, containing accommodation for about 400 head of cattle. The defendant, John Low the elder, was during the period to which this action relates in the habit of receiving in these lairs the cattle of persons who had cattle for sale, and charging in respect of them so much a night for food and lodging. Some of such cattle were imported from foreign countries, some were English and were brought by railway or driven on foot. Some of them were consigned to the defendants (who were in partnership as cattle salesmen in the Metropolitan market) for sale on commission. Some were merely laired there by their owners or salesmen (other than the defendants) to whom they were consigned. The term "cattle" as used in this case includes milch cows.

The majority of such cattle were driven from the said premises of the defendant, John Low the elder, to the cattle market of the plaintiffs and there sold. But some were sold on the said premises before the holding of the market of the plaintiffs in the interval between that market and the next.

Such sales upon the premises of the

defendant, John Low the elder, were of two kinds. In some instances the cattle were sold by the owners or the salesman (other than the defendants) to whom they were consigned. In others the defendants themselves effected sales upon commission for persons who had consigned the cattle to them for sale.

Such sales were in all instances by private contract and not by public auction. The persons to whom they were made were, as a general rule, persons accustomed to frequent the market of the plaintiffs.

No charge was made by the defendant, John Low the elder, in the nature of a toll upon sales effected upon his premises by persons other than himself and his co-defendant, John Low the younger. The defendant, John Low the elder, made one uniform charge for lairage and fodder, which was the same whether or not the cattle were sold there or elsewhere. With respect to cattle consigned for sale to the defendants, and by them sold, not in the market of the plaintiffs, but upon the premises of the defendant, John Low the elder, the defendants charged and received the same commission as if the cattle had been sold in the market of the plaintiffs, and the commission upon such sales was dealt with between the two defendants in the same manner in all respects as if the sales had taken place in the market of the plaintiffs. The defendant, John Low the younger, had no interest in the lairs nor in the business of lairage there carried on, and he did not interfere in any way in such business.

The cattle thus sold in the interval between the two markets would, if there had been no opportunity for sale between the two markets, have found their way into and have been sold in the market of the plaintiffs, and the loss incurred by the consequent delay would have fallen primarily upon the owners of the cattle.

As far back as living memory goes, and down to the time of the closing of Smithfield Market, there were within the distance of seven miles from St. Paul's Cathedral at least thirteen lairs where business was carried on in the same manner as described in the foregoing

Mayor, &c. of London v. Low, Q.B.

paragraphs. Some of such lairs have been closed in consequence of the removal of the market from Smithfield, and since such removal some others nearer to Islington have been opened by either the owners or lessees of those that were closed. In the thirteen lairs above mentioned a large number of cattle were regularly laired, and the practice of selling cattle in the intervals between one market and the next was known to the servants of the plaintiffs having the management of Smithfield Market. One of the lairs situate close to the market had been in possession of John Low the elder for more than fifty years till September, 1854, when his business of lairage was removed to York Road, Belle Isle.

The Court was to be at liberty to draw inferences of fact. The questions for the opinion of the Court were—

1. Have the defendants or has either of them since the passing of the Metropolitan Act, 1857, opened a new market for the sale of cattle?

2. Have the plaintiffs, since the passing of the Metropolitan Market Act, 1857, a right to sue as for a disturbance of their market at Common Law?

3. Have the defendants or has either of them disturbed the plaintiffs' market?

4. Do the facts stated establish a right, whether arising from lost grant, or prescription or otherwise, on the part of the defendants or either of them, to do the acts complained of?

Judgment was to be entered for the plaintiffs or for the defendants, or either of them, according to the answers to the above questions.

Gorst (Benjamin and Edwyn Jones with him), for the plaintiffs.—The findings of the arbitrator justify the inference either that a new market has been opened, or that the defendants have done acts which constitute at Common Law a disturbance of the market.

As regards the opening of a "new market," it was expressly provided when the market at Smithfield was closed, that all privileges should be preserved to the corporation. The 14 & 15 Vict. c. 61. s. 10 enacts "that no new market for the sale of cattle or horses shall be opened

in the city of London or Westminster, or the liberties thereof, or the borough of Southwark, or at any place distant less than seven miles in a straight line from St. Paul's Cathedral in the city of London." The Act of 1857 (21 & 22 Vict. c. 135) repealed 14 & 15 Vict. c. 61, but re-enacted the 10th section thereof, it having changed the subject-matter of the franchise, but not the franchise. If, therefore, the Court should be of opinion that the defendants have opened a new market, that would entitle the plaintiffs to judgment.

The main enquiry, however, involved here will be whether the defendants have disturbed the plaintiffs' market, and if so, whether they have established the right to do so. Now there are numerous authorities as to what acts will constitute a disturbance of market or opening of a new market. The judgment of Lord Mansfield in *Mosley v. Chadwick* (1) almost decides this case in favour of the plaintiffs. That was an action upon the case brought against the defendants for depriving the plaintiff, who was seised of a franchise for holding a market, of the profits of his market by erecting another market, in a certain place near the plaintiffs' market, in which meat was sold without any toll being taken; and Lord Mansfield, after dealing with the authorities, including *The Prior of Dunstable's Case* (2) held that the action was maintainable. See also Tenterden's, C.J., judgment in *Moseley v. Walker* (3). Whenever a person seeks to take the benefit of a market without payment of the toll, that is a fraud upon the market, for which an action will lie—*Bridgland v. Shapter* (4). The finding of the arbitrator that the sheep sold by the defendants in those lairs would otherwise have found their way to the plaintiffs' market brings the case within the principle laid down in *Gard v. Ford* (5), and clearly supports the present action—See *The Mayor of Dor-*

(1) 7 B. & C. 47 note a.

(2) 11 Hen. 6. 19 a.

(3) 7 B. & C. at page 51; 5 Law J. Rep. K.B. at page 361.

(4) 5 Mee. & W. 375; 8 Law J. Rep. Exch. 246.

(5) 2 Saund. 172.

Mayor, &c. of London v. Low, Q.B.

chester v. Ensor (6) (judgment of Channell, B.). The only other question is, whether, admitting the disturbance, it can be justified so as to bar the present action. The defendants will doubtless cite *Holcraft v. Heel* (7), but no reasons were given for the decisions arrived at in that case, and it was not followed in *Campbell v. Wilson* (8). They also cited *The Llandaff and Canton Market Company v. Lyndon* (9), *M'Hole v. Davies* (10), *Fearon v. Mitchell* (11), and *Pope v. Whalley* (12).

Arthur Charles and Pitt Lewis (Austen with them), for the defendants.—Until the Smithfield Market was abolished the city of London were in possession of an ancient market, the nature and rights incident to which it is important to bear in mind. *Prima facie*, the grant of a market would not exclude sales like these. The mere possession of a market does not imply the right of preventing individuals from selling in their own shops on market-days. *The Prior of Dunstable's Case* (2) amounts only to this, that a person shall not take the benefit of the lord's market, and the customers attending it, and yet fraudulently deprive him of the tolls—See judgment of Parke, B., in *The Mayor, &c., of Macclesfield v. Chapman* (13). In *Wiltshire v. Willett* (14) it was held that a sale by auction in a shop attached to a dwelling house was privileged, and from what the Judges said it is obvious that there can be no distinction between owner's goods and goods sold by commission. If the contention of the other side were to prevail, all sale of horses within depositories would be an infringement of the plaintiffs' market rights. Sales in the ordinary course of business are allowed, and if a person is possessed of private

(6) 39 Law J. Rep. Exch. 16; Law Rep. 4 Exch. 335.

(7) 1 Bos. & F. 400.

(8) 3 East, 294.

(9) 8 Com. B. Rep. N.S. 515; 30 Law J. Rep. M.C. 105.

(10) 45 Law J. Rep. M.C. 30; Law Rep. 1 Q.B. D. 59.

(11) 41 Law J. Rep. M.C. 170; Law Rep. 7 Q.B. 690.

(12) 6 B. & S. 303; 34 Law J. Rep. M.C. 76.

(13) 12 Mee. & W. 18; 13 Law J. Rep. Exch. 32.

(14) 11 Com. B. Rep. N.S. 240; 31 Law J. Rep. C.P. 32 *M. & S.*

premises to which goods are sent for the purpose of sale without invitation, then though day after day goods are sold which would otherwise go into the market, that would not be a disturbance of the franchise.

[LUSH, J.—The question of whether there has been a disturbance or not is a question of fact.]

That may be, but whether it is actionable or not is a question of law, and depends on the franchise of market. The primary purpose of lairs is what their name imports, and it is contended that this was an ancient mode of carrying on trade.

[COCKBURN, C.J.—What do you call "ancient?" The expression the arbitrator used is "living memory."]

In *Penryn v. Best* (15) the plaintiffs proved the holding of a market "as long as living memory goes," and the inference drawn by the Court of Appeal was that there had been an immemorial enjoyment. The statute never intended to interfere with persons who carried on an ancient trade unless such trade is affected by the prohibition as being a "new market." The finding of the arbitrator that "as far back as living memory goes" these lairs have been established shew that what was done was impliedly authorised by statute. Again, even assuming that what was done amounted at common law to a disturbance, the use of the lairs has been sufficiently long to bar the plaintiffs' right of action. In *Holcraft v. Heel* (7) it was held that the grantee of a market who suffers another to erect a market in his neighbourhood and to use it for a space of twenty-three years without interruption was by such user barred of his action on the case for disturbance of his market.

[LUSH, J.—The authority for that proposition rests merely on a *dictum* of Erle, C.J., and no reasons are given.]

In *Campbell v. Wilson* (8) twenty years' user was held sufficient to presume a grant, and Lord Ellenborough in his judgment says—"It might, indeed, be too much to say, in *Holcraft v. Heel* (7), that the adverse use of the neighbouring

(15) 48 Law J. Rep. Exch. 103; Law Rep. 3 Ex. D. 292.

Mayor, &c. of London v. Low, Q.B.

market for twenty years was a bar to the action by the grantees of the Crown," but the meaning of the Court probably was, as said by Le Blanc, J., that "the adverse possession for above twenty years was so strong that the Chief Justice ought to have left it to the jury to find a grant of the market from the Crown.

[LUSH, J.—*Campbell v. Wilson* (8) was a right of way case, and is no longer an authority since Lord Tenterden's Act.]

If, therefore, the right attached, it was reserved under 14 & 15 Vict. c. 61, by which it was enacted that "nothing in this Act contained shall extend or shall be deemed or construed to extend to prejudice or derogate from the estate, rights, interests, privileges, franchises or authority of the mayor and commonalty and citizens of the city of London." Moreover, as regards Low, junior, the case finds that he had no interest in the lairs, and did not interfere in the business.

[COCKBURN, C.J.—But he sold cattle on those premises, so that no distinction can be drawn between the two defendants.]

They also cited *Ellis v. The Mayor of Bridgnorth* (16), *The Mayor of Macclesfield v. Pedley* (17) and *The Mayor of Brecon v. Edwards* (18).

Benjamin replied.

COCKBURN, C.J.—We are asked on the Special Case, stated by the learned arbitrator, to say whether there has been an infringement of the market rights vested in the corporation of the City of London by the Act of Parliament, which has been referred to, and upon the facts stated in the Special Case I come to the conclusion that there has been a disturbance of the market rights, and that in consequence there must be judgment for the plaintiffs. I think it unnecessary to give an opinion whether these lairs, set up and used by the defendants, constituted a new market or not. The establishing of a new market, and thereby infringing the rights of the owners of the ancient market, is not

in se actionable. It is actionable only because it constitutes a disturbance, but it is not necessary in order to constitute a disturbance of market rights that a new market should be established. The disturbance may be constituted by something very short of the establishment of a new market. It is enough, therefore, if, on the part of the plaintiffs, it is established that there has been a disturbance of the market rights of the plaintiffs. Now, looking at the question, irrespective of the former existence of the old market in Smithfield, and its transfer to Islington, the facts are shortly these. The defendant, Mr. Low, senior, has established certain lairs for the reception of cattle in the immediate vicinity of the New Cattle Market at Islington. So far as these lairs are really a place for the reception of cattle, they are not and cannot be found fault with. The market rights which the plaintiffs have acquired under the Act of Parliament do not authorise them to monopolise the use of lairs for the reception of cattle, and it is open to anybody to provide a receptacle for cattle and horses brought for sale at the Islington Market. But it is abundantly clear that the defendant has established his lairs for a two-fold purpose, the one being for the reception of cattle, and the other being to enable persons to come and buy and sell the cattle stored in the lairs, either on the market day, or on the intermediate days, the consequence of which is that they are thus enabled to avoid taking the cattle into the market, and so escape the tolls which the plaintiffs, as owners of the market, would be entitled to receive. It is expressly found that the result of what takes place is to keep the cattle from going into the market to be sold, and so to diminish the tolls which the plaintiffs would otherwise receive. The result is, in my judgment, a clear and distinct disturbance of the market rights of the plaintiffs.

Next comes the question, can this disturbance be justified on the grant of any right? I think not. Endeavours were made to shew there was some inherent right, by reason of the state of things which existed at the time when the market for the City of

(16) 16 Com. B. Rep. N.S. 52; 32 Law J. Rep. C.P. 273.

(17) 4 B. & Ad. 307; 1 Nev. & M. 708.

(18) 1 Hurl. & C. 51; 31 Law J. Rep. Exch. 368.

Mayor, &c. of London v. Low, Q.B.

London was held in Smithfield, and it was undoubtedly proved that for a long period of time, which went back perhaps for some half a century, and from which it might fairly be inferred that it existed for a longer period there had been a practice on the part of Mr. Low, senior, and other persons to have lairs in the immediate vicinity of Smithfield Market, which lairs were put to exactly the same use as the lairs which the said defendant has erected in the immediate vicinity of Islington. I think, however, that no inference can be drawn from that fact in favour of the defendants. If we are asked to draw the inference that there was, coeval with the grant of the market, a reservation of the right of individual citizens to have lairs for the double purpose to which I have referred, and which would in themselves be an infringement and a disturbance of the market, I can only say I can draw no such inference, because it seems to me to be so entirely inconsistent with common sense to suppose that the Crown would have so entirely derogated from the grant of the market, as practically to annihilate the grant of the market. But then it was contended that the facts stated in the Special Case would warrant a presumption on our part that there was originally some grant from the Corporation of London, but if what was granted amounted to an infringement it would be beyond the power of the corporation to grant it. If, however, it was only put in the way of license, and we were asked to infer that a license had been given, then the consequence would be that the license would be put an end to by the resistance of the corporation to the exercise of this supposed privilege. But I cannot infer the grant even of a license, because it seems to me that the only rational view that can be taken of the permissive existence of these lairs in the neighbourhood of Smithfield by the corporation amounts merely to this, that the limits of Smithfield Market being very confined, and the accommodation insufficient, and it being to the advantage of the corporation that as many cattle and sheep as possible should be brought to market for the convenience and subsistence of the citizens of London,

the corporation permitted these lairs to exist simply because it was a convenience to them to do so. If that be the correct view, it seems to me that, even supposing Smithfield Market had remained where it was, the corporation were empowered at any time to put an end to a state of things which had its existence in their permission, and which had no foundation of legal right. Here, however, the Smithfield Market has been put an end to, and a market at Islington established in its stead under statutory authority, and with the express provision that there should be no other market established within a given distance. It has been argued, however, on the part of the defendants, that there is a reservation of all rights and privileges which existed previously to the transfer of the market, and that being only transferred to Islington, any rights that existed previous to the transfer have been preserved to those who had them. Now, in the first place, I negative the existence of any rights capable of being enforced in law, and therefore capable of being transferred; and, secondly, I say that, even assuming any such rights did exist in the citizens of London, they would not follow a market established beyond the confines of the City, and as to which, therefore, the citizens, *qua* citizens, could have no such right. That market, therefore, I think, must be treated quite independently of such considerations as arise out of the previous existence of Smithfield Market, of any rights or privileges which might attach to individuals, whether citizens or not, in reference to the latter market. I am of opinion, therefore, that no legal justification existed for the erection and use of these lairs, the result of which has been a disturbance to the market rights of the corporation by the diminution of tolls. I regret that it is a very hard case, and I trust that the corporation may, under the circumstances, see their way to deal liberally with Mr. Low; but the hardship is, of course, a matter which, in determining the legal rights of the parties, we have no right to take into consideration. In my judgment no privilege has existed in Mr. Low which could not at any time be put a stop to by the cor-

Mayor, &c. of London v. Low, Q.B.

poration, and even if such rights had existed with regard to Smithfield, they did not follow the transfer of the market to Islington, and therefore cannot be insisted on as an answer to the present action. For these reasons I think our judgment must be for the plaintiffs.

LUSH, J.—I am entirely of the same opinion. It is not for us to take into account the consequences that will ensue either to one party or the other by reason of the judgment we are called upon to pronounce. All we have to determine is, the legal rights of the parties, and all other considerations belong to the parties themselves. Now the legal rights of the corporation, as the owners of the new market, is to prevent any person doing any acts which amount to a disturbance of their market, that is, which amount to anything like acts which would have been done on the market, and which, if done, would have produced a larger income to the corporation. The case finds as a fact that what was done upon the lairs of the defendants does diminish the profits of the corporation, because it is found that the cattle which are sold there would otherwise have been sold in the market, and if they had been sold in the market they would have been subject to a toll. Being sold on the defendants' premises, they are not subject to a toll, because they are outside the market; there is, therefore, clearly a disturbance of the market in point of fact, and that not by a casual or exceptional state of things, but as a systematic course of business by which cattle are diverted to the defendants' lairs, and when there are open to the inspection of buyers, and are sold, if needed, even by the defendants themselves.

Mr. Charles has contended before us that the defendants had a right to act as they have done, and that really is the main question which has been argued. Now I have throughout been utterly unable to understand what is the nature of the right which the defendants set up. It is said that the defendants had lairs of a similar kind in the neighbourhood of Smithfield, while the market existed there, for the reception of cattle, and that at these lairs cattle have been sold

in the same way as they have been by the defendants at their new lairs at Islington; and—that state of things being continued a considerable length of time—we are asked to presume that that course of dealing originated in some legal right or other. I confess I can come to no such conclusion. I can well understand that when the market at Smithfield, having so limited an area, could not accommodate all the cattle that were brought into London to be sold, the corporation were glad to have extra accommodation afforded by private individuals of receiving cattle brought to London to be sold; but that, at the most, could only be a license which they had power to revoke at any time. I cannot refer it to a legal origin, because I cannot suppose that when the Crown granted the legal right to the corporation of London, they also granted to the citizens of London a right to set up a rival market. That would be to derogate from the grant altogether; and it would be absurd to suppose any such thing could have happened. I can only therefore hold that what the defendants did in the neighbourhood of Smithfield, while that continued to be the metropolitan market, they did by the license of the corporation, a license which conferred no right upon them, but which the defendants might have revoked at any time.

But again, even assuming the defendants had such a right as was contended for, namely, to set up their lairs in Smithfield itself, I fail to see how that right has been transferred so as to give them a right to establish such lairs at the new market out of the City. I invited Mr. Charles to point out something in the Acts of Parliament for the establishment of the new market, which, by any construction whatever, would amount to a license to persons who had carried on business in the neighbourhood of Smithfield to carry it on in the neighbourhood of the new market. There is not, so far as I can see, a single word in all the statutes which can in any way be construed to give them such a right; therefore, even if the defendants had a right to erect these lairs and carry on business in the neighbourhood of Smithfield, they

Mayor, &c. of London v. Low, Q.B.

have not a right, in my judgment, to do so in the neighbourhood of the new market at Islington. The grant of that market is to the corporation itself; it is an exclusive right, and there is not a word in the Act which even hints at the existence of any counter-right on the part of the citizens of London, or any other citizens.

I can, therefore, only come to the conclusion with the Lord Chief Justice that the plaintiffs have established their rights, and that the defendants have not shewn any legal justification for what they have done.

MANISTY, J.—It seems to me that this is a case which, when reduced to its true elements, is free from all difficulty, and I only desire to make one or two short observations. It has been argued that, although the practice of the defendants may amount to a disturbance of the market, yet it was not so intended, and that the lairs at Islington, with which alone we have now to deal, were not intended as a place for the sale of cattle. The intention may be an element to be considered; but, apart from intention, if these lairs were *de facto* used as a place of sale for cattle which otherwise would have found their way to the market, then there was just as much a disturbance as if it had been originally intended to use those lairs for a place of sale. But can anyone doubt that, when these lairs were constructed in the neighbourhood of Islington, they were constructed for the express purpose of being used both for the reception and sale of cattle. It is said that it is very hard for a man who had the right—as I will assume for the moment he had, but which I am clearly of opinion he had not—to have a lair as a place of sale so near the Smithfield market should not also have a right to have a lair equally near the Islington market. But such cases as the present have occurred all over the kingdom since the Market and Fairs Act has been adopted by governing bodies in large towns in England and Wales, in which markets have been opened which were new markets. To take the case of *Fearon v. Mitchell* (11) from among a number; there the hardship was extreme, because

the corporation had actually assented to the defendant going to enormous expense to erect an agricultural hall, as it was called, where for years he carried on large sales of cattle by public auction; yet when the corporation adopted the Market and Fairs Act some years afterwards, this Court held that, notwithstanding the hardship inflicted, the corporation had a right to prohibit Mr. Mitchell from continuing any longer to sell cattle in the hall. If these were cases of hardship, they should have been brought to the attention of the Legislature when they authorised the opening of the market at Islington in place of Smithfield. To say that the right to have a lair in the City of London can follow the market and be attached to the market at Islington seems to me to be so utterly without foundation either in law or common sense—that it is not necessary to say anything more about it. It is the ordinary case of a market with ordinary rights, and there cannot be a doubt that here there has been a most serious disturbance of the market ever since 1875, when it seems that, owing to the boats from Rotterdam changing their day from Tuesday to Wednesday, a great number of cattle which used to come into the market for sale in the market have, since 1875, arrived on the day after the sale, and have all been sold systematically in private lairs. Therefore, there is a most substantial interference in this case. I should like to mention, in the event of this case being taken to the Court of Appeal, the case of *The Corporation of Manchester v. Petherell* (20), argued in 1876 before the Vice-Chancellor of the Duchy of Lancaster, which is in almost every respect on all fours with the present case, and in which the Vice-Chancellor, in a most elaborate and exhaustive judgment, arrived at the same result as we have done.

Judgment for the plaintiffs.

Solicitors—T. J. Nelson, for plaintiffs; W. S. Gardiner and M. Hawkins, for defendants.

(20) Not reported.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1879. } PELLAS AND COMPANY v. THE
 Nov. 20, 21. } NEPTUNE MARINE INSURANCE
 Dec. 18. } COMPANY.*

Marine Insurance—Action by Assignees of Policy—Defence—Set-off—Counter-claim—31 & 32 Vict. c. 86. s. 1—Rules of Court, Order XIX. Rule 3.

In an action on a policy of insurance on a ship's cargo brought by the assignee of such policy in his own name, pursuant to the provisions of 31 & 32 Vict. c. 86, the defendant cannot set off any debt which he could not have set off prior to the passing of that Act. Nor does rule 3 of Order XIX. alter the law in this respect, for a counter-claim is not a defence within the meaning of section 1 of 31 & 32 Vict. c. 86,—

So held, reversing the decision of the Common Pleas Division.

Appeal by the plaintiffs from a judgment of the Common Pleas Division. The case is reported 48 Law J. Rep. C.P. 370.

The plaintiffs sued the defendants as underwriters of a policy of insurance for 300*l.*, made in January, 1876, by a firm of Harris & Co. on a cargo of coals.

The policy was assigned by Harris & Co. to one Questa; he again assigned it to Pastorino & Co., who assigned it to the plaintiffs. The cargo was lost, and the plaintiffs sued the defendants on the policy; the defendants admitted that the plaintiffs were entitled to recover, and paid into Court the full amount, less 40*l.*, which the defendants claimed to set off, that being the amount of a debt incurred by Harris & Co. to the defendants in January, 1876.

At the trial a verdict passed for the defendants. A rule nisi for a new trial was afterwards obtained in the Common Pleas Division and discharged.

The plaintiffs appealed.

Murphy and Webster, for the appellants.—The question turns on the effect of the provisions of section 1 of the Policies

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

VOL. 49.—Q.B., C.P. & EXCH.

Marine Insurance Act, 1868 (1), and of rule 3 of Order XIX. of the Rules of Court (2). Prior to the year 1868 this defence could not have been set up in answer to an action brought in a Court of Equity by an assignee of the policy.

The claim is for unliquidated damages, and, therefore, there could not have been any set-off, and even if an adjustment has been made a mutual ascertained debt is not thereby created, such as can be met by a set-off—*Luckie v. Bushby* (3); *Arnould's Marine Insurance*, vol. i. p. 219. The Insurance Act of 1868 was only a statute of procedure, it did not alter the rights of the parties to a contract of insurance, but enacted that thereafter defences might be set up in a Court of Law which could at that time only be set up in a Court of Equity, so that the respondents do not by that statute acquire any rights, save of procedure, which they did not possess before it passed.

It is then urged that this set-off can now be maintained as a counter-claim under rule 3 of Order XIX. (2), and that then such a counter-claim is a defence within the meaning of the Insurance Act of 1868; but that Act only applies to defences existing at the time it was passed, and the Judicature Act and the rules thereunder only contemplate such a counter-claim as would form the basis of a cross-

(1) By 31 & 32 Vict. c. 86. s. 1, it is enacted that the assignee of a policy of insurance may sue thereon in his own name, and that "the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected."

(2) Order XIX. rule 3, "A defendant in an action may set off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

(3) 13 Com. B. Rep. 864; 22 Law J. Rep. C.P. 220.

X

Pellas v. Neptune Marine Ins. Co. (App.), C.P.

action by the defendants against the plaintiffs in this case. A counter-claim is a cross-action, and is not a defence, so that a counter-claim does not come within the meaning of the word "defence" in the Insurance Act of 1868.

Further, the defendants cannot be heard to make any such claim, for they issued the policy with full knowledge of the practice which prevails of assigning policies, and knowing that such policies are endorsed and pass from hand to hand as do other negotiable documents, and therefore the defendants must be taken to have agreed that no such defence as this should be set up, "for if the contract was to pay the assignees without right of set-off, then the assignees have an equity to prevent a set-off being enforced against them," as Bramwell, B., said in *Higgs v. The Northern Assam Tea Company* (4). Without doubt, as a rule, an assignee in equity takes subject to the equities existing between the original parties to the contract; "but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from, and unaffected by, such equities"—*Re Agra and Masterman's Bank* (5); *Re Blakeley Ordnance Company* (6).

A. Smith (Herschell and Chalmers with him), for the respondents.—The appellants cannot succeed without interpolating words into the Act of 1868; to support their contention it is necessary to limit the nature of the defence mentioned in section 1 of that Act (1). The case must be considered, as though Harris, the original assured, were the plaintiff, and then there would be a right of set-off in the defendants against him for a liquidated sum, and that right becomes, by virtue of the Act of 1868, a right which the defendants can set up against the present plaintiffs.

The Judicature Act, moreover, creates a set-off which may "sound in damages,"

Order XIX. rule 3 (2), and such a claim need not be for a liquidated sum. It is possible that this claim of set-off could not be pleaded before the Judicature Act; but if so, then that Act gives an extended right of set-off. If, however, this is not in all strictness a set-off, still it must be a counter-claim, and then even though not founded on mutual dealings, still under the rule already referred to it is a defence, and if a defence then it is covered by the Act of 1868. The plaintiffs claim to be assignees, but no notice having been given of the assignment the rights of the defendants cannot be altered by such assignment—*Cavendish v. Geaves* (7).

Cur. adv. vult.

BRAMWELL, L.J. (on Dec. 18).—We are all of opinion that this appeal must be allowed. The plaintiffs are merchants who sue the defendants, the underwriters of a policy of marine insurance, which was effected with the defendants by Harris & Co., from whom by divers assignments it came to the plaintiffs. To part of the amount claimed in the action the defendants pleaded, by way of set-off and counter-claim, a sum of 40*l.* which was due to the defendants from the original assured, Harris & Co. The question for decision is whether this is a good defence. We are of opinion that it is not. It is founded on the provision contained in the first section of 31 & 32 Vict. c. 86, which enacts that assignees of policies may sue in their own names, and provides that the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the action had been brought in the name of the original insurer.

Now that statute was a statute of procedure only, and I do not think that those words alter the general effect of the statute. Before this statute was passed the assignee of a policy could sue in his own name in the then existing Courts of Equity, although he could not do so in a Court of Common Law; this provision then gave him a right to sue in his own name in all Courts, and it was intended, I think, to place a plaintiff in the same

(4) 38 Law J. Rep. Exch. 233 at p. 234; Law Rep. 4 Exch. 387 at p. 394.

(5) 36 Law J. Rep. Chanc. 222 at p. 226; Law Rep. 2 Ch. App. 391 at p. 397.

(6) 37 Law J. Rep. Chanc. 418; Law Rep. 3 Ch. App. 154.

(7) 24 Beav. 163; 27 Law J. Rep. Chanc. 314.

Pellas v. Neptune Marine Ins. Co. (App.), C.P.

position as that in which he used to be in a Court of Equity. If that be so, then this defence is invalid, for a Court of Equity did not allow any defence to be advanced there which could not have been advanced in a Common Law Court, it only assisted the plaintiff to get over a technical difficulty. Now this defence could not have been set up in such a Court, because the claim of the plaintiffs was for unliquidated damages, and such a defence was no answer to such a claim at the time when the Act to which I have referred was passed.

It is then urged that it is made a good defence by the 3rd rule of Order XIX. (2), and it is said that that rule should be read into the statute. I do not think that the general provision in the Rules of Court would repeal the particular enactment in the statute; but apart from that consideration, we are of opinion that the rule to which reference has been made does not allow such a defence as this to be made under the statute of 1868. The set-off and counter-claim given by Order XIX. rule 3 differs from the old set-off given by 2 Geo. 2. c. 22, and made perpetual by 8 Geo. 2. c. 24. The judgment under those statutes was for so much as was due to the plaintiff after one debt had been set against the other; but it was never adjudged, as it may now be, that the defendant should recover something in consequence of his pleading a set-off which may now overtop the claim of the plaintiff, so that the cases are very different. Then it was said that, if this would have been before the passing of the Judicature Act a good defence to a claim for liquidated damages, that it must now be held to be by the effect of the same Order a good defence to a claim for unliquidated damages.

But that is not so; a cross-claim is often not a defence, and what Order XIX. rule 3 (2) authorises, is not a defence but a cross-claim. This view is strengthened if reference be made to the latter part of the rule, for it provides that a Judge may "refuse permission to the defendant," not surely to avail himself of a defence, that cannot be, but to avail himself, in the action then proceeding, of a cross-claim.

The Judicature Act and the Rules thereunder relate to matters of procedure, and they were not intended to affect the rights of parties nor, save in some specified cases, to alter the law.

BRETT, L.J., and COTTON, L.J., concurred.

Judgment reversed.

Solicitors—Lowless & Co., for appellants; Shum, Crossman & Co., agents for Turnbull & Tilley, Hartlepool, for respondents.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)
1879. } HAMILTON AND COMPANY v. JOHN-
Dec. 3. } SON AND COMPANY.*

Practice—Entering Judgment on Findings of Jury—Motion for New Trial—Divisional Court—Jurisdiction to enter Final Judgment—Order XL. rules 4 and 10.

Where a Judge entered judgment for the plaintiffs on special findings of a jury, and the defendants moved in a Divisional Court for a new trial on the ground that the findings were against the weight of evidence,—

Held, that the Divisional Court had jurisdiction, under Order XL. rule 10, to enter final judgment for the defendants.

This was an appeal from a decision of the Queen's Bench Division.

The action was to recover damages for the breach of a contract by the defendants in not accepting a ship built for them by the plaintiffs.

At the trial before Denman, J., and a jury at the Liverpool Assizes, the Judge left certain specific questions to the jury, which they answered in favour of the plaintiffs, and assessed damages.

Denman, J., after further consideration, entered judgment for the plaintiffs on the findings for the amount assessed.

The defendants did not appeal from this judgment, but moved for and obtained a rule *nisi* for a new trial in the Queen's Bench Division, on the ground

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

Hamilton v. Johnson (App.), Q.B.

that the findings of the jury were against the weight of evidence.

Cause was shewn, and the Queen's Bench Division (Cockburn, C.J., and Lush, J.) reserved judgment, and ultimately Lush, J., delivered the opinion of the Court to the effect that, being satisfied that they had all the materials before them for finally determining the question in dispute, they had decided to order judgment to be entered for the defendants, which was accordingly done.

The plaintiffs appealed.

C. Russell and Warr, for the plaintiffs.—The Queen's Bench Division had no power to order judgment to be entered for the defendants. Order XL. rule 10 (1) does not apply where the Judge has entered judgment on special findings. He has a jurisdiction co-ordinate with a Divisional Court as to entering judgment, and the appeal from his judgment must be, under rule 4 (1), to the Court of Appeal. Otherwise rule 10 would be in conflict with rule 4.

Rule 10 was meant to apply where the jury gave a general verdict. Then the party dissatisfied may go to a Divisional Court, without any leave reserved, and they may act under that rule.

Herschell and Crompton, for the defendants.—When the findings are right, and there has been no misdirection, then the judgment entered on the findings can, under rule 4, be questioned in the Court of Appeal. But rule 10 is meant to provide for cases where the findings or direction are questioned. Then the Divisional Court, if satisfied that all the materials

(1) Order XL. rule 4. [Substituted for the former rule 4 by the Rules of December, 1876.]

Where at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

An application under this rule shall be to the Court of Appeal.

Rule 10.—Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute . . . give judgment accordingly.

for finally determining the questions in dispute are present, and that if the findings or direction had been right, judgment could only have been entered in one way, may enter judgment as it ought to have been entered.

BRAMWELL, L.J.—I am of opinion that this objection ought not to prevail. Order XL. rule 10 is tolerably plain in its object. The meaning and intent of it really are that, where misdirection on the part of the Judge or a wrong finding of the jury is complained of, the only remedy of the party complaining is to go to a Divisional Court. Having gone there for that purpose, the Court may be of opinion that there was a misdirection, or that the verdict was against evidence; but they may say, "We are satisfied that we have all the materials before us for giving final judgment, we shall do so, instead of sending the case for a new trial." They may give, when all the materials are before them, what is the correct judgment in the case. I do not think that rule 10 is abrogated by the new rule 4 in the manner suggested. Rule 4 is confined to cases where upon findings that are not questioned a wrong judgment has been given.

BRETT, L.J.—I am of the same opinion, and for the same reasons. Under rule 10, where the Court think either the direction, or the findings, or both are wrong, and they are satisfied that they have all the materials for finding a correct final judgment before them, they may give the judgment—either for one party or the other—which would have been given if there had been no misdirection or wrong finding.

COTTON, L.J.—I am of the same opinion.

Objection overruled.

Their Lordships then proceeded to hear the appeal upon the merits, and in the result reversed the decision of the Queen's Bench Division.

Solicitors—Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiffs; Wynne, agent for Forshaw & Hawkins, Liverpool, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1879. { THE MAYOR AND CORPORATION
Dec. 17. { OF SWANSEA v. QUIRK AND
ANOTHER.

Interrogatories—Corporation answering by their Solicitor—Privilege.

Interrogatories were administered to the plaintiffs, a corporation, which they elected to answer through their town clerk. The town clerk claimed to be privileged from answering some of the interrogatories, on the ground that he was also solicitor to the plaintiffs in the action, and had received the information asked for in his capacity as solicitor for the purpose of the action,—

Held, that the plaintiffs having elected to put forward their solicitor to answer the interrogatories, could not avail themselves of the privilege which otherwise would have attached to communications made to him in such capacity.

Opposed motion on appeal from chambers.

Action for recovery of land in which the defendant had obtained an order under Rules of Court, Order XXXI. rule 4, to administer interrogatories to the plaintiffs. The interrogatories were administered "to John Thomas, the town clerk of the plaintiffs, or other their proper officer." The plaintiffs elected to answer by their town clerk. The answers to certain of the interrogatories being deemed insufficient, a summons was taken out by the defendants, calling on the plaintiffs to shew cause why further and better answers should not be given. In answer to the summons, John Thomas, the town clerk of the plaintiffs, filed an affidavit, in which he gave the following reason (amongst others) for not delivering further and better answers:—"I am solicitor for the plaintiffs in the action, and the only information I possess in respect of the matters upon which I am interrogated is derived from communications made to me as the solicitor for the plaintiffs in this action, or to my clerks, or to the agents of the corporation for the purposes of this action, in the course of getting up the evidence for the plaintiffs in this case, and preparing for the trial herein, by persons who will or may be witnesses for the

plaintiffs at the trial." The summons came on before Denman, J., at chambers, who held that the plaintiffs were not relieved from answering the interrogatories, and ordered the answers to be delivered.

From this order the plaintiffs now appealed.

F. B. Fitzroy Cowper, for the plaintiffs, contended that a solicitor would be clearly privileged from giving the information he had obtained from communications made to him for the purpose of the action; that the town clerk was the proper person for the plaintiffs to put forward, and that as he was solicitor to the plaintiffs, he could decline answering matters which he was privileged from communicating.

Levett, for the defendants, contended that the town clerk could not sever his position as solicitor from that of public officer, and claim a privilege in the one capacity which he would not be entitled to in the other, and that the defendants had waived any privilege they might have claimed by electing to put him forward as their representative.

The following authorities were referred to:—Bustros v. White (1), Anderson v. The Bank of British Columbia (2), Atherley v. Harvey (3), The Southwark and Vauxhall Water Company v. Quick (4).

GROVE, J.—The order of Denman, J., is in my judgment right. The corporation have put forward a person as their public officer to answer these interrogatories, and the question is, can they set up privilege, and decline answering on the ground that he is their solicitor? I am of opinion they cannot. They have selected a person to appear for them, and they cannot avail themselves of his individuality. If it were otherwise, the corporation might purposely put forward their own solicitor, in order to avail themselves of his privilege. Or a case might arise in which a matter

(1) 45 Law J. Rep. Q.B. 642; Law Rep. 1 Q.B. D. 423.

(2) 45 Law J. Rep. Chanc. 449; Law Rep. 2 Ch. D. 644.

(3) 46 Law J. Rep. Q.B. 518; Law Rep. 2 Q.B. D. 524.

(4) 47 Law J. Rep. Q.B. 258; Law Rep. 3 Q.B. D. 315.

Mayor, &c. of Swansea v. Quirk, C.P.

being known to ninety-nine persons out of a corporation consisting of 100 persons, the corporation might put forward the 100th person, and he might answer that he had no knowledge of the matter in respect of which he was interrogated. I am therefore of opinion that the order must be affirmed.

LOPES, J.—It is contended that the town clerk ought not to be compelled to answer these interrogatories, because the information asked is derived from communications which have been made to him as the solicitor of the plaintiffs, but I do not think such a contention is maintainable. It must be remembered that the privilege is not the privilege of the solicitor, but of the clients; and I do not think that it is competent to a corporation, who elect to put forward their town clerk to answer interrogatories, to say he is our solicitor, and therefore he ought not to be called upon to answer. The corporation cannot be allowed thus to blow hot and cold. Having elected to put forward their solicitor, they have, in my opinion, waived the privilege they might otherwise have claimed.

Appeal dismissed.

Solicitors—Johnson & Weatheralls, agents for J. J. Thomas, Swansea, for plaintiffs; Hacon & Turner, agents for Charles Norton, Swansea, for defendants.

Order made 49th Feb 21/4.

[IN THE COURT OF APPEAL.]

1879. }
Dec. 3. } POTTER v. COTTON AND OTHERS.*

Practice—Trial by Judge without a Jury
—Finding of Fact—Appeal—Motion for New Trial—Order XXXIX. Rule 1 a.

In an action tried by a Judge without a jury, the Judge stated that he found certain facts and then gave judgment for the defendants. The plaintiff moved ex parte in the Court of Appeal for a new trial on the ground that the findings were against the weight of evidence:—

Held, that the plaintiff ought to have ap-

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

pealed from the judgment, instead of moving for a new trial.

Krehl v. Burrell (48 Law J. Rep. Chanc. 252; Law Rep. 10 Ch. D. 420) *discussed and distinguished.*

Action to recover possession of four houses.

At the trial before Huddleston, B., without a jury, in the Michaelmas Sittings, 1879, at Westminster, the Judge, after hearing the evidence, found as a fact that the writ in an action of ejectment, brought in 1873 by the present defendant, Cotton, against one Harvey, through whom the present plaintiff claimed as mortgagee, was in respect of the same four houses which were the subject-matter of the present action, and held that the judgment obtained in the first action was conclusive against the plaintiff in the present one, and gave judgment for the defendants.

Bompas and Nasmith, for the plaintiff, now moved, *ex parte*, within twenty-one days from the date of the trial, for a new trial, on the ground that the finding of fact was against evidence, and that there had been a misreception of evidence at the trial.

[BRAMWELL, L.J., asked if the matter was not one for an appeal, instead of a motion for a new trial.]

It is submitted that the proper course has been taken, and that this case is within the decision in *Krehl v. Burrell* (1). There has been a distinct finding of fact by the learned Judge, which it is desired to question.

BRAMWELL, L.J.—We think that this is clearly a case for an appeal, but it is not necessary now to decide within what time the appeal should be brought. We think that the decision in *Krehl v. Burrell* (1) must be limited to the particular cases where the Judge says—"I find such and such facts, and I reserve judgment." There is then something from which an appeal can be brought, namely, a finding of fact. I think the judgment in that case was wrong. A Judge gives judgment, he does not give a verdict.

(1) 48 Law J. Rep. Chanc. 252; Law Rep. 10 Ch. D. 420.

Potter v. Cotton, App.

BRETT, L.J.—We are, perhaps, not at liberty to differ from the judgment in *Krehl v. Burrell* (1) when the facts are exactly the same as in that case. I think, however, that the case of *Lowe v. Lowe* (2) confines the decision in *Krehl v. Burrell* (1) to this, that the reasoning of the latter case only applies where a Judge says, "I am not going to try this case. I am only going to try issues of fact." Then the finding upon those issues of fact can be questioned by motion for a new trial. We are bound by that decision until it has been reviewed by a greater number of members of the Court of Appeal or by the House of Lords. After having heard this question mooted many times, I have come to the conclusion that in all other cases than the very special one of *Krehl v. Burrell* (1), wherever an action is tried by a Judge without a jury, whatever fault is found with his ruling must be matter of appeal and not of application for a new trial. He is in the same position as a Vice-Chancellor under the old procedure, and his ruling is to be questioned in the same way, by an appeal straight to this Court. Whether appeals of this kind ought to be brought within twenty-one days or within a year it is not necessary at this moment to determine.

COTTON, L.J.—I am of the same opinion. This is clearly a case for an appeal, and not for an application for a new trial. When the appeal is before us it is competent for the Court to direct a further investigation of the facts if it appears necessary. I quite agree with the opinion of the other members of the Court that when a case is tried before a single Judge involving questions of fact, then, the appeal being from his decision on mixed questions of fact and law, the proper course is not to move for a new trial, but to appeal to the Court of Appeal, who may order a new trial if it is thought necessary. The only instance in which the motion should be for a new trial is in cases which come precisely within *Krehl v. Burrell* (1), when there has been a separate trial of issues of fact by the Judge, and then a separate decision on the questions of law. That is all that

(2) 48 Law J. Rep. Chanc. 383; Law Rep. 10 Ch. D. 132.

Krehl v. Burrell (1) decided, as appears from the judgment of Lord Justice James in *Lowe v. Lowe* (2). I do not think the decision in *Krehl v. Burrell* (1) was meant to be confined to cases where there were formal definite issues, but it was to apply where there was a separate trial by the Judge, occupying with respect to the issues of fact the same position as a jury would occupy if the case was being tried by a Judge and jury. That in my opinion is the only result of *Krehl v. Burrell* (1).

BRETT, L.J.—I agree that the issues of fact need not be formal. My judgment is with reference to what is stated to be the particular practice pursued by the Master of the Rolls. He gets the counsel on both sides to state what are the issues of fact, and then proceeds to try them. Those are not formal issues, but they are still issues.

Rule refused.

Solicitors—Sympson, Warner & Turner, for plaintiff; A. F. & R. W. Tweedie, for defendants.

Newton v. Linnard 492962573.

[IN THE COURT OF APPEAL.]

(Appeal from a Divisional Court.)

1879. } WALKER AND OTHERS v.
Dec. 11. } BUDDEN.*

Practice—Appeal to Divisional Court not prosecuted—Appeal to Court of Appeal.

An appellant to a Divisional Court who fails to prosecute his appeal there, and against whom judgment is there given, cannot afterwards appeal from that judgment to the Court of Appeal.

Appeal by the defendant from an order of a Divisional Court, affirming an order made by a Master, setting aside, on the application of the defendant, an order for substituted service, and giving leave to defend, on the condition of his paying a sum of money into Court, or of giving security for a portion of the plaintiff's claim. The defendant had appealed against the order of the Master to a

* *Coram* Cockburn, C.J.; Bramwell, L.J. Cotton, L.J.

Walker v. Budden (App.), Q.B.

Judge, who affirmed the decision of the Master. The defendant then gave notice of his intention to move a Divisional Court to set aside the order of the Judge.

Before the hearing of the motion the counsel for the defendant wrote to the counsel for the plaintiffs, and asked him to let the case stand over. The counsel for the plaintiffs replied that he was instructed not to consent to this, but owing to the absence from London of the counsel for the defendant, this reply did not reach him until after the day for the hearing of the motion. On that day the plaintiffs appeared, and claimed the judgment of the Court, and the decision of the Judge at chambers was, as no one appeared to support the appeal, affirmed.

The defendant appealed against that decision.

Torr, for the appellant.—The defendant failed to appear and support his appeal in the Divisional Court; judgment was accordingly rightly given against him. He is therefore entitled to appeal against that judgment, for it is none the less a valid order of a Court having jurisdiction over the subject-matter, and the validity of the judgment cannot be affected by the fact that the decision was given, as it were, *ex parte*, and without hearing counsel for the party against whom it was given.

M. Powell (with him *Day*), for the plaintiffs, was not called on.

COCKBURN, C.J.—I am of opinion that we cannot hear this appeal; the appellant has failed to prosecute his appeal to the Divisional Court, and now seeks to come *per saltum* to this Court. We cannot deal with the case. The remedy, if any, must be by an application to the Divisional Court. We must dismiss this application.

BRAMWELL, L.J., and COTTON, L.J., concurred.

Appeal dismissed.

Solicitors—H. Chatterton, for appellant; Gelatly, Son & Warton, for respondents.

[IN THE COMMON PLEAS DIVISION.]
(Appeal from Revising Barrister's Court.)

1879. { MORTLOCK (appellant) v. FARRER
Nov. 19. { (respondent). HALL (appellant) v. CROPPER (respondent).

Parliament—Borough Vote—Notice of Objection—Parish of Person objected to—41 & 42 Vict. c. 26. Sched. A. Form I.

The statute 41 & 42 Vict. c. 26, gives in Schedule A. Form I. the forms of notices of objection in a parliamentary borough, No. 1 to the overseers, No. 2 to the person objected to. And then follows a note: "If there is more than one list of parliamentary voters, the notice of objection in each of the above cases Nos. 1 and 2, should specify the list to which the objection refers, and if the list referred to is made out in divisions, the notice of objection should specify the division to which the objection refers":—

Held, that the list which the notice of objection should specify is the list of voters under each head of franchise, and that it is not necessary to specify the parish to which the objection refers.

These were two consolidated appeals from the Revising Barristers' Courts for the boroughs of Westminster and Nottingham respectively. In both cases the same point arose for determination, namely, whether the notice of objection to a borough voter should specify the parish in which the qualification objected to was situated. The two appeals were argued as one, and one judgment was delivered for the two cases.

MORTLOCK v. FARRER.

CASE.

1. The appellant objected to the name of Thomas Allen, of 79, Berwick Street, being retained on the list of persons who, being on the register of voters now in force for the parliamentary borough of Westminster in respect of residence in lodgings within the parish of St. James, claimed in respect of residence in the same lodgings to have their names inserted in the list of persons entitled to vote at the election of two members to serve in Parliament for the said borough.
2. The notice of objection given by the

Mortlock v. Farrer, C.P.

appellant was, so far as is necessary to be stated, as follows:—

“To Mr. Thomas Allen.—I hereby give you notice that I object to your name being retained on the list of persons entitled to vote as lodgers at the election of members to serve in Parliament for the city of Westminster, on the following grounds (which the notice then proceeded to state).

“Dated this 25th day of August, 1879.

“(Signed) Joseph Mortlock,

“Of No. 6, Cambridge Villas,

“Waterford Road, Fulham,

“on the list of voters (for No. 7, North Street) for the parish of St. John the Evangelist (called List No. 3);”

and was regular in all respects, except in the following particulars, namely:—

3. The said Thomas Allen objected that such notice was invalid and void in law, inasmuch as it did not specify upon which list of persons entitled to vote as lodgers for the election of members for the said borough his name appeared.

4. There are eleven parishes and precincts within the said borough, each having its own overseers; but for one of such precincts there was on the register of voters now in force no lodger.

5. As to the remaining ten parishes or precincts, the overseers of each parish or precinct made out, in obedience to the 22nd section of the Parliamentary and Municipal Registration Act, 1878, such a list as is mentioned in the 1st paragraph of this case.

6. The names of four hundred other persons were objected to under similar circumstances.

7. The Revising Barrister decided that the said notices of objection ought to have specified upon which of the said ten lists respectively the names of the persons so objected to appeared.

8. The Revising Barrister was requested by the objector nevertheless to go into the merits of the various objections; but this was opposed on behalf of the parties objected to; and he declined to do so.

The Solicitor-General (Sir Hardinge Giffard) (Douglas Kingsford with him), for the appellant.—By the Representation of the People Act (30 & 31 Vict. c.

Vol. 49.—Q.B., C.P. & Exch.

102), which confers the lodger franchise, the lodger must have occupied the same house in the borough for twelve months preceding the last day of July (sect. 4), he also had to send in his claim before the 25th of August in every year (sect. 30), in accordance with the form I. in Sched. G.; that form is now altered by the Parliamentary and Municipal Registration Act, 41 & 42 Vict. c. 26, and Form H. No. 2, in the schedule of that Act has now to be filled up by the lodger, and he has to send in a fresh claim every year before the 25th of July (sect. 22). The sole question here being whether the notice of objection to a lodger ought to have specified the parish in which he resided, it is submitted that as the lodger must have complied with these conditions and given notice of his claim according to this elaborate form (Form H. No. 2), which is addressed in the first instance to the overseers of the parish in which he resides, and in respect of which parish alone he can of necessity be entitled to vote as a lodger, he could by no possibility be misled by the omission of his parish from the notice of objection.

The division referred to in the footnote to Form I. No. 2 (1), is the division

(1) 41 & 42 Vict. c. 26. Sched. A. Form (I.).

Form of Notice of Objection.

No. 1 (Parliamentary).

Notice of Objection to be given to Overseers.

To the Overseers of the Parish [or Township] of

I hereby give you notice that I object to the name of being retained on the lists of persons entitled to vote at the election of a member [or members] to serve in Parliament for the Parliamentary Borough of

Dated the day of 18

(Signed) A. B. (Place of Abode)

On the List of Parliamentary Voters for the Parish of

No. 2 (Parliamentary).

Notice of Objection to be given to the Person objected to.

To Mr.

I hereby give you notice that I object to your name being retained on the lists of persons entitled to vote at the election of members [or a member] to serve in Parliament for the Parliamentary Borough of on the following grounds, viz.

1. e.g., that you have not occupied for twelve months to the 15th of July.

2. That

Y

Mortlock v. Farrer, C.P.

explained in sect. 15, in cases where the lists of parliamentary voters and the burgess lists are made out together (2), and the list to which the objection refers should be divided into divisions as in Form D. Then the notice of objection must specify the division to which the objection refers. The lodger list is only one list, throughout the statutes it is so treated—see Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 30. par. 2.

The person objected to need only be informed of the franchise list to which the objection is directed, the parish list would be unnecessary. The object of the notice which is framed to carry out the intention of the Act is to let the person objected to know of the objection; in the present instance he would be aware of the objection to his vote without the mention of his parish in the notice of objection.

R. S. Wright, for the respondent (3).
—This footnote has to be construed with

3.

Dated the day of 18
(Signed) A. B. of [place of abode] on
the List of Parliamentary Voters for the Parish
of

Note.—If there is more than one list of parliamentary voters, the notice of objection in each of the above two cases, Nos. 1 and 2, should specify the list to which the objection refers, and if the list referred to is made out in divisions, the notice of objection should specify the division to which the objection refers; and if the list contains two or more persons of the same name, the notice should distinguish the person intended to be objected to.

(2) 41 & 42 Vict. c. 26. s. 15, sub-sect. 2:
“When the parish is situate wholly or partly both in the parliamentary borough and in the municipal borough, the list for the parish shall be made out in three divisions:

“Division 1 shall comprise the names of the persons entitled both to be registered as parliamentary voters under a right conferred as aforesaid and to be enrolled as burgesses;

“Division 2 shall comprise the names of the persons entitled to be registered as parliamentary voters under a right conferred as aforesaid, but not to be enrolled as burgesses;

“Division 3 shall comprise the names of the persons to be entitled to be enrolled as burgesses, but not to be registered as parliamentary voters under a right conferred as aforesaid.”

(3) The High Bailiff of Westminster, who was returning officer, and had been made respondent by the Revising Barrister.

reference to other qualifications than that of lodger, and though in the case of a lodger there would be no necessity to state the parish, yet there would be in other cases where the voter can have qualifications in different parishes. In the footnote to Form I. No. 4, which is a similar form of notice to be given to persons objected to in municipal registration, it is enacted that “if there is more than one burgess list the notice of objection should specify the list, &c.” There can be but one burgess list in municipal boroughs, therefore the list in that case can only be the parish list. In *Wansey v. Perkins, Quigley's Case* (4), which is a decision on the old form No. 10, Sched. B. to 6 & 7 Vict. c. 18, where this footnote is only appended to the objection to the overseers, it was suggested in argument that the footnote should also be applied to the notice of objection to the party, as it was only reasonable he should have the same information, and it was suggested that after the words “on the list” in the notice of objection to the party there should be added the words “for the parish of —;” and Tindal, C.J., says: “The difficulty particularly complained of is, that the notice to the party himself does not specify the list to which the objection is intended to apply; and that as a party may have various qualifications within the borough, a notice in the present form would impose on him the difficulty of examining more than one list. I admit this is a difficulty which to some extent may be imposed on the party; and possibly if it had occurred to the Legislature, they might have framed a form of notice somewhat in the manner that has been suggested.” This is a new Act introducing a new form of registration, therefore the “list” is to be construed as under this Act, and not as under the old law.

The Solicitor-General, in reply.

HALL v. CROPPER.

Consolidated appeal from the decision of the Revising Barrister for the borough of Nottingham.

In this case the same point was raised

(4) 7 Man. & G. 127; 14 Law J. Rep. C.P. 60.

Mortlock v. Farrer, C.P.

with respect to a notice of objection to an occupier.

Ridley, for the appellant.—The list which should be specified is the franchise list, the parish list need not be stated. If the overseers were the persons alone to whom the notice of objection was to be sent, it cannot be suggested that the list to be specified is to be the parish list, because that information would appear on the notice itself, which is to be headed "To the overseers of the parish of —," Form I. No. 1. In *Wansey v. Perkins* (4) it was assumed that the list to be specified in the notice to the overseers was the franchise list, for it was held that there was no necessity to specify the list because the overseers at that time only made out one franchise list in the city of London. The information to be afforded in each case is put on the same basis, and it cannot have one meaning when applied to the overseers, and another when applied to the party. If the list were to mean "parish" list, the Legislature would have left out the very information intended to be afforded by the notice, namely, the information as to qualification.

Graham, for the respondents.—It is necessary to insert the parish in the body of the notice. The draftsman of the Act has obtained the form from the old Act, 6 Vict. c. 18, Sched. B. Form 10, but the old Act can throw but little light on the new Act, because the circumstances were different. The Reform Act had not defined the lists to be specified. Then when there came to be several lists in a borough it was considered necessary to specify the list so far as the overseers were concerned, but not in the case of the person objected to. In the present Act the necessity to specify the list is extended to the party. The notice to the overseers is to the overseers of the parish, but as they have to make out more than one list it is necessary in dealing with notice to them to specify what list the objection refers to, but in giving notice of objection to the party you must specify to which parish the objection refers, for the voter may claim the franchise in respect of different parishes, and he is

entitled to know to which parish the objection refers as well as the particular list of franchise for that parish. In *Wansey v. Perkins* (4) it was held that in the notice of objection to the party it was not necessary to specify the parish list to which the objection referred, but only because the footnote was confined to the case of the overseers, see the headnote to the Law Journal report of the case; when, therefore, the footnote is extended to the party, it is intended the parish shall be stated.

[LORD COLBRIDGE, C.J.—This list referred to in that decision is not the parochial list, but the lists of various qualifications.]

The only other case which throws any light on the subject is *Moon v. Andrew* (5), where the list of voters seems to have been treated as the parish list.

Douglas Kingsford, for the town clerk, did not argue.

Ridley, in reply.

LORD COLBRIDGE, C.J.—In these two cases I am of opinion the Revising Barristers have decided wrongly. In each case the notices of objection are framed in the exact words of the form given in the Act, 1878 (1), they are dated and signed in accordance with the words of the form, and in both notices the objector has given his parish as he is bound to do. The only difference between the two appeals is that in one case the voter claimed as lodger, and in the other case as occupier, and this in my opinion constitutes no difference in point of law.

The objection to the notices is raised upon the construction to the note appended to Form I. No. 2 (1), by which it is enacted that "if there is more than one list of parliamentary voters, the notice of objection in each of the above two cases, namely, first, to the overseers, second, to the person objected to, should specify the list to which the objection refers," and it becomes necessary to consider what is the meaning of the word "list."

It is argued by the appellants that

(5) 38 Law J. Rep. C.P. 97; Law Rep. 4 C.P. 461.

Mortlock v. Farrer, C.P.

since the list of parliamentary voters for a borough is made up of persons who claim to be on it in respect of divers sorts of franchise, such as freemen, lodgers, 10l. householders, &c., the list referred to is the list of voters under each head of franchise, and consequently the information to which the voter is entitled under this footnote is to which list, having regard to the diversities of the franchise, the objection is made.

On the other hand, it was contended, on behalf of the respondents, that inasmuch as in many boroughs there are more than one parish, and as in each parish the overseer has to make out a list, and as each such list is divided under different heads of franchise, and the voter may claim the franchise in respect of various parishes in the borough, he is entitled to know to which parish in the borough the objection is directed, and that as, in the present case, there was no such information afforded, the notice of objection was bad.

If I had to construe this notice quite alone, and with the ordinary information one possesses on questions of franchise, I should feel there was a great deal to be said for both contentions. Both cannot, I think, be true. The note appended to the form applies to both notices of objections, and I must therefore interpret the word "list" reasonably with regard to both the notices, namely, to the notice of objection to the overseers and to the person objected to.

That is one help to the interpretation of this footnote, but it is not the only help. In the Act itself the word "division" is explained, and it is shewn to be confined and limited to three sorts of divisions, namely:—First. Persons entitled to be registered both as parliamentary voters and burgesses; second, as parliamentary voters only; third, as burgesses only, section 15 (2). So that we have a statutory interpretation of the word "division" shewing the word to be confined and limited to those three divisions.

But the matter does not rest there because by this Act we are referred to the old Registration Act, 6 Vict. c. 18, an Act which for the first time drew up a

code of registration. It was drawn with great care, and has been the subject of numerous decisions. It has been incorporated with the present Act, and it is expressly declared that terms used in the present Act are to have the same meaning as in that Act (see 41 & 42 Vict. c. 26. s. 4). The old Registration Act dealt with county and borough registration, it contained a variety of forms which were to be applied in the instance of counties and of boroughs, and amongst these there are forms of objection to be given—First, to overseers, and second to parties. In the notice to the overseers it will be seen that both in the county and in the borough the form is silent as to the locality of the franchise to which the objector objects, and it is obvious that a notice of objection to an overseer whose jurisdiction only extends over a local area, need not state that the objection is to a franchise within that area; in onesense, therefore, though, not in a literal sense, the notice to the overseers, contains the parish. When the notice of objection is to a party on the county register it is expressly directed that the name of the parish is to be inserted in the body of the notice, and therefore a notice of objection to a party on the county register which omitted the parish would not be a good notice. But in the form of notice of objection to the party in a borough the form is silent as to the parish of the party objected to.

Such being the case under the old Act, which is incorporated with the present Act, and whose terms are, as far as possible, to have the same meaning as in the present Act, we find that whereas under the old Act this footnote does not exist in the case of a party, and it would have been impossible to have interpreted it in the manner contended for by the respondents, it is possible to interpret it as it was interpreted under the old Act. The words are *pari materia*, and it seems to me to be more reasonable to place the same interpretation on them, and I am content to construe them in the same way rather than to do that violence to them which would follow from any other construction.

Under the old Act it is clear the list to

Mortlock v. Farrer, C.P.

be specified was the franchise list, and in my judgment the list to be specified by this footnote is not the list of the parish in which the voter's qualification is situated, but the list of the particular franchise in respect of which he claims.

Very little authority is to be found on the point. In *Moon v. Andrews* (5), which was a decision under the old Registration Act (6 Vict. c. 18), the notice of objection was signed by the objector as "on the list of voters for the borough of Penryn;" it was proved that the Parliamentary borough of Penryn comprised six parishes, and amongst them one called the "borough of Penryn," and the Court held, with perfect sense as it seems to me, that the objector who resided in that parish had sufficiently described himself. The other case of *Wansey v. Perkins* (4) seems to be rather in favour of the appellants than of the respondents because there the overseers only made out one franchise list, the other lists being made out by other officers, and the Court held that a notice of objection to the overseers which did not specify the list was good because it could only apply to the list they made out. There are some expressions from Tindal, C.J., shewing that he thought that as a party claiming to vote may have various qualifications in different parishes, a difficulty might be imposed on him in ascertaining to which qualification the objection applied, though, as he proceeded to point out, no great hardship could occur, for the voter could either apply to the overseers or the objector. No such difficulty as that pointed out by Tindal, C.J., could occur in the case of a lodger, a person who is obliged to make an annual local claim on local property in order to maintain the franchise. When therefore the notice of objection is served on a lodger, he must of necessity know to what parish the notice refers, for no man can be a lodger in two places at the same time. It is true that in other cases it is conceivable there may be more difficulty to the voter. As an occupier it is possible he may have two qualifications in the same borough, but I think the answer given by Tindal, C.J., in *Wansey v. Perkins* (4), that he can apply to the

overseers or the objector is the true answer, and I am of opinion that the reasonable interpretation to the "notice specifying the list to which the objection refers" is that the notices should specify the character of the qualification.

I cannot deny but that I was struck with the difficulty pointed out by Mr. Wright with regard to the note appended to municipal notice No. 4. I confess I am not able to place an adequate interpretation on it, and all I can say to it is that the matter is not free from difficulty. I do not pretend that I can construe the note to the two forms of election, but the considerations introduced by the later footnote are not sufficient to override the construction of the earlier footnote. Without therefore saying that the matter is free from difficulty, for I frankly admit that it is not, I am of opinion that the decisions of the Revising Barristers were wrong and must be reversed.

GROVE, J.—I have had considerable doubts in the case, for the point was one of difficulty, and the arguments were, to my mind, evenly balanced; but the argument of Mr. Ridley has convinced me that the appellants ought to succeed.

We have to construe this footnote with reference to notice of objection both to the overseers and to the party. The respondents contend the parish is to be inserted in the notice, but the overseer of course knows his parish, and moreover the heading to the notice is "To the Overseers of the Parish of—." If, then, we were to accept the interpretation contended for by the respondents, and hold that the list to be specified was the parish list, we should, in my opinion, be placing a meaningless interpretation on the words when applying them to the notice to the overseers. We have, then, to place an interpretation on the footnote which is applicable to both notices.

Arguments were addressed to us, to which my Lord has referred, shewing that this note is almost a copy of the footnote in the old registration Act. That footnote undoubtedly referred to the lists under the different heads of franchise. When, therefore, we come to words which are *pari materia*, it seems to me we should apply the same inter-

Mortlock v. Farrer, C.P.

pretation, for there are strong reasons for saying that Parliament, when using the same language, meant the same thing.

The language of the footnote is very special. I cannot think it was drawn carelessly; and when I find it specially applied to both cases, I cannot but think the Legislature intended something which was applicable to both cases. The argument of the respondent could only prevail by giving the previous Act, and this Act one meaning, in the case of the overseers, but this Act a different meaning when applied to the party. Such a construction appeared to me strange, and led me to consider the appellant was entitled to our judgment.

I was impressed with the difficulty pointed out by Mr. Wright in the footnote to No. 4, and I feel there is a difficulty in that footnote. I should much wish that there were no difficulty, but we cannot assume, as we were invited to do, that there is error or mistake in the Act. All I can say is that I cannot explain it, and I do not think the difficulty sufficient to override the arguments of the appellants. This footnote has to be applied to the cases of notice of objection to overseers and persons objected to; we have to place a meaning on it which shall be applicable to both, and I agree with my Lord that the interpretation we ought to place on it is that the list, if more than one, to be specified, is the franchise list, and not the parochial list.

LINDLEY, J.—I am of the same opinion. Both these cases turn on the true construction of Form I., note 2, which, by section 8, is to be construed and have effect as if enacted in the body of the Act. Now the words that give rise to the difficulty are, "if there is more than one list of Parliamentary voters;" and it is said that, if there is more than one parish of voters, there must be more than one list. On the other hand, there are several lists made out by the overseers of the several parishes. I think the argument of Mr. Ridley to be unanswerable. If you apply this footnote to the objection to the overseers, it would be unmeaning, if the list to be specified were the parish list. If a notice is directed

to parish A. it cannot of course be a good notice to parish B. In other words, the several lists referred to must be the several qualifications which are made out by the overseers. Having such meaning attached to it in the one case, it would be a strong thing to say it is to have a different meaning in the other.

The construction we place on this footnote is fortified by referring to other forms, and also observing that, when the parish is to be given, it is specifically mentioned, as is the case where the objector has to mention his parish; and I see no difficulty, excepted that pointed out by Mr. Wright. I do not pretend to be able to give the full meaning to forms 3 and 4, but I decline to accept his argument to the extent of overriding what seems clear in the present instance. It appears to me that spelling this clause out, and having regard to this Act as well as the previous Acts, the Revising Barristers should have allowed the objections.

Ridley applied for costs, and that the names be struck out.

PER CURIAM.—There should be no costs against the town clerk; but in each of the other cases, where the respondents have rested their defence on technical grounds, there must be costs as against them. The names must be struck off, as the persons objected to have resisted the objection on grounds which have failed.

Decisions reversed.

Solicitors—Rogerson, Ford & Co., for the appellant *Mortlock*; the respondent *Farrer* in person; C. C. Ellis, Munday & Co., for the appellant *Hall*; Aldridge, Thorn & Co., agents for *F.* Acton, Nottingham, for the respondent *Cropper*.

[IN THE COMMON PLEAS DIVISION.]
 (Appeal from Revising Barrister's Court.)
 1879. } HAYWARD (appellant) v. SCOTT
 Nov. 25. } (respondent).

Parliament—Registration—Persons incapacitated by Law or Statute from Voting—Power to expunge—41 & 42 Vict. c. 26. s. 28 (sub-secs. 7, 8).

Section 28 of the Parliamentary and Municipal Registration Act (41 & 42 Vict. c. 26), which declares the duties and powers of the Revising Barrister, by sub-section 7 enacts that he shall expunge from the list the name of every person "incapacitated by any law or statute from voting at an election:"—

Held, that the incapacity referred to was the general incapacity which would exist in the case of peers, women, aliens, &c., and not such transitory incapacity as would exist by reason of the receipt of parochial relief, insufficient occupation, &c.

Stowe v. Jolliffe (43 Law J. Rep. C.P. 265; Law Rep. 9 C.P. 734) followed.

Consolidated appeal from the decision of the Revising Barrister for the city and borough of Bath.

At the revision of the lists for the city and borough of Bath application was made by the appellant, on the list of voters for the said borough, to expunge from the list of voters for the parish of Lyncombe and Widcome, in exercise of the powers conferred on the Revising Barrister by sub-sections 7 and 8 of section 28 of 41 & 42 Vict. c. 26 (1), the name of George

(1) 41 & 42 Vict. c. 26. s. 28. "A revising barrister shall, with respect to the list of voters for a parliamentary borough and the Burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following:—"

Sub-section 7. "He shall expunge the name of every person, whether objected to or not, where it is proved to the Revising Barrister that such person was, on the last day of July then next preceding, incapacitated by any law or statute from voting at an election for the parliamentary borough or an election for the municipal borough, as the case may be, to which the list relates."

Sub-section 8. "Before expunging from a list the name of any person not objected to, the Revising Barrister shall cause such notice, if any, as shall appear to him necessary or proper under the cir-

Baker and eight other persons consolidated with this case, on the ground that the said George Baker and the said eight other persons had received parochial relief during the qualifying period.

An application was also made by the appellant to expunge under the same powers the name of William Clarke on the list of voters for the parish of Lyncombe and Widcome and fifty other persons consolidated with this case, on the ground that the said William Clarke and fifty other persons had not occupied the qualifying premises as owners or tenants as required by statute during the qualifying year. In neither of the said cases had notice of objection been given, as required by 6 & 7 Vict. c. 18. s. 17, as amended by 41 & 42 Vict. c. 26.

The facts of receipt of parochial relief and non-occupation of qualifying premises by the persons above-named were admitted.

The Revising Barrister held that sub-sections 7 and 8 of 41 & 42 Vict. c. 26. s. 26 (1) did not apply to either of the cases, and retained the names of George Baker and William Clarke and the other persons on the list of voters.

Ridley, for the appellant.—Persons in receipt of parochial relief are as a fact incapacitated by statute and common law, see section 36 of the Reform Act (2 Will. 4. c. 45). The case of *Stowe v. Jolliffe* (2) seems at first sight against the appellant. Lord Coleridge, C.J., in dealing with the words "persons prohibited from voting by a statute or by the Common Law of Parliament," says—"the receipt of alms, the receipt of parochial relief, non-residence within the proper distance of the borough, non-occupation, insufficient qualification, none of these things appear to satisfy the words of this proviso." . . . "It means persons who from some inherent or for the time irremovable quality in themselves, have not, either by prohibition of statutes or at common law, the *status* of Parliamentary electors. Such,

circumstances of the proposal to expunge the name, to be given or left at the usual or last known place of abode of such person."

(2) 43 Law J. Rep. C.P. 265; Law Rep. 9 C.P. 734.

Hayward v. Scott, C.P.

for example, are peers, women, and persons convicted of crime," but it is submitted Lord Coleridge, C.J., has placed the persons in receipt of parochial relief in the wrong list, as their disqualification rests on very different grounds to that of the other disqualifications in the first list, which are merely failures to comply with the Act, and not prohibitions. By section 40 of the Representation of the People Act (30 & 31 Vict. c. 102) and by note P. to schedule 41 & 42 Vict. c. 26, the overseers are to omit such persons from the list. Consequently, in the present case the overseers have failed to perform their duty, which constitutes strong ground for the interference of the barrister. The case of such persons differs from those who have a right to be on the list.

[LOPES, J.—Persons in receipt of parochial relief always were put on the list.]

Peers and women ought to be omitted from the list. Then the Act says, that persons who are in receipt of parochial relief shall be like peers and women, the overseers shall omit them from the list. The Revising Barrister has to correct the default of the overseers, and by sub-section 8 (1) he has, before doing so, to give notice to such person (3).

Blake Odger, for the respondent, was not called on.

LINDLEY, J.—I am of opinion that the decision of the Revising Barrister was right. The question is whether he was bound to expunge from the list certain persons who had not been served with notice of objection, but who were objected to on the ground, either of receipt of parochial relief or of insufficient qualification.

Leaving out for the moment the case of insufficient qualification, we have to determine whether a person who has received parochial relief within the qualifying year is incapacitated within the words of 41 & 42 Vict. c. 26. s. 28. sub-sect. 7 (1). It is argued that inasmuch as by a certain statute persons who have received

parochial relief ought not to be on the list at all, therefore they are incapacitated within this section. There may be some difficulty in defining the word "incapacity," but to my mind it is clear that the incapacity indicated by this section is the general incapacity to vote at all, and not an incapacity which would prevent the person from voting at one particular election, and when we know the practice is to place such persons on the list, the section appears to me to be inapplicable. But any difficulty we might feel is set at rest by *Stowe v. Joliffe* (2), a case which, though turning on a different statute, shews *ratione decidendi* the sort of incapacity which is meant. Having regard, therefore, to that case, I hold that the Revising Barrister was right. The same reasoning would *a fortiori* apply to the case of the occupier. I, therefore, give judgment for the respondent.

LOPES, J.—This case appears to me to be governed by *Stowe v. Joliffe* (2); and even if it were not, I should have no hesitation in saying that the Revising Barrister was right. I am of opinion that the word "incapacity" in this section refers to such general incapacity as would prevent the person from voting at any election, e.g. such incapacity as would exist in the case of married women, peers, infants and aliens, and not to any such transitory incapacity as would exist in the case of a person receiving parochial relief or disqualified by reason of insufficient occupation. I think that those who are familiar with the practice attending the revision of the lists will agree that in thus deciding we have arrived not only at a right but a salutary conclusion.

Decision affirmed.

Solicitors—C. C. Ellis, Munday & Co., for appellant; Rogerson & Ford, agents for John Ricketts, Bath, for respondent.

(8) It was conceded that the case of the occupier was not within the words of section 28, sub-section 7.

[IN THE COMMON PLEAS DIVISION.]
(Appeal from Revising Barrister's Court.)
 Nov. 20. } JAMES (appellant) v. HOWARTH
 1879. } (respondent).

Parliament—Borough Vote—Notice of Objection—Description of Objector—Parliamentary List—Power to amend Notice—41 & 42 Vict. c. 26. s. 28.

In a notice of objection to a person on the list of parliamentary voters for a borough, the objector, who was himself on such list, and as such entitled to object, described himself as "on the list of voters for the parish" of W., instead of "on the list of parliamentary voters for the parish" of W., in accordance with Form (I.) No. 2 in the schedule to the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26.) :—

Held, that this was a mistake within the meaning of section 28 sub-section 2 of that Act, and that the Revising Barrister both could and ought to have corrected such mistake.

At a Court held before the Revising Barrister, appointed to revise the list of voters for the city and borough of Bath, Henry James, the appellant, objected to the name of John England being retained on the Parliamentary list of voters, for the parish of St. James's. The notice of objection was signed thus—"Henry James, of 36 New King Street, on the list of voters for the parish of Walcot."

There are two lists of parliamentary voters for the parish of Walcot, namely, list No. 1, division 1, being the list of persons entitled under the Reform Act, or by section 3 of the Representation of the People Act, 1867; and list No. 3 being the list of lodgers published under 41 & 42 Vict. c. 26. s. 2.

There are also two lists of burgesses for the said parish of Walcot, namely, list 1, division 1, and list 1, division 3.

The name of the said Henry James was on the parliamentary list 1, division 1. Fifty-nine other persons, whose names and qualifications were set out in the schedule to the case, were also objected to by the said Henry James.

VOL. 49.—Q.B., C.P. & EXCH.

It was contended, on behalf of the said John England, that the notice of objection was insufficient, inasmuch as the said Henry James stated himself to be on the list of voters for the parish of Walcot, whereas he should have stated on which of the said several lists for that parish his name appeared, and also should have defined the list to be a parliamentary list, as required by Form (I.) in the schedule to the said 41 & 42 Vict. c. 26.

It was contended, on behalf of the appellant, that the said omission did not invalidate the said notice of objection, and also that it was in the power of the Revising Barrister to supply the omission under 41 & 42 Vict. c. 26. s. 28.

The Revising Barrister was of opinion that the said notice of objection was invalid for omitting to state in the description of the objector that he was on the parliamentary list, and also for omitting to define on which of the said several lists his name appeared, and that he, the Revising Barrister, had no power to amend. He, therefore, retained the names of the said John England, and the said fifty-nine other persons on the list of voters, and he ordered the said cases to be consolidated.

If the Court should be of opinion that such notices of objection were sufficient, the register was to be amended by expunging the names of the said John England and fifty-nine other persons in the said schedule from the said list of voters for the said borough.

Bidley, for the appellant.—The omission to state that the objector was on the list of parliamentary voters was not fatal. It was at most only a mistake which the Revising Barrister had power to amend. The objector was, in fact, on the parliamentary list No. 1, division 1, and as no one has a right to object to another person being on the parliamentary list of the borough, unless he is himself on that list, no one could have been misled by the objector in this case omitting to insert the word "parliamentary." Unfortunately he followed the old form of notice of objection given by 6 & 7 Vict. c. 18, Schedule (C.), No.

Z

James v. Howarth, C.P.

11, which states only "on the list of voters for the parish of"—instead of following the form given by the late Act, 41 & 42 Vict. c. 26, schedule Form (I.), No. 2, which states, "on the list of parliamentary voters for the parish of." There were in the present case two lists of parliamentary voters for the parish of Walcot, namely, the list of those entitled under the Reform Act, and section 3 of the Representation of the People Act, 1867, and the list of lodgers, so that the insertion of the word "parliamentary" would not have given the person objected to any further information than he must have otherwise known, and would not have shewn the particular list on which the objector was to be found, and, therefore, the word "parliamentary" was not important; and if the Revising Barrister had the power to amend, the omission was a mistake which he should have amended. Then, as to the power to amend, it is clear that sub-section 2 of section 28 of 41 & 42 Vict. c. 26, gives such power. It may be said that it gives only a discretionary power to amend, but in the present case the Revising Barrister never exercised any discretion, but held that he had not the power to amend. Next, as to the notice being bad, because it did not state on which list the objector's name appeared.

[LORD COLERIDGE, C.J.—Is not your stronger ground that this was a mistake, which the Revising Barrister had power to amend? Upon that point we are with you.]

Blake Odger, for the respondent, was then called upon.—By section 15, sub-section 7, of 41 & 42 Vict. c. 26, "where the list is made out in divisions, divisions one and two shall be deemed to be lists of voters for the parliamentary borough, and divisions one and three shall be deemed to be burgess lists for the municipal borough." The objector ought, therefore, to specify the list on which he is, as well as the person objected to, and to which the notice refers, and which he must do according to the note to Form (I.), No. 2, in the schedule. There were several lists for the parish of Walcot and even two parliamentary lists, and therefore he ought to state in which list his name appeared

—*Edsworth v. Farrer* (1), *Crowther v. Bradney* (2), *Bright v. Devenish* (3). Then, as to this amendment, it is clear that sub-section 2 of section 28 gives the Revising Barrister a discretion as to amending, and it does not appear from the case whether he would have amended.

[LORD COLERIDGE, C.J.—We are all of opinion that if he had the power to amend, he ought in this case to have amended, and we will presume, therefore, he would have done so if he thought he had the power. The question you have to argue is whether he had the power to amend.]

He had not the power to make such an amendment as this, which was not correcting any mistake, but supplying an omission of what was essential for the title of the objector to object. Although the Revising Barrister might amend a misnomer, he could not amend an omission, as shewn from the case of *Moss v. Lichfield* (4), on the construction of 6 & 7 Vict. c. 18. s. 75.

[LORD COLERIDGE, C.J.—That depended on the words "misnomer, or inaccurate, or insufficient description in any rate," and the person there had never been rated at all.]

A mistake is where there is some inaccuracy or misdescription, and not a total omission. *Edsworth v. Farrer* (1), which was decided on section 101 of 6 & 7 Vict. c. 18, shews the difference between omission and misdescription.

Ridley, in reply, cited *Samuel v. Hitchmough* (5), and the case of *Bendle v. Watson* (6), upon the power to amend under 6 & 7 Vict. c. 18. s. 40.

LORD COLERIDGE, C.J.—As far as the notice of objection depends on the correct description of the voter objected to, it must specify the list to which he belongs. That must be governed by the construction we have put on the note at

(1) 4 Com. B. Rep. 9; *nom. Farrer v. Edsworth*, 16 Law J. Rep. C.P. 142, 152.

(2) 16 Com. B. Rep. N.S. 536; 33 Law J. Rep. C.P. 70.

(3) 36 Law J. Rep. C.P. 71.

(4) 7 M. & G. 72; 14 Law J. Rep. C.P. 56.

(5) 13 Com. B. Rep. N.S. 9; 32 Law J. Rep. O.P. 55.

(6) 41 Law J. Rep. C.P. 15.

James v. Howarth, C.P.

the end of Form (I.) No. 2, in the schedule to 41 & 42 Vict. c. 26, and which note, *mutatis mutandis*, is similar to the note to the form of notice of objections to the overseers in Schedule B. to 6 & 7 Vict. c. 18. There is no reference in that note to the list to which the objector belongs, and the reason for the omission is, that it cannot be of any consequence to the person objected to whether he is informed or not of the class of list to which the objector belongs, if he is informed that such objector is a person qualified to object. Therefore, I do not think that it is necessary to do more, except in the case of freemen, than to follow the words in Form (I.) in the schedule to 41 & 42 Vict. c. 26, when by so doing sufficient information is given to the person objected to. Consequently, when the objector to a Parliamentary voter is on the list of parliamentary voters, if he signs the notice, with his last place of abode, describing himself as on the list of parliamentary voters, that is sufficient. No one could be misled by such a notice, because who he was and where he lived appeared, and what was his qualification entitling him to object would appear by reference to the parliamentary list of voters. It has been contended for the respondent, that the word "parliamentary" was essential, and that its omission in the notice of objection was fatal, and Mr. Ridley for the appellant had a difficulty in arguing that it was not. The schedule to 41 & 42 Vict. c. 26, is by section 8 to be construed as if enacted as part of this Act, and inasmuch as in the form of notice of objection given in the schedule to the former Act (namely, 6 & 7 Vict. c. 18) the word "parliamentary" was not used to describe the list of voters on which the objector was, but it is so used in the Forms Nos. 1 and 2 of notices of objection in the schedule to the Act 41 & 42 Vict. c. 26; and as that Act deals with both parliamentary and municipal registrations, and as there may be a list which is parliamentary and not municipal, as also there may be a list which is municipal and not parliamentary, it must, I think, be at least a matter of grave doubt whether the word "parlia-

mentary" was not essential to describe the list in which the objector was; but it is not necessary that I should determine this now, and I give no opinion upon it, though I am strongly inclined to think that the Revising Barrister was right in holding that its omission was fatal. He said, however, that he had no power to amend. Now we are all of opinion that this was a case in which he ought to have amended if he had the power, for it appears that some fifty or sixty voters who are not entitled to be on the register will be there if the notice of objection is bad; therefore it becomes necessary to see if he had the power to amend. Now I think it sufficiently appears that he had such power, from the words of section 28 of 41 & 42 Vict. c. 26. That section sets out in great detail the duties and power of the Revising Barrister. The 1st sub-section states that he *shall* correct any mistake in any list. The second sub-section states that he *may* correct any mistake in any claim or notice of objection. Now the omission here was manifestly a mistake in the notice of objection. The objector evidently followed the old form which was in use before this Act, but he was a person entitled to object, and the objection was a good objection, and clearly the mistake was one which it was in the power of the Revising Barrister, under that 28th section, to correct, and it was a correction which he might and ought to have made. On that ground, and on that ground alone, I am of opinion that the decision of the Revising Barrister should be reversed.

DENMAN, J.—The Revising Barrister states that he was of opinion that the notice of objection was invalid for two reasons, and that he had no power to amend, and therefore he retained on the list of voters the names of the several persons who were objected to. I do not intend to express any opinion upon the point whether the omission of the word "parliamentary" in the description of the list was a fatal one, but for the power of amendment, as it is unnecessary to give any opinion on that point, because I am clearly of opinion that the Revising Barrister had power to amend; and I

James v. Howarth, C.P.

think we should be frittering away the sub-section 2 of section 28 if we did not give effect to it in such a case as the present one. It appears to me that the omission here was clearly a mere mistake. The only thing the objector had omitted to do was to insert the word "parliamentary" between the words "on the list of" and the words "voters for the parish of Walcot." His name being on any other list than the list of parliamentary voters would have been useless, and would not have entitled him to object; and one may assume, I think, that it was known he was on the list of parliamentary voters, and so entitled to object. I think, therefore, the Revising Barrister had not only the power to amend, but that he ought to have amended the notice in this case.

LINDLEY, J. — If the Revising Barrister had no power to amend, I should have thought the omission of the word "parliamentary" here would have been fatal, as that is an important word; but the sub-section 2 gives a power to amend a mistake in any notice of objection, and I think that the leaving anything out of such notice may be as much a mistake as putting something else into it, and that, therefore, this omission was a mistake which the Revising Barrister could have amended.

Decision reversed.

Solicitors—Ellis, Munday & Co., for appellant;
Bogerson & Ford, agents for J. Ricketts, Bath,
for respondent.

[IN THE COMMON PLEAS DIVISION.]
(*Appeal from Revising Barrister's Court.*)
1879. } FORD (*appellant*) v. DREW
Nov. 18. } (*respondent*).

Parliament—Borough Vote—Residence
—2 & 3 Will. 4. c. 45. s. 31.

A person on the list of voters for the city of Exeter had not in fact resided within seven miles of that city for six calendar months previous to the 15th of July, but during a small portion of that time he had been in London serving under articles of clerk-

ship to a solicitor there. He had, however, a separate bedroom set apart for his exclusive use in his father's house, which was situate within seven miles of Exeter, where he had continuously resided previously to his going to London to serve under such articles, and where, subject to such articles, he always intended to reside, and where in fact on the expiration of such articles he did so reside.

Held, that such person whilst serving in London under such articles had not a sufficient constructive residence within seven miles of Exeter to satisfy the requirements of 2 & 3 Will. 4. c. 45. s. 31.

At a Court held by the Revising Barrister, for the revision of the list of voters for the city of Exeter, the respondent's name appeared on form D, No. 2, for the parish of St. Tidwell, of the list of persons entitled to vote at the election or members to serve in Parliament, for the said city, as the owner of a freehold rent-charge, and the appellant duly objected to the respondent's name being retained on the list, upon the ground (as far as is material to this case), "that the respondent had not resided for six calendar months previous to the 15th day of July last within the said city, or within seven statute miles thereof."

The following facts were proved:—

1. For a long time previously to the month of May, 1878, the respondent had continuously resided at his father's house (which is within seven miles of the said city), as a member of his father's family, and a separate bedroom was set apart for his exclusive use in the said house, and the same room has continued to be so, as aforesaid, set apart for the respondent's exclusive use, with the right to use it up to the present time whenever he thought fit, and he has always kept some of his clothes and other property in the said room.

2. Some time previously to the said month of May, the respondent had been articled as a clerk to Mr. Follett, a solicitor, at Exeter, and he had served within about nine months the full time of his clerkship under the said articles.

3. In the said month of May, in consequence of the said Mr. Follett having

Ford v. Drew, C.P.

ceased to practise as a solicitor, the respondent (who was then of full age) articulated himself to Mr. Lake, a solicitor in London, for the purpose of completing the unexpired term under his articles to the said Mr. Follett, and the said articles to the said Mr. Lake expired on the 20th of January, 1879.

4. In the said month of May, the respondent went to London for the sole purpose of serving under the said articles to the said Mr. Lake, and subject thereto, he always intended to, and did, continue his said residence, with the right to the said room in his said father's house until the present time.

5. In the month of August, 1878, and whilst the respondent was serving under his said articles to the said Mr. Lake, he (with Mr. Lake's permission) returned to his father's said house for his holidays and slept in the aforesaid room for about three weeks, he then went back to London under the said articles and remained there until the 23rd day of January, 1879, on which last-named day he came back to his father's house, and has resided therein and slept in the said room until the present time.

6. The respondent is not married, and has had no other home but the said house of his father and the said room therein as is hereinbefore mentioned during the whole time aforesaid, except under the circumstances herein stated when he was in London serving under the said articles to the said Mr. Lake.

7. The appellant contended that the respondent was not a free agent to return to or reside at his father's said house when he was serving under the last-named articles, and that he had not the right to reside there during that time without the permission of the said Mr. Lake.

On behalf of the respondent it was contended that notwithstanding the said articles he had a residence within seven miles of the city of Exeter, and had the right to reside there during six calendar months previous to the 15th day of July last.

The Revising Barrister decided that the respondent's residence was sufficient to satisfy the requirements of the Act,

2 & 3 Will. 4. c. 45. s. 31, and he retained his name on the said list of voters for the said city.

Bompas, for the appellant.—The respondent was under contract to attend at the office in London of the solicitor with whom he was serving under the said articles of clerkship, and he could not, therefore, return to his father's house near Exeter, without the permission of such solicitor, so that in this respect he was not a free agent. He did not, in fact, reside near Exeter for six calendar months previous to the 15th of July last, and he did not reside there constructively or in point of law during that time—*Whithorn v. Thomas* (1). The cases shew that to give a person such constructive residence it is essential that he should have the power of going to such residence whenever he should please to do so, and that accordingly, where by reason of imprisonment from which he cannot get free by payment of money, or by reason of an engagement he has entered into, he is prevented from returning, his constructive residence is lost—*Powell v. Guest* (2), *Taylor v. The Overseers of St. Mary Abbots, Kensington* (3), *Durant v. Carter* (4), *Ford v. Pye* (5), *Ford v. Hart* (6). In *Beal v. Ford* (7), there was an actual residence of the voter within the distance prescribed by 2 & 3 Will. 4. c. 45. s. 33, and it was immaterial whether he had a right to be there or not.

Buckmill, for the respondent. It appears from the fourth paragraph of the case that the respondent went to London for the sole purpose of serving under the articles to Mr. Lake, and it is there expressly stated that "subject

(1) 7 Man. & G. 1; 14 Law J. Rep. C.P. 38.

(2) 18 Com. B. Rep. N.S. 72; 34 Law J. Rep. C.P. 69.

(3) 40 Law J. Rep. C.P. 45; Law Rep. 6 C.P. 309.

(4) 43 Law J. Rep. C.P. 17; Law Rep. 9 C.P. 261.

(5) 43 Law J. Rep. C.P. 21; Law Rep. 9 C.P. 269.

(6) 43 Law J. Rep. C.P. 24; Law Rep. 9 C.P. 273.

(7) 47 Law J. Rep. C.P. 56; Law Rep. 3 C.P. D. 73.

Ford v. Drew, C.P.

thereto he always intended to, and did, continue his said residence with the right to the said room in his said father's house."

[GROVE, J.—He was by the articles bound to serve under them to Mr. Lake.]

His being so bound would not prevent his right to return and reside at his said father's house. According to *Bond v. The Overseers of St. George's, Hanover Square* (8), the residence need not be a continued and unbroken one, and absence does not matter "if there be the liberty of returning at any time and no abandonment of the intention to return."

In that case the case of *Whithorn v. Thomas* (1) was referred to, and Keating, J., pointed out that that case had been decided on the ground that the residence was not a *bona fide* residence at Tewkesbury, and that the Court did not decide that the residence would not have been sufficient had it been otherwise. In *Powell v. Guest* (2), Erle, C.J., says, "it seems to me that the doctrine is correctly laid down in *Elliot on Registration*, 2nd edit. 204, where it is said 'that in order to constitute a residence a party must possess at the least a sleeping apartment, but that an uninterrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence.' " This passage is also quoted with approval by Brett, J., in *Bond v. The Overseers of St. George's, Hanover Square* (8), and it is clear that, according to law as so stated, the respondent had a residence at his father's house, near Exeter, for there existed the liberty of returning, and there had been no abandonment of the intention to return.

[GROVE, J.—Would it not have been a non-compliance with the articles of clerkship if the respondent had gone to Exeter without the leave of Mr. Lake?]

Being bound as an articulated clerk is not like being bound as an apprentice. Regulation 23 of the regulations made by the

(8) 40 Law J. Rep. C.P. 47; Law Rep. 6 C.P. 312.

Incorporated Law Society in November, 1877, states that every candidate, before his final examination, is to give to the secretary "written notice of his desire to be examined, stating his place or places of residence and of service under articles for the last preceding twelve months, together with the name or names and place or places of residence of the person or persons with whom he has served during the continuance of his articles." That shews that the two residences may be different.

[LINDLEY, J.—But one of the questions required to be answered is, "Have you at any time during the term of your articles been absent without the permission of the solicitor or solicitors to whom you were articulated or assigned?"]

Still that shews he might go away. In *Ford v. Hart* (6), Keating, J., expressly guarded himself from saying that a residence, though in some sense permissive, might not be sufficient. *The King v. Mitchell* (9) shews that absence during service in the militia does not prevent such person from being an inhabitant of the borough in which his family resided.

Bompas replied.

GROVE, J.—The case is not free from doubt; but, on the balance of authority, I think that the respondent did not reside, as required by section 31 of the Reform Act, within seven miles of the city of Exeter. There is no case exactly in point. The case of *Ford v. Hart* (6) is the nearest, but there the absence of the voter was more compulsory than it was under the articles of clerkship in the present case; and, moreover, in that case there was no one who appeared for the respondent on the appeal, and the Court had not the advantage of hearing arguments on both sides. Still, however, as I have already said, I think that on the balance of authority the respondent in the present case did not reside within seven miles of the city, as required to satisfy the Act. It appears that he was serving under articles of clerkship to a solicitor in London during a portion of the time, and for this purpose I do not think it matters how

(9) 10 East, 511.

Ford v. Drew, C.P.

many days of the six months he was so serving, for it is the character, and not the amount in point of time, of the break which is material. It is stated in the case that he had a room in his father's house, which was within seven miles of Exeter, which was set apart for his exclusive use, with a right to use it whenever he thought fit; and the 4th paragraph of the case states that, subject to his serving under the said articles, he always continued his residence, with the right to the said room, in his father's house. I cannot, however, read this as shewing that he had an absolute legal right to the room, so as to give him a right to turn out of it any of his father's guests. It does not appear that he paid any rent, and I conclude it was only with his father's permission he had the use of such room. This is a matter not altogether unimportant to be considered, because it makes his residence within seven miles of Exeter dependent on two permissions, namely, first, that of his father, and secondly, that of the solicitor in London with whom he was serving his articles. We have not had these articles before us, but I assume that they were in the usual form. In *Pullen's Law of Attorneys*, 3rd ed. p. 37, it is said that "no particular form is necessary, but the contract must be a valid subsisting contract during the time it extends to, and bind the clerk for the full prescribed term to serve the master;" and for this is cited *Ex parte Unthank* (10). Now, as the voter's father resided near Exeter, it may be treated as impracticable for him to have resided with his father during the time he was serving under his articles in London. He could not have done so at all except by going from his office in London on a Saturday evening, and returning there early on the following Monday morning; or else by going with the leave of the solicitor with whom he was serving; and therefore, except with such leave, he could not, during six days at least of the week, have resided at his father's house without committing a breach of his own contract under the articles by which he was substantially bound to serve the solicitor in London

during office hours. Now, is that residing within seven miles of the city of Exeter, as contemplated by the Act of Parliament? I think it is not. The case nearest in point is that of *Ford v. Hart* (6). That was the case of an officer in the army serving with his regiment, and it was decided that as he resided only with his mother within seven miles of the borough when he did so with leave of his commanding officer, he did not constructively reside there for the six months within the meaning of the Act. The only difference between that and the present case is, that service in the army is more compulsory than under articles of clerkship to a solicitor, and absence without leave is more severely punished. What is the service under articles of clerkship to a solicitor? The clerk is bound by contract to remain with and give his services to such solicitor, and in fact he does so. Erle, C.J., in *Powell v. Quest* (2), considered that the imprisonment for a civil debt might be different, as affecting residence, from imprisonment on a criminal charge, because where the imprisonment is only for a civil debt, by paying the debt or compounding with his creditors a person could remove the disability of returning to his home. That, however, is different from the present case, as there the ability to return does not, as it does in the present case, depend on the permission of another person. Here it cannot be fairly said that the residence of the respondent was at his father's house, because that was a place which he could only occasionally visit, and that only with the permission of his master. The residence, I think, was not sufficient, though in so holding I own I am not free from doubt, the doubt arising rather from the cases which have been decided than from what would have been my own opinion independently of the cases; for if, without reference to cases, I had been asked whether the respondent resided within the distance of seven miles from Exeter, I should undoubtedly have said No. The difficulty only arises from the extended meaning the Courts have given to a constructive residence. But, according to the best opinion I can form, I have come to the decision that the appellant is en-

(10) 2 Mo. & P. 453.

Ford v. Drew, C.P.

titled to succeed, and that the decision of the Revising Barrister should be reversed.

LINDLEY, J.—I am of the same opinion. In point of fact the respondent did not reside within seven miles of Exeter for the six months required by the statute, though he nearly did so. Then on what theory is he to be treated to have done what in point of fact he did not actually do? I take the law as thus stated by Erle, C.J., in *Powell v. Guest* (2), and quoted by Brett, J., in *Bond v. The Overseers of St. George's, Hanover Square* (8): "Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience to do so, will not prevent a constructive legal residence." Now, let us see in what respect the respondent here was at liberty to return. He was in fact at liberty to do so, but that the distance between London and Exeter was such that he could not, without committing a breach of contract, return to and reside at his father's house near Exeter. Then, had he any intention to do so? In other words, had he an intention to break his contract? The presumption must be that he had not, and therefore one must say that he had neither the liberty nor the intention to return; and that, I think, disposes of the present case. In *Ford v. Hart* (6) the inability to return arose from military service; and Brett, J., says, "Where the person in fact lives elsewhere, and cannot by law return to the borough without permission of another, it seems to me that it is impossible to say that there is an intention to return within the meaning of the term as applied to the doctrine of constructive residence." In *Taylor v. The Overseers of St. Mary Abbots, Kensington* (3), where the claimant, who resided with his wife and family in the borough, had entered into an agreement to attend upon some gentleman in the daytime, and for his convenience in doing so lodgings were taken for him in the same house as such gentleman occupied, in which he might and usually did sleep, it was held that he resided where his wife and family resided, and the *ratio decidendi* was that

he was not bound to sleep elsewhere. But here the respondent had bound himself to reside in London, or so near thereto as to be able to perform the service under the articles of clerkship which he had contracted to perform. I therefore am of opinion that the decision of the Revising Barrister was wrong.

Decision reversed, but without costs.

Solicitors—J. E. Fox & Co., agents for H. & B. J. Ford, Exeter, for appellant; S. D. Hamilton, agent for J. W. Friend, Exeter, for respondent.

[IN THE COMMON PLEAS DIVISION.]
(Appeal from Revising Barrister's Court.)
1879. }
Nov. 18. } PORRETT (appellant) v. LOED
Dec. 6. } (respondent).

Parliament—Borough Vote—Description of Qualification—Declaration by Voter—Houses in succession—Power to amend—41 & 42 Vict. c. 26. ss. 24, 28.

The 41 & 42 Vict. c. 26. does not, any more than 6 & 7 Vict. c. 18, empower a Revising Barrister to substitute a different qualification for that appearing on the list.

Therefore where the qualification of a person on the list of borough voters was described in the third column as "house," and in the fourth column as "8 Birley Place," and such person made a declaration according to section 24 of 41 & 42 Vict. c. 26, in which he declared that the correct particulars of his qualification ought to be stated in the third column "houses in succession," and in the fourth column "8 Birley Place and 9 Birley Place," it was held that the Revising Barrister had no power to amend the list in accordance with such declaration.

Appeal from the decision of the Revising Barrister appointed to revise the list of voters for the township of Burnley in the borough of Burnley, Lancashire. At the revision of the list of persons entitled, both to be registered as parliamentary voters and to be enrolled as

Porrett v. Lord, C.P.

burgesses in division one for the township of Burnley within the parliamentary and municipal borough of Burnley, the respondent duly objected to the name of Arthur Speight Ludlow being retained on such list. The notices of objection (copies of which were set out in this case), both parliamentary and municipal, were on the ground *inter alia* that the

nature of the voter's qualification, and the name and situation of the qualifying property, were not correctly described.

The person so objected to was described as hereunder on the said list of voters for St. Andrew's polling district for the township of Burnley, division one, the list having been prepared by the overseers of the township of Burnley :

No.	Names of Voters in full, surname being first	Place of abode	Nature of qualification	Name and situation of qualifying property
218	Ludlow, Arthur Speight .	8 Birley Place . . .	House . . .	8 Birley Place

The said person had duly delivered to the town clerk for the borough of Burnley on the 12th day of September, 1879, two declarations, such declarations being duly endorsed and initialed by him. Copies of these were set out in this case, but as there was no variation between them, it is only necessary to give here a copy of the parliamentary one, which was as follows :—

"St. Andrews Polling District."
"Parliamentary" "No. 218"

"Declaration for correcting misdescription in the List.

I, Arthur Speight Ludlam, of No. 9 Birley Place, in the parish or township of Burnley, in the parliamentary borough of Burnley, do solemnly and sincerely declare as follows.

1st. I am the person referred to in the list of parliamentary voters made out for the parish or township of Burnley by an entry as follows :

"Division one.

Name as described in List	Place of Abode as described in List	Nature of qualification as described in List	Names and situation of qualifying property
Ludlow, Arthur Speight .	8 Birley Place . . .	House . . .	8 Birley Place

2nd. My correct name and place of abode and the correct particulars respecting my qualification, are and ought to be stated for the purposes of the

register about to be made up of voters for the parliamentary borough of Burnley, as follows :

"Division one.

Correct name	Correct place of Abode	Correct nature of qualification	Correct name and situation of qualifying property
Ludlam, Arthur Speight .	9 Birley Place	Houses in succession	8 Birley Place and 9 Birley Place

Dated this 9th day of September, 1879.

(Signed) Arthur Speight Ludlam.

Made and subscribed before me this 9th day of September, 1879.

J. F. Arlindale,

A commissioner to administer oaths in the Supreme Court of Judicature in England."

VOL. 49.—Q.B., C.P. & EXCH.

No evidence was given before the Revising Barrister other than the said declarations that the premises in question had been occupied in immediate succession, nor did the said voter appear by himself or by any person on his behalf.

The Revising Barrister was of opinion that as the declarations proposed to sub-

2 A

Porretti v. Lord, C.P.

stitute a new and different qualification in the place of that which was described in the said list of voters, it was beyond the scope and meaning of section 24 of the 41 & 42 Vict. c. 26, which was confined to misdescription, and that he had no power to substitute such other and new qualification, and amend the said list of voters as required by the said person who should have sent in a claim which might have been the subject of objection in open Court.

The Revising Barrister therefore held that the said person was not entitled to be retained on the said list, and he expunged his name therefrom.

The names of thirty-four other persons were expunged by the Revising Barrister from the list under similar circumstances.

Henn Collins, for the appellant.—The question is, whether the Revising Barrister had power to amend the description of the qualification of the person objected to in this case. That raises the question, what is the effect of a declaration of the voter made in accordance with section 24 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26) (1). Before this last

(1) The following is the 24th section above referred to. "Any person who is entered on any list of voters for a parliamentary borough or any burgess list subject to revision under this Act for a municipal borough, and whose name or place of abode, or the nature of whose qualification or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list, may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration in the form in that behalf in the schedule to this Act, or as near thereto as the circumstances will admit, before any justice of the peace, or any commissioner or other person authorised to administer oaths in the supreme Court of Judicature.

"The declaration shall be duly dated, and shall on or before the 12th day of September be sent to the town clerk, who forthwith shall indorse on the declaration a memorandum signed or initialed by him stating the date when he received it, and naming the declarant and the list to which the declaration refers, and shall deliver all such declarations to the Revising Barrister at his first Court. If the declaration is sent as aforesaid in due time, of which the said indorsement shall be *prima facie* proof, the Revising Barrister shall re-

enactment the only mode which was left open to a person on the list of borough voters of altering his description of qualification on the register was to send in a new claim which by section 15 of 6 & 7 Vict. c. 18. he was obliged to do on or before the 25th of August. This 24th section of the Act of 1878 was intended to amend this and to enable such person to correct any mistake by sending to the town clerk a declaration in the form given in schedule form M to the Act, which declaration may be sent as late as the 12th of September. The words of section 24 are wide enough to comprise the alteration which was asked to be made in this case. The qualification of the voter was "houses in succession numbered 8 and 9 Birley Place," and not "house numbered 8 Birley Place," as described in the list of voters. Now section 24 expressly enables the declaration to be made by a person, "the nature of whose qualification, or the name or situation of whose qualifying property, is not correctly described in such list." Although before this enactment there was no power to insert the description of the two houses occupied in succession, where one of them had been omitted, yet "house" in the singular was sufficient in the third column for the qualification, *Hitchins v. Brown* (2). The power of correcting a mistake under the old law was governed by section 40 of 6 & 7 Vict. c. 18, which contained this restrictive proviso: "Provided always that whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the

ceive the declaration as evidence of the facts declared to, and that without proof of the signature of the declarant or of the justice, commissioner, or person before whom the declaration purports to have been subscribed, unless he has good reason to doubt the genuineness of any signature thereto. The declaration shall be open, free of charge, to public inspection at the office of the said town clerk at any time between the hours of ten of the clock in the morning and four of the clock in the afternoon of any day, except Sunday, before the 15th day of September, and he shall deliver copies thereof on application and payment of the price of fourpence per folio of seventy-two words."

(2) 2 Com. B. Rep. 25; s. c. 15 Law J. Rep. C.P. 38.

Porrett v. Lord, C.P.

list of voters, or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The 28th section of 41 & 42 Vict. c. 26 is, as regards a borough, substituted for this 40th section, and the powers of amendment which it gives to the Barrister are greatly increased. It is true that such 28th section in sub-section 13 contains a proviso in almost identically the same terms as those of the above proviso in section 40, but there it commences with the words "except as herein provided," and therefore it is necessary to examine the other parts of that 28th section, and upon doing so it will be found that the powers of amendment are very large; for instance, in sub-section 6 it is the duty of the barrister to expunge the name of every person "whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property if the qualification is in respect of property, or any other particulars respecting whom by law required to be stated in the list is or are either wholly omitted, or in the judgment of the Revising Barrister insufficiently described for the purpose of being identified, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of the Revising Barrister;" "and in case such matter or matters shall be so supplied, he shall then and there insert the same in such list." The 40th section of 6 & 7 Vict. c. 18 with which this enactment corresponds, has not the words "or any other particulars respecting whom by law required to be stated in the list is or are either wholly omitted."

[GROVE, J.—Why is this word "whom" used? "whom" applies to persons, not to things.]

It is difficult to say why that is so, but the fact that the Legislature has provided that any omission as to these matters may be supplied and corrected by a declaration in accordance with section 24, shews that it contemplated that the Barrister should have power to amend such.

[GROVE, J.—Sub-section 6 of section 28 does not contain anything inconsistent with sub-section 13, such as changing the nature of the qualification as described.]

It is enough for the present purpose to say that "9 Birley Place" is omitted in the fourth column of the list. This matter having been supplied, it became the duty of the Barrister, according to sub-section 6, to have inserted the same in the list. Moreover, there is sub-section 12, and that expressly states that where the matter stated in a list is "insufficient in law to constitute a qualification of the nature or description stated," which is the case where the qualification as it appears in the list is "a house," but is proved to be not a house but two houses in succession, "the Revising Barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly."

[LINDLEY, J.—That seems to contemplate the case of two lists, and the shifting the name of the voter from one list to the other.]

It can hardly be said to be limited to that, for such sub-section 12 goes on to say "and in any other case shall insert the name with such qualification in the appropriate list." Then form (M) in the schedule to the Act, which is the form of declaration referred to by section 24, treats as matter capable of being corrected the qualification of "house" under the Representation of the People Act, 1867, and the qualification of "shop" given by the Reform Act, and shews that one may be altered into the other.

Mellor, for the respondent.—The lists must be published on the 1st of August. Notices of objection must be served on the 25th of August, and on the same day, namely, 25th of August, any person "desirous of being registered for a different qualification than that for which his name appears in the said list," is by section 15 of 6 & 7 Vict. c. 18 to give notice of his claim to be so registered. The object of making such claim is to correct the description of the qualification, and it is generally resorted to where the voter has during the year gone from the

Porrett v. Lord, C.P.

house he occupied, and in respect of which he is registered, to another house which he has occupied in immediate succession thereto. Now, if the description of the qualification from "a house" to "houses in succession" may be altered in the way contended for by making a declaration under section 24 of 41 & 42 Vict. c. 26, no one will ever make a new claim according to 6 & 7 Vict. c. 18. sect. 15, and that section will become altogether unnecessary. That never was the intention of the 41 & 42 Vict. c. 26. The 24th section of that last Act only states that the Barrister shall receive the declaration as evidence of the facts declared to, and it in no wise says what shall be the effect of such declaration. It is obviously intended only to alter the mode of proof and to relieve the voter of the necessity of personal attendance before the Barrister. It was not intended that it should have the effect of changing the qualification, but should be only, as stated in heading of the Form (M), a "declaration for correcting misdescription in list." The example it gives in such form of the description "shop" being corrected into that of "house," refers evidently to the same building, and applies therefore where there has been no change in the nature of the qualification, but where the building in respect of which the voter is qualified is wrongly described in the list as a shop, when in fact it ought to be described as a house, or *vice versa*, for where there is no change of the qualification but only an insufficient description of it, such as a wrong description of the building, as calling the house No. 4 when it was No. 9, it has been held that the Barrister has power to amend—*Bendle v. Watson* (3). That is very different from the present case, where the voter has lost the qualification he had, namely, a house, but is entitled to another and different qualification, namely, houses in succession, and in respect of which he desires the Revising Barrister to change accordingly the description of the qualification which he could not have done under section 40 of 6 & 7 Vict. c. 18.

(3) 41 Law J. Rep. C.P. 15; s. c. Law Rep. 7 C.P. 163.

Bartlett v. Gibbs (4), and *Onions v. Bowdler* (5).

Henn Collins in reply cited *Daniel v. Coulsting* (6).

Our. adv. vult.

GROVE, J. (on Dec. 6).—This was a registration appeal which was argued before my brother Lindley and myself, and the point raised turned partly on the provision contained in section 24 of 41 & 42 Vict. c. 26, by which a borough voter is enabled to make a declaration in the form given by the Act, and to forward it to the Revising Barrister, who is to receive it as evidence of the facts declared to. In this case the declaration was to this effect. The voter was originally described in the list of voters as being qualified in respect of a house situate 8 Birley Place, and by the declaration the voter declared that the correct particulars respecting his qualification ought to be stated as "houses in succession," situate "8 Birley Place and 9 Birley Place." Now supposing, instead of a declaration, this had been a matter of evidence brought before the Revising Barrister under the Registration Act, 1843 (6 & 7 Vict. c. 18), it is clear that it would not have been admissible, and that the Barrister would have been obliged to have expunged the name of the voter from the list of voters, because section 40 of that Act has this proviso, namely, "that whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described on the list of voters or claim, as the case may be, nor shall the Barrister be at liberty to change the description of qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The recent Parliamentary and Municipal Registration Act (41 & 42 Vict. c. 26), after several provisions, which it was contended on behalf of the appellant have given the Revising Barrister larger powers than those contained in section 40 of 6 & 7 Vict. c. 18, repeats in sub-section 13 of section 28 the proviso

(4) 1 Lutw. 73; s. c. 13 Law J. Rep. C. P. 40.

(5) 5 Com. B. Rep. 65; s. c. 17 Law J. Rep. C.P. 70.

(6) 1 Lut. 230; s. c. 14 Law J. Rep. C.P. 70.

Porrett v. Lord, C.P.

I have just read in the following words. [The learned Judge here read sub-section 13 of section 28.] The words in that sub-section, after "except as herein provided," are almost identical with those in the said proviso in section 40 of the former Act. Then in the preceding sub-section, namely, sub-section 12, to which we were referred, there is power given to the Revising Barrister to correct any entry in the list which is "insufficient in law to constitute a qualification of the nature or description stated," "but sufficient in law to constitute a qualification of some other nature or description." That is a power to correct where neither the property is changed nor the qualification is changed; but I do not see anything in that sub-section, nor in any previous sub-section of that 28th section, which prevents the application of this sub-section 13 to such a case as the present one, where there is a change of the qualification for one which is not consistent with that in respect of the qualifying property as stated in the list, but is in respect of something added to make up the qualifying property, namely, another house, so that instead of its being a qualification founded on the occupation of one house, it is a qualification founded on the occupation of two houses in succession. Now that is a change which the case of *Bartlett v. Gibbs* (4) has clearly decided could not have been made under 6 & 7 Vict. c. 18. s. 40, and the words of sub-section 13 of section 28 of 41 & 42 Vict. c. 26 are, as I have shewn, nearly the same as those in that 40th section. What embarrassed me during the argument is, that in Form (M) in the schedule to 41 & 42 Vict. c. 26, which is the form of declaration referred to in section 24, there is given as an example of the kind of correction which may be made, the alteration of "shop" into "house," which would seem like a different qualification, and would be an alteration which on that account could not previously have been made if the shop were a different building from the house, but it may be intended to be used only where the two are the same building in fact, but which has been incorrectly described by the voter. I should have had no difficulty in this case

but for this example in Form (M), which created an obstacle, to my mind, difficult to get over, except the alteration there given is to be treated as I think it must as being consistent with there being in fact no change in the qualification. On these grounds I think, therefore, that the Revising Barrister was right, and that his decision should be affirmed.

LINDLEY, J.—The cases of *Bartlett v. Gibbs* (4) and *Onions v. Bowdler* (5) shew that the claim in this case could not have been amended before 1878 upon evidence being given to the effect of the declaration made in this case. The *ratio decidendi* in *Bartlett v. Gibbs* (4), which most resembles this, was that the house mentioned in the claim did not give a qualification, because it had not been occupied long enough, and that the addition of another house was not a better identification of the property referred to in the claim as a qualification, but was the addition to that of something else necessary to confer a qualification. This reasoning appears to me to apply to the present case, and to distinguish it from those like *Bendle v. Watson* (3), where the number of the qualifying house was inserted or corrected by the Revising Barrister.

Section 24 of the Act of 1878 (41 & 42 Vict. c. 26) is, I think, a mere alteration in the mode of giving evidence, and schedule M is only a form in which declarations under that section are to be made. Neither section 24 nor the Form (M) says what is to be done by the Revising Barrister when the evidence is given. To ascertain this we must look to section 28, sub-sections 6 and 13 of which, though slightly different from 6 & 7 Vict. c. 18. s. 40, are framed on the same principle. I therefore am of opinion that the Revising Barrister was right, and that this appeal ought to be dismissed.

Decision affirmed.

Solicitors—Shaw & Tremellen, agents for Hall & Baldwin, Clithero, for appellant; E. Warriner, agent for T. Nowell, Burnley, for respondent.

12 Sale 5729 & 2115.

Alams v. Rostock 5129 & 2176.

Ruff v. Jamplin 5129 & 2178.

Bradley v. Rayles 5129 & 2190.

QUEEN'S BENCH, COMMON PLEAS AND EXCHEQUER.

[N. S.]

[IN THE COMMON PLEAS DIVISION.]
(Appeal from Revising Barrister's Court.)
1879. } PICKARD (appellant) v. BAY-
Nov. 19, 29. } LIS (respondent).

Parliament—Borough Vote—Amendment
—Lodger Franchise—Mistake in Claim—
41 & 42 Vict. c. 26. ss. 22, 23, 28, sub-sec.
1, Sched. Form H, No. 2.

By section 28 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), the Revising Barrister shall, with respect to the lists of voters which he is appointed to revise, perform the duties and have the powers following:—(1) "He shall correct any mistake which is proved to him to have been made in any list;" (2) "he may correct any mistake which is proved to him to have been made in any claim or notice of objection."

The appellant claimed for the first time to have his name inserted in the list of voters in respect of a lodger qualification. The claim, which was in the Form H, No. 2, of the Parliamentary and Municipal Registration Act, 1878, was insufficient, inasmuch as the appellant had omitted from the 4th and 5th columns respectively to state

the amount of rent he paid and the address of his landlord. The Revising Barrister refused to amend:—

Held, that these were mistakes in a "claim" within section 28, sub-section 2, and that the Barrister had therefore a discretionary power, and was not bound to amend.

Consolidated appeal from the decision of the Revising Barrister for the borough of Chelsea, who stated the following

CASE.

1. At a Court, held this 6th day of October, 1879, by me, a Barrister appointed to revise the lists of voters for the borough of Chelsea, Henry Pickard claimed, as a lodger in respect of residence within the parish of St. Mary Abbott's, Kensington, to have his name inserted in the list of persons entitled to vote at the election of members to serve in Parliament for the parliamentary borough of Chelsea. Such claim was in the Form H, No. 2, of the Schedule to the Parliamentary and Municipal Registration Act, 1878, and was as follows:—

Name of Claimant in full, surname being first	Description of Rooms occupied, and whether Furnished or not	Street, Lane, or other place, and Number (if any) of House in which Lodgings situate	Amount of Rent paid	Name and Address of Landlord or other person to whom rent is paid
Pickard, Henry	Two rooms, first floor	46 Abingdon Road	Butler.	Edmund Parker, Carpenter.

and such claim was duly signed by the claimant, and was duly witnessed, and was regular in all respects, except as hereinafter stated.

2. In the second column of his claim the claimant had omitted to state whether his lodgings were furnished or unfurnished; but I held that this was a defect which I could amend upon proper evidence, and proper evidence was given that his lodgings were in fact unfurnished.

3. The claimant had further omitted to state in the 4th column of his claim whether he paid any rent; nor could that information be gathered from any other part of his claim.

4. Evidence satisfactory to me was given in Court as to what was the amount

of rent which he actually paid, namely, 6s. 6d. a week; but I held that, in cases in which lodger claimants had wholly omitted to give the information which Parliament required them to give upon the face of their claims, I ought not to supply the defect upon evidence given for the first time before me in Court, and that this applied with especial force to the 4th or rent column of lodgers' claims, because the form in which such claims were originally required to be made by the Representation of the People Act, 1867, Schedule G, Form No. 1, had been expressly superseded by the Form H, No. 2, to the Parliamentary and Municipal Registration Act, 1878, and by such new form the lodger was for the first time ex-

Pickard v. Baylis, C.P.

pressly required to state the amount of rent paid, so that it would, in my opinion, be contrary to the policy of the latter Act to allow such information to be given for the first time before the Barrister in Court; and I accordingly held that this objection was fatal to the claim.

5. The claimant had further omitted to state the address of his landlord in the 5th column of his said claim, nor could that information be gathered from any other part of his claim.

6. Evidence satisfactory to me was given in Court as to what was the address of his landlord, namely, the same address as that of the claimant; but I held that I could not supply the landlord's address in the 5th column upon such evidence, first, because it was admitted before me that my predecessors had always held this to be a fatal objection to a lodger's claim, and there was for this purpose no substantial difference between Form No. 1, Schedule G, to the Act of 1867 and Form H, No. 2, of the Schedule to the Act of 1878, and I ought therefore to follow the established practice; and, secondly, because such practice was in my judgment correct, for that the object of Parliament in requiring lodger claimants to give that information was that any person interested might, from the information given by the claim, have the opportunity of making enquiries of the landlord or other person to whom the rent was thereby stated to be paid, for the purpose of testing the validity of the claim, before the holding of the Revising Barrister's Court, and that that object would be frustrated if the defect were allowed to be supplied upon evidence given for the first time before the Barrister in Court; and I accordingly held that this objection also was fatal to the claim, and upon both the above grounds I disallowed the claim.

7. The following eight persons also claimed as lodgers in the said Form H, No. 2, to have their names inserted in the said list, namely [the names were here set out]. Their respective claims were all subject to certain amendments which I held myself entitled to make and did make, upon evidence given to me in Court, regular in all respects, except that

each of those eight claimants had omitted to state in the 5th column of their respective claims the address of the landlord or other person to whom their rents were respectively paid, nor could that information be gathered from any other part of their respective claims.

8. Evidence satisfactory to me was given in Court as to what were the addresses of such last-mentioned landlords or other persons respectively, namely, the addresses respectively stated in the 3rd column of the said eight claims; but I disallowed each of these claims, upon the same ground as is stated in the 6th paragraph of this case.

9. Due notice of appeal from my decision was given; and I ordered the appeals in all the before-mentioned cases to be consolidated.

Signed by the Barrister.

Crompton, for the appellant (1).

[LORD COLERIDGE, C.J.—The omissions in the claim of the rent in the 4th column and of the landlord's address in the 5th column clearly made the claim bad. The only question is, whether the Revising Barrister had power to amend, and whether he ought to have amended.]

The duties and powers of the Revising Barrister in this respect are provided for by section 28 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26) (2). Sub-section 1 of this section states that "he shall correct any mistake which is proved to have been

(1) The case was first argued by *Crompton*, for the appellant, on the 19th of November, no one then appearing for the respondent. After hearing argument for the appellant, the Court desired to have the case re-argued on a future day, and in the meanwhile to communicate to the Attorney-General their desire to have counsel instructed to represent the respondent. The case was accordingly re-argued on the 29th of November.

(2) 41 & 42 Vict. c. 26. s. 28: "A revising barrister shall, with respect to the lists of voters for a parliamentary borough and the burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following:—

"1. He shall correct any mistake which is proved to him to have been made in any list.

"2. He may correct any mistake which is proved to him to have been made in any claim or notice of objection."

Pickard v. Baylis, C.P.

made in any list." This was a mistake in the lodger list of voters within the meaning of that sub-section, which the Barrister was therefore bound to have corrected. Moreover, by sub-section 2 it is enacted that "he may correct any mistake which is proved to him to have been made in any claim or notice of objection."

[LORD COLERIDGE, C.J.—Are these lodgers old lodgers or new?]

They are all new lodgers. The Representation of the People Act (30 & 31 Vict. c. 102), s. 4, for the first time confers the lodger franchise. Section 30, sub-section 2, enacts that he shall send in his claim in the Form No. 1 in Schedule G, a form of claim with a declaration annexed which had to be sent in annually. Now, by 41 & 42 Vict. c. 26. s. 23 (3), the declaration annexed to the notice of claim is sufficient evidence of qualification, and consequently the lodger has no longer to rely on the formal notice of claim, and evidence to supply those particulars may be given by parol.

[LORD COLERIDGE, C.J.—Section 22 (4) permits old lodgers for the first time to remain on the list without being put to a fresh proof of their claim; so that although they have to send in an annual notice of their claim, yet they are on the list in all other respects the same as other voters, but I do not find any provision for

(3) Section 23: "In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be *prima facie* evidence of his qualification."

(4) Section 22: "Where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in respect of the same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the 25th day of July."

"The overseers shall, on or before the last day of July, make out a list of all persons so claiming. . . ."

"The lists so made out shall be signed, published, and otherwise dealt with in the same manner as the alphabetical lists mentioned in section 13 of the Parliamentary Registration Act, 1843, and shall, for the purposes of the Parliamentary Registration Acts, be deemed to be the lists of voters; and the provisions of the Parliamentary Registration Acts as to objections shall apply to such lists. . . ."

making a list of new lodgers. The old lodger has to make a fresh claim, and for fear that should put him in a worse position by calling on him as a new claimant to prove his claim, section 23 (3) makes his declaration sufficient.]

Section 23 (3) is general; it is not confined to persons who have been on the register before. The form of precept to the town clerk and others, given in Schedule A to 41 & 42 Vict. c. 26, explains what lists are to be made out. A list is to be made of old lodger claimants according to Form D, and a list of new lodger claimants according to Form K. The lists mentioned in the precept, Schedule A, would be included in the words "any list" mentioned in section 28, sub-section 1 (2). The Form K No. 2 would be simply a copy of the claim and particulars of the claim. Had the qualification been wholly omitted, the Revising Barrister could not probably have amended (section 28, sub-section 6); but by the same sub-section, an insufficient description may be supplied, in which case the Revising Barrister shall insert the name in the list. In the present case the description was merely insufficient, and the Revising Barrister ought to have transferred the name, with the amendments, from the list of claimants to the list of voters. The limit to his power is shewn in section 28, sub-section 13, by which he is not to change the description on the list, except for the purpose of more clearly defining the same. The Revising Barrister is therefore bound to alter an omission in the description which does not go to the whole qualification.

Assuming the appellant is not on the list of voters within sub-section 1 (2), but is within sub-section 2, then the Barrister should have amended, and he has held he did not exercise his discretion because he had no power.

Edward Clarke, for the respondent.—The appellant's name did not appear on "any list" within sub-section 1 (2), and therefore the Revising Barrister was not bound to amend. Under the Act of 1867 the lodger had to claim every year; the 41 & 42 Vict. c. 26, dispenses with that necessity in the case of old lodgers, and

Pickard v. Baylis, C.P.

divides the lodgers into two classes, the old and the new. The old lodgers are dealt with by section 22 (4), and by the last paragraph of that section the list of old lodgers shall be deemed to be lists of voters, &c., so that they are on the list with which the Barrister has to deal. A catalogue of new lodger claimants is made out, and the Barrister has to transfer names from that catalogue to the list of voters. The distinction between sub-sections 1 and 2 of section 28 (2) is important. The first amendment is imperative, and the second discretionary. If the catalogue of new lodger claimants were the list, there would be nothing on which sub-section 2 could operate.

[LORD COLERIDGE, C.J.—The lodger would not be answerable for a mistake in the list, whereas he would be answerable for a mistake in the claim.]

The remaining sub-sections preserve this distinction. Sub-sections 4, 5, 6, 7, deal with the duties of the Barrister with regard to expunging the names from the lists. There would be no necessity to expunge a name from a catalogue, since that would confer no franchise. By sub-section 9, he shall “retain;” this again can apply only to the list as distinguished from the catalogue. Sub-section 12 deals with both list and claim. Supposing this to be a claim under sub-section 2 (2), then the Barrister has exercised his discretion.

Crompton, in reply.

LORD COLERIDGE, C.J.—I am of opinion that the decision of the Revising Barrister was right and should be affirmed. Two questions arise for our determination—First, whether the Revising Barrister was bound to make the amendment by virtue of section 28, sub-section 1 (2)? Secondly, if he was not bound, whether he has, as a matter of fact, exercised his discretion in refusing the amendment? In my judgment this is not a case in which the words of the Act make it imperative on him to make the amendment asked for, but it is a case in which he was at liberty to exercise his discretion.

Section 28, sub-section 1 (2) enacts that the Revising Barrister “shall correct any mistake which is proved to him

to have been made in any list,” so that if this was a mistake on any list he was bound to make the correction; and in order, therefore, to maintain his decision it must be shewn that this was not a mistake in a “list” within the words of sub-section 1. I am of that opinion.

In deciding this case it becomes necessary to consider the earlier as well as the later enactments of the Legislature, and to contrast the duties of the Revising Barrister as they existed under the 6 Vict. c. 18, with his duties as they were altered by the Representation of the People Act and the Act of 1878. So far as detail is concerned, I pass at once from the entire consideration of county registration, but it is to be observed that in county equally with borough revision, the duties of the Revising Barrister—which are expressed in his very name—are to revise, not to correct.

Prior to the lodger franchise, the duty of the Revising Barrister in the revision of the borough lists, was to take the different lists as presented to him by the overseers, and to retain thereon the names of all persons not objected to, to insert therein *manu propria*, or by his clerk, the names of all persons who in various parishes had duly claimed, and had established their claim, to be on such list, and to expunge from it those against whom valid objections were brought, and this catalogue—I adopt the word used by the counsel for the respondent—of voters corrected and added to, became, when signed by the Revising Barrister, the Parliamentary list for the ensuing year, and so on from year to year. There was a continual revision of the existing list.

Such, shortly described, was the state of things with which the Revising Barrister had to deal in the boroughs prior to the Representation of the People Act, 1867. By that Act the franchise was for the first time conferred on lodgers, and as it was of the essence of this franchise that the lodger should occupy the same lodging for the preceding twelve months, and broadly speaking should be under the same roof, it was considered right by Parliament that the lodger who claimed to vote should, year by year, make a

Pickard v. Baylis, C.P.

fresh claim. As compared then with other voters, the lodger was in this peculiar situation, that, whereas other voters who had claimed and proved their qualification did so once and for all, and were placed on the list, from whence they could not be removed until a valid objection was made to them, the lodger, who had equally proved his qualification, was put to a perpetual re-claim of his vote, and each year was in the position of a new claimant, and had each year to prove his qualification. And it was probably represented by the lodger, or else put forward on his behalf, that though considered by Parliament entitled to the franchise, he was placed in a more unfavourable position than other voters who equally with him were entitled to the franchise.

Such was the state of things from 1867 up to 1878. Then by section 22 of this Act (4) when once the lodger had proved his qualification and had been placed on the list, he was to be in the same position as other voters, though he had still to be placed on a separate list. In my opinion section 23 (3) points only to the case of such persons; when once on the register, though obliged to go through the form of sending notice of claim each year, they are not obliged to prove their claim; but they are entitled to send in the declaration annexed to their notice of claim, which is to be *prima facie* evidence of the qualification, and by virtue of section 22 (4) objections to their votes would have to be proved as though they were not lodgers. Although it is some disadvantage to have to sign the declaration each year, yet that is the only disadvantage to which such lodgers are now subject.

The persons whose case we have here to consider were not in the position of those old lodgers who are on the register, but new lodgers who are in the position of new claimants. They are not on the lodger list of section 22 (4), because that section applies to the old lodger list only, and, consequently, leaving out for the moment the list of freemen, they are not on either of the lists which the overseers have to make out. On what other list which the Revising Barrister has to revise are they? The answer is—none.

A catalogue of claims is not a list, the Revising Barrister could not be said to unger names from such a catalogue, would only transfer to the list those who proved, and not transfer those who did not prove. It is only a catalogue from which the list may be supplemented.

This seems to me clearly to shew that a mistake in such catalogue is not within the words of sub-section 1 (2), it would not be a mistake in "any list" which the Revising Barrister is bound to amend. It follows, then, that it must be a claim within the words of sub-section 2, in which he "may" correct any mistake. I am aware that sometimes the word "may" magnifies into "it may be lawful," and is equivalent to "must." But here it seems to me that "shall" is equivalent to "must," and "may" involves the exercise of discretion.

Such being the case, the question arises, has the Revising Barrister exercised his discretion? I think he has. To ingenious minds it might appear from his statement of the case that he has not, but looking at it plainly, one can fairly come to the conclusion that he did exercise his discretion, and that he intends to convey this to us. In the second proposed correction he certainly uses the words "I held, I could not," but then he gives his reasons why he could not, he says he was following the practice of his predecessors; if their practice were wrong, the reason would be bad, but he goes on to say it was quite right, because the object of the Act of Parliament would be frustrated if the defect were allowed to be supplied by evidence given for the first time before him in Court. In these Courts, when in the exercise of our discretion we have to refuse an application, we often are in the habit of saying we "cannot." I, therefore, think the Revising Barrister did exercise his discretion; and I think I ought to add that in my judgment he exercised it on good grounds. I am consequently of opinion that the judgment was right and should be affirmed.

DENMAN, J.—I must own that I have entertained doubts during the argument of this case, but on the whole I have

Pickard v. Baylis, C.P.

come to the conclusion the decision of the Revising Barrister was right. I am glad that the case has been re-argued, so that we have had the advantage of hearing the other side. It is extremely unsatisfactory to have a case of this sort argued on one side only, and I feel indebted to the respondent's counsel for having put us in possession of the respondent's view of the case.

Three questions appear to me to arise for our determination: First, Assuming an amendment to be necessary, was the Revising Barrister bound to amend? Secondly, Does section 23 (3) dispense with this necessity, and make the declaration sufficient? Thirdly, Assuming the Revising Barrister was not bound to amend, has he exercised a discretion in the matter? On all points I am of opinion the respondent is entitled to judgment. The first point turns on a few sections of the Act of 1878. Section 22 (4) relates to persons who have been on the register of voters as lodgers for the previous year; then follows section 23 (3) which, it seems to me, can only refer to claims made by such persons; and then we come to section 28 (2), on which depends the question whether the Revising Barrister was bound or not to amend. If this were the case of an old lodger voter, undoubtedly sub-section 1 would apply, but these are new claimants who have never been on any list, and *prima facie* they are within sub-section 2, which relates to claims. It has been argued, and for some time I thought not without considerable reason, that section 23 applies to these claimants; but after further discussion, I have come to the conclusion that that section only applies to the case previously dealt with by section 22 (4), that is to the case of lodgers who had been previously on the list and claimed a continuation of their vote in respect of the same lodgings; and though such an interpretation would be limiting the words of the section, yet it seems to me to be a fair interpretation, because otherwise the section would be giving to new lodgers a more favourable mode of getting on the register than that possessed by other voters. Even if this section did include new lodgers, it would not follow the claim was sufficient, be-

cause all that section says is, that the declaration annexed to it shall be *prima facie* evidence of qualification, it does not dispose of the question whether the claim should be amendable if deficient, or whether it is sufficient for the claim itself to be sufficient. I do not think that section can be called in aid of the present appeal.

As regards the third point, it seems to me, though the language might be more explicit, yet in substance the Revising Barrister has exercised his discretion, and he has exercised it in a manner which I cannot say is unreasonable.

LINDLEY, J.—It is admitted these persons are new lodger claimants, and I agree with the reasons given by my Lord and my brother Denman that the Revising Barrister declined to make the amendment asked for in the exercise of his discretion. The question then to be decided comes to this, had the Revising Barrister a discretion in the matter, or was this a defect which he was bound to amend?

In order to solve this problem one must consider with what he was dealing, and the first thing to be decided is the meaning of the word "list" in section 28 (2); for the reasons which have been given, it appears to me that the list means the list of voters and not the catalogue of claims.

If we look back to see what were the lists of voters, we shall see that these lodgers were not on any such list. In 30 & 31 Vict. c. 102, the lodger franchise is created for the first time, and the claim had to be made each year in the form given in the schedule of the Act. Section 30 of that Act shews that these claims are to be published on a separate list, and that "so much of section 18 of 6 Vict. c. 18 as relates to the manner of publishing lists of claimants shall apply to every such claim and list;" the same section refers to back sections 38 and 39 of 6 Vict. c. 18, and it is clear from this section and the *modus operandi* pointed out that the lodger was not a voter until he had properly claimed and was on the list, and until then it could not be said that the Revising Barrister could "expunge" his name from any list.

Pickard v. Baylis, C.P.

That is how matters stood from 1867 to 1878. In 1878 it was enacted for the first time that the lodger claimants should be split into two classes, old lodger claimants and new lodger claimants. For the old lodger the Form D 3 in the schedule is given, and section 22 says that a list of persons so claiming shall be made out, which shall be deemed to be the list of voters. The persons with whom we have to deal are not on that list, but for them the Form K 2 is given, and they, together with the list of general claimants who claim in accordance with K 1, form the list of claimants, not voters. If their claims are correct they will get on the list, but they are not on the list. Such being the case, we come to section 28 (2) which deals in sub-section 1 with mistakes in lists, and in sub-section 2 with mistakes in claims: with regard to sub-section 2 the word "may," shewing the matter to be one of discretion, is used, so that the Revising Barrister is not bound to correct mistakes in a claim. I might leave the case there, and say no more, because it seems the Revising Barrister has rightly exercised his discretion. I can imagine cases in which the Revising Barrister can exercise his discretion in a different way; but it may well be that in a large constituency like this, with obscure landlords, the Revising Barrister may find it necessary to act strictly in the exercise of his discretion and may refuse to accept claims which are drawn in a slovenly way.

I do not feel satisfied that section 23 (3) applies to this case; but I do not think it affects the question before us, because it applies to qualification, and we are not dealing with qualification. The claimant has written "Butler" in the place where he should have stated the amount of rent, and he has left out the address of his landlord. But I do not see the amount of rent has anything to do with the qualification. The qualification depends upon the value of the lodgings, not the amount of the rent; and it is possible a lodger may pay no rent and yet have a qualification, and it appears to me then that section 23 applies to qualification, and not to correction. In my judgment the Revising Barrister has a discretion, and

has ample reasons for the exercise of his discretion.

PER CURIAM.—There will be judgment for the respondent, but without costs. As it was at the invitation of the Court that counsel for the respondent appeared, we do not think the appellant ought to bear costs so incurred.

Solicitors—Halse, Trustram & Co., for appellant;
E. A. Baylis, for respondent.

[IN THE COMMON PLEAS DIVISION.]
(*Appeal from Revising Barrister's Court.*)

1879.	}	SPENCER (appellant) v. HARRISON (respondent).
Nov. 29.		
Dec. 19.		

Parliament—County Vote—Interest in Land of uncertain Duration—Land devised in Trust for Sale—Estate of cestui que trust pending Sale.

A testator devised his copyhold lands to trustees upon trust to sell and invest the proceeds and pay the dividends to his wife for life, and after her decease to divide the proceeds among his children equally. The share of each son to become vested and payable at twenty-one; the share of each daughter to become vested at twenty-one or marriage, and the trustees to stand possessed of each daughter's share upon trust to pay the dividends to her during her life for her sole use independent of her husband (if any), and after her decease in trust for her children.

The trustees duly proved the will, and were admitted to the copyholds according to the custom of the manor. The wife predeceased the testator, and at the time of his death there were three sons and one daughter; the daughter was married and had issue, who were infants.

The sale of the copyhold lands was postponed, and in the meantime the children of the testator became of full age, and by verbal agreement among themselves, in which the husband of the daughter concurred, agreed to keep the copyhold lands unconverted. The rents, which were of

Spencer v. Harrison, C.P.

sufficient annual value to confer the franchise on each of the testator's children, were received by the trustees and divided amongst the testator's children yearly. The appellant, one of the testator's sons, claimed to vote as a freeholder in respect of his equitable interest in the copyholds:—

Held, that the appellant had no such freehold estate as would entitle him to be registered as a voter for the county.

Consolidated appeal from the decision of the Revising Barrister for the North-east Division of the County of Lancaster.

Samuel James Harrison duly objected to the name of Charles Grainger Spencer, of Winckley Street, Preston, being retained on the register of voters for the township of Briercliffe with Extwistle, in the said division, in respect of share of copyhold cottages.

The title deeds of the said Charles Grainger Spencer were produced, from which it appeared—

1. That Lawrence Catlow Spencer duly made and executed his last will and testament on the 8th day of December, 1865, whereby he bequeathed his personal estate and gave and devised his real estate whatsoever and wheresoever unto and to the use of his wife, Sarah Spencer, and his friends, Joseph Isherwood and Edward Garlick, their heirs, executors, administrators and assigns upon trust, to sell the said hereditaments and stand possessed of the purchase-money upon trust, to invest the same and pay the dividends to his wife for her life, and after her decease to stand possessed of the said trust funds upon trust for his children, to be equally divided between them: the share of each son to be vested and payable to him at twenty-one, and the share of each daughter to be vested in her at twenty-one or at marriage: the trustees to stand possessed of each daughter's share in trust, to pay the dividends to her for her sole and separate use independently of her husband (if any), and free from his control, and from and after the decease of such daughter in trust for her children equally, &c. (1)

(1) The material part of the will was as follows: "Upon trust that they, my said wife and the said Joseph Isherwood and Edward Garlick,

2. That the cottages in respect of shares in which the appellant claims to

and the survivors and survivor of them, and the heirs, executors and administrators of such survivor, do and shall as soon as conveniently may be after my decease absolutely sell and dispose of the said hereditaments and premises either entirely and altogether or in parcels, and either by public auction or private contract, for such price or prices as they, my said wife and the said Joseph Isherwood and Edward Garlick, or the survivors or survivor of them, or the heirs, executors or administrators of such survivor shall think reasonable, with power to buy in the said premises or any part thereof at any sale or sales, and to rescind, vary or abandon any contract for sale, and to re-sell the premises which shall be so brought in, or the contract for the sale of which shall be rescinded or abandoned as aforesaid, without being in any wise answerable for any loss which may be occasioned thereby respectively, and with power to enter into and execute all such contracts, agreements, conveyances and assurances as to them, my said wife and the said Joseph Isherwood and Edward Garlick, or the survivors or survivor of them, or the heirs, executors or administrator of such survivor shall seem meet, and do and shall stand possessed of and interested in the purchase-money to arise from such sale or sales as aforesaid upon and for the trusts, intents and purposes, and subject to the powers, provisos and declarations hereinafter expressed and declared of and concerning the same, that is to say, upon trust in the first place to pay and discharge all my just debts, funeral and testamentary expenses, and the costs and charges to be incurred in or about the sale or sales, calling in, conversion into money as aforesaid, or otherwise in or about the execution of the trusts aforesaid or in relation thereto, and do and shall lay out and invest the residue of the said moneys in their, his or her names or name, in any of the public stocks or funds of Great Britain, or upon Government or real securities in England, or in or upon the share stocks or securities of any company incorporated by Act of Parliament and paying a dividend, with power for the said trustees or trustee to vary the said stocks, funds, shares and securities at their, his or her discretion. And I declare that the said trustees or trustee shall pay the interest, dividends and annual proceeds of the said trust moneys, stocks, funds and securities as and when the same respectively shall become payable unto or permit the same to be received by my said wife, Sarah Spencer, during her life or so long as she shall continue my widow. And from and immediately after her decease or marriage, which shall first happen, I direct that my said trustees or trustee shall stand possessed of the said trust moneys, stocks, funds and securities, upon trust for all and every my child and children who shall be living at my decease or born in due time afterwards, to be equally divided between them; the share or shares of such of them as shall be a son

Spencer v. Harrison, C.P.

vote are copyhold of inheritance of the Manor of Ightenhill, and are situate at Haggate, in the said township of Briercliffe with Extwistle, and are part of the real estates devised by the will of the said Lawrence Catlow Spencer.

3. That the testator died on the 1st day of May, 1872, leaving three sons, the

or sons to be vested and payable to him or them on his or their attaining the age of twenty-one years, and the share or shares of such of them as shall be a daughter or daughters to be vested in her or them on her or their attaining the age of twenty-one years or day or days of marriage, which shall first happen. And if there be but one such child who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then the whole to be in trust for such only child. And I direct that my said trustees or trustee do and shall lay out and invest the shares or share of each of my said daughters or daughter in the purchase of stocks, funds and securities of the like nature as are hereinbefore mentioned with regard to the proceeds of my real and personal estate, and with the like powers of varying such investment. And do and shall during the life of each such daughter pay the interest, dividends and annual proceeds of her said share or of the stocks, funds and securities in or upon which the same may be laid out or invested to such daughter for her sole and separate use independently and exclusively of her husband for the time being (if any), and of his debts, control, interference, and engagements, and so that her receipts alone shall be discharges for the same, and that she shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge or otherwise in the way of anticipation. And from and after the death of each such daughter do and shall stand possessed of the share hereinbefore given to her of the said trust moneys and the interest, dividends and annual produce thereof; in trust for all and every or such one or more of the children of such daughter, with such provisions for their respective maintenance and education or advancement, and if more than one in such parts, shares and proportions, and upon such conditions and with such restrictions as such daughter, whether covert or sole, shall by her last will and testament in writing or any codicil or codicils thereto or any writing or writings in the nature of or purporting to be a will or codicil at any time or times direct or appoint. And in default of such appointment and so far as the same if incomplete shall not extend, in trust, for all and every the children and child of each such daughter as shall be living at her decease who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, in equal shares. And if there shall be but one such child, the whole to be in trust for such only child."

appellant and two brothers, and one daughter, him surviving.

4. That Sarah Spencer, the wife of the testator, and one of the trustees and executors named in his will, predeceased the testator, having died on the 4th day of December, 1869.

5. That Joseph Isherwood and Edward Garlick, the surviving trustees and executors of the said will, duly proved the will in the district registry at Lancaster, attached to Her Majesty's Court of Probate, on the 17th day of July, 1872, and that the said Joseph Isherwood and Edward Garlick were on the 8th day of December, 1873, duly admitted to the said copyhold cottages at Haggate according to the custom of the said Manor of Ightenhill as surviving trustees under the will of the said testator, and they are now customary tenants of the said cottages upon the trusts and for the purposes of the said will.

6. That the said daughter, in the year 1866, intermarried with, and is now the wife of, John Edward Garside, and has issue, who are infants.

7. That all the children of the testator are of full age, and in accordance with a verbal arrangement amongst themselves (in which the said John Edward Garside concurs) have agreed to keep unconverted the said copyhold cottages at Haggate, and the rents thereof are received by the said Joseph Isherwood and Edward Garlick, as such surviving trustees of the said will, and divided amongst the testator's children yearly.

8. That the rents arising from the copyhold cottages amount to 50*l.* per year, or thereabouts, and that Charles Grainger Spencer's share of such rent exceeded 10*l.* a year, and was sufficient in point of value or amount to confer the franchise.

It was contended on the part of the objector that, inasmuch as Sarah Emma Garside, one of the parties beneficially entitled to a share of the income for life from the moneys to arise from the sale and conversion of the testator's real estate, under the will of the said testator, was a married woman, and had issue who were infants, no election could be made to take the said cottages in their actual state, and so determine and extinguish

Spencer v. Harrison, C.P.

the converting trust; and also that the said surviving trustees were no parties to the said verbal arrangement, and that the said Charles Grainger Spencer was not entitled to have his name inserted on the said list of voters in respect of the said qualification.

It was argued, on the part of the said Charles Grainger Spencer, that, inasmuch as the share of the said Sarah Emma Garside was settled under the said will to her separate use for life, independent of her husband, she was as much capable of making an election, although she had infant children interested in the trust fund, as if she had been still a *feme sole*, and that accordingly no deed was necessary to ratify such election.

It was further contended on the same behalf that, even when real property by will is directed to be sold and converted into money, the franchise would attach in favour of the person or persons for the time being entitled to and receiving the rents or income thereof, such rents or income being of sufficient annual value, until the moment of such conversion actually taking place, in the same manner as it is contended that partners in a trading concern are entitled thereto in respect of partnership property, which though in its nature real, is in equity, or by the terms of the partnership deed, considered as personalty.

The Revising Barrister concurred in the view held by the objector, and expunged the name of the said Charles Grainger Spencer from the said list.

The same point of law was also raised in the cases of the two other persons whose names were also expunged. The facts and circumstances in those cases being similar to those which are hereinbefore mentioned, their cases were consolidated with this appeal.

If the Court should be of opinion that the decision was wrong, the register is to be amended by restoring the names of the said Charles Grainger Spencer and of the two other persons mentioned.

Henn Collins, for the appellant.—The franchise is claimed in respect of the equitable estate in the copyholds. The equitable doctrine of conversion does not

apply to questions of franchise, and until conversion the land remains land. In *Baxter v. Brown* (2) several persons who had entered into partnership to work a mill claimed and obtained freehold votes in respect of freehold land, part of the partnership property. By a clause in the partnership deed it was agreed that the freehold property should be considered personal estate, and not real estate, and held in trust for the partners as part of their partnership stock-in-trade. There Tindal, C.J., says, "In general there can be no question but that for all purposes necessary to effectuate the intention of the parties, personal estate may be considered as real, and real estate as personal, by a Court of Equity, as in the ordinary instance of money agreed or directed to be laid out in land; and so, in the instance of a real estate under an absolute trust or direction to sell; and against this general rule our decision in the present case will not in any way militate. But, notwithstanding this acknowledged doctrine of the Court of Equity, no one can deny that the land still remains land, and nothing else, and there is no authority or decision that for the collateral purposes of giving a vote, which has no bearing upon or reference whatever to the objects of the deed of copartnership, the right of the *cestui que trust* should not remain just as it would have been without such declaration of trusts." That decision is said to have been questioned by Lord St. Leonards in *Myers v. Perigal* (3); but in *Bennet v. Blain* (4) the Court, while following the principle of *Myers v. Perigal* (3), point out that that case is distinguishable from *Baxter v. Brown* (2), and that Lord St. Leonards so considered it.

This would not even in equity be considered personalty for all purposes—see the notes to *Fletcher v. Ashburner*, in *White and Tudor's Leading Cases in Equity*, 5th edit. at p. 925 *et seq.* The appellant has an interest in land, equivalent

(2) 7 Man. & G. 198, *nom. Baxter v. Newman*, 14 Law J. Rep. C.P. 193.

(3) 2 De Gex, M. & G. at p. 622; 22 Law J. Rep. Chanc. at p. 434.

(4) 15 Com. B. Rep. N.S. 518; 33 Law J. Rep. C.P. 63.

Spencer v. Harrison, C.P.

to a freehold, as in *Beeson v. Burton* (5), where certain allotments were vested in trustees, to be held by freemen so long as they paid the rent and conformed to the regulations of the trustees, and it was held that the allottees had freehold estates which entitled them to vote. Williams, J., says—"This is clearly an estate of freehold, inasmuch as it is for an uncertain interest, which may last for the life of the party, and is not confined to the will of the grantors." So in *Ashworth v. Hopper* (6), it was held that although the power of sale of certain freehold property was vested in the trustees, they could not cut down the freehold interest which was there created in the beneficiaries, because the power could only be exercised for their benefit. If in the present case the beneficiaries take the same interest in land as in the proceeds, it shows that the will of the trustees cannot cut it down, and is immaterial. The appellant has a right to receive the rent of the land, and he has either no interest in the land, or the same interest as is given by the proceeds, namely, an estate for life—*Oasamajor v. Strobe*, cited in the note to *Walker v. Shore* (7). In *Miller v. Miller* (8), a testator having purchased a piece of land, opened it as a brickfield, and it was open at his death. By his will he devised it to trustees upon trust to sell, "when in their discretion it may seem advisable;" and he directed that the rents "and profits" should, until sale, be considered as part of his personal estate. Bacon, V.C., in the course of his judgment, says—"By the general law a tenant for life has the right to the proceeds of an open brick-field," so that so long as the trustees do not sell, the tenant for life has the land. In *Franks v. Bolans* (9), land devised in trust for sale was held to be an interest in land in the *cestuis que trustent*. The question in the present case is what interest in the land

the appellant has. It must be an interest for life. The only right by which it could be cut down would be the arbitrary exercise of the power of sale by the trustees. Though in equity the land would, for certain purposes, be considered as converted, yet *Baxter v. Brown* (2) shews that, for the purposes of the franchise, the land still remains land; the tenant is in possession, and there is no difference between being in possession and in for life, and the trustees cannot cut down this interest.

No one appeared for the respondent.

Cur. adv. vult.

The judgment of the Court was (on Dec. 19, 1879) (10) delivered by

LINDLEY, J.—The question we have to determine is, whether the appellant has under the above will and parol agreement postponing the sale of the devised copyhold, any such interest in them as entitles him to vote for the county of Lancaster. The Revising Barrister has decided this question in the negative, and we have to determine whether his decision is correct.

The appellant clearly had no legal estate; and his right to vote depends entirely on his equitable estate, if any, in the copyhold lands devised for sale.

Before the Reform Act, section 19, copyhold land conferred no qualification; and before 7 & 8 Will. 3. c. 25. s. 7, equitable interests conferred none. At the present time the right of a person to vote in respect of an equitable interest in copyholds depends on 30 & 31 Vict. c. 102. s. 5, which is as follows (11).

(10) Lindley, J.; and Lopes, J.

(11) 30 & 31 Vict. c. 102. s. 5—"Every man shall, in and after the year 1868, be entitled to be registered as a voter, and when registered, to vote for a member or members to serve in Parliament for a county, who is qualified as follows:—(that is to say)

"1. Is of full age and not subject to any legal incapacity, and is seised at law or in equity of any lands or tenements of freehold, copyhold or any other tenure whatever, for his own life, or for the life of another or for any lives whatever, or for any larger estate, of the clear yearly value of not less than 5*l.* over and above all rents and charges payable out of or in respect of the same, or who is entitled, either as lessee or assignee, to

(5) 13 Com. B. Rep. 647; 22 Law J. Rep. C.P. 33.

(6) 45 Law J. Rep. C.P. 99; Law Rep. 1 C.P. D. 178.

(7) 19 Ves. 387, at p. 390.

(8) 41 Law J. Rep. Chanc. 291; Law Rep. 13 Eq. 283.

(9) 37 Law J. Rep. Chanc. 664; Law Rep. 3 Chanc. App. 717.

Spencer v. Harrison, C.P.

The 26th section of 2 Will. 4. c. 45, here referred to, is as follows (12).

These enactments shew that to entitle the appellant to vote in this case he must establish—

1. That he is seised in equity of the copyholds in question for his own life, or the life of another, or for some lives, or for some larger estate.

2. That he shall have been in the actual possession of the lands, or in the receipt

of the rents and profits thereof, for his own use, for six calendar months at least next before the last day of July, previous to his entry on the register.

We are of opinion that the second of these requisites is established, for it is stated that the trustees received the rents and divided them amongst the *cestuis que trustent*. The appellant, therefore, was in the receipt of his share of the rents.

We proceed to consider whether he was seised in equity of the copyhold for such an estate as the Statute requires. This enquiry involves two others, namely, first, Has the appellant any beneficial interest in the land, as land? And second, If he has, what is the nature of such interest? The will does not contain any express trust of the land or rents until sale; but there is an implied trust of them for the appellant and other persons entitled to the proceeds of sale. By virtue of this implied trust, the appellant is entitled in equity to a share, one-fourth, of the rents and profits of the land until sale—*Casa-major v. Strode* (7). But an interest in the rents and profits of the land is an interest in the land itself (*Co. Lit. 4 b*).

Consequently the appellant has an equitable interest in the land until sale. He is not in the position of a person who has only an interest in so much money charged on land. This is shewn by *Franks v. Bollans* (9), where it was held that a married woman who had a similar interest to that of the appellant could not transfer that interest without an acknowledged deed. The equitable interest of the appellant in the lands amounts, therefore, to this:—First, he has a right to have them sold. Second, he has a right to his share of the rents until they are sold. But this is all, and we are of opinion that this is not a seisin in equity of copyholds for such an estate as the Statute requires.

If the appellant can be correctly said to be seised in equity of any estate in the copyholds, which we do not think he can, we are of opinion that his estate is not an estate for life, or any larger estate.

The period of sale, or, in other words, the determination of the appellant's interest, is wholly uncertain; it depends on the trustees and the *cestuis que trustent*. It

(12) 2 Will. 4. c. 45. s. 26, enacts—"That notwithstanding anything hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament, unless he shall have been duly registered according to the provisions hereinafter contained; and that no person shall be so registered in any year in respect of his estate or interest in any lands or tenements, as a freeholder, copyholder, customary tenant or tenant in ancient demesne, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use, for six calendar months at least next previous to the last day of July in such year, which said period of six calendar months shall be sufficient, any statute to the contrary notwithstanding; and that no person shall be so registered in any year, in respect of any lands or tenements held by him as such lessee or assignee or as such occupier and tenant as aforesaid, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use, as the case may require, for twelve calendar months next previous to the last day of July in such year: provided always, that where any lands or tenements, which would otherwise entitle the owner, holder or occupier thereof to vote in any such election, shall come to any person, at any time within such respective period of six or twelve calendar months, by descent, succession, marriage, marriage settlement, devise or promotion to any benefice in a church, or by promotion to any office, such person shall be entitled in respect thereof to have his name inserted as a voter in the election of a knight or knights of the shire in the lists then next to be made by virtue of this Act, as hereinafter mentioned, and, upon his being duly registered according to the provisions hereinafter contained, to vote in such election."

Spencer v. Harrison, C.P.

is even possible that no sale may ever be made under the trusts of the will; for the land may remain unsold until all the *cestuis que trustent* are of age, and capable of electing to keep the land unsold. Is such an uncertain interest as this a freehold interest, determinable upon a contingency, or is it an interest at will? If the appellant is seised of an equitable estate of freehold determinable he is entitled to be on the register—*Ashworth v. Hopper* (6); if not, he is not.

An uncertain interest in land, *i.e.* an interest determinable on a contingency which may or may not happen, is in almost all cases a freehold interest, unless the contingency depends on the will of the person creating the estate of his successors in title. See Serjeant Manning's notes in 2 Man. & G. 19, and 7 Man. & G. 45, and the authorities there cited.

Speaking generally, we agree with Serjeant Manning in thinking that any interest in land of uncertain duration (though not expressed to be for life) determinable by matter subsequent which is the subject of human agency (as where it is determinable at the will of a stranger) constitutes a freehold for life—2 Man. & G. 19, *note*.

We say speaking generally, because there are exceptions to the rule thus stated. For example, estates created by will for the payment of debts, and determinable when they are paid, are regarded as chattel and not freehold interests (*Co. Lit.* 42 a). Further, a tenant by *elegit* has only a chattel interest determinable when his judgment is satisfied (*Co. Lit.* 42 a), and not a freehold interest, although there is some uncertainty as to the duration of his estate.

On the other hand, an estate of uncertain duration determinable on the will of the grantor or lessor, or of their successors in title, is, generally speaking, an estate at will and not a freehold. See *Lit.* 68 and *Co. Lit.* 55 a; *Com. Dig.* Estate by Grant, H. 1.—*Fernie v. Scott* (13). It is true that Brudnell, C.J., speaking in the early part of the reign of

Henry 8th, is reported to have said, "A lease at will must be at the will of both parties, for if it be at the will of the lessor only it is a lease for life." See 7 Man. & G. 46 n. But we can find no instance of a lease at the will of the lessor which is not also a lease at the will of the lessee, and therefore a lease at will. And Lord Coke, in *Co. Lit.* 55 a, says that a lease cannot be at the will of the lessor only. So a lease at the will of the lessee is also at the will of the lessor (*ib.*).

But here again some qualification is necessary, for it is laid down that, "If I make a lease to another till I go to Westminster, the lessee has an estate for life. So, if A. leases to B., till A. makes J. S. bailiff of his manor, B. has the freehold in him; for since there is no particular time specified, but it is left indefinitely when I shall go to Westminster or J. S. be made bailiff of the manor, and these contingencies may or may not happen during the life of the lessee, and the livery transfers the freehold to him, so he must consequently, by the words of the gift, enjoy it during his life if none of these contingencies happen in that time upon which the estate is to determine." In such a case as this, the granting of livery of seisin or the omission to grant livery would shew at once what was the estate of the grantee. If livery was granted an estate for life would be created; otherwise not. Excluding such cases as these, and excluding cases where the intention of the parties can be ascertained, the distinction between a freehold estate determinable at will and an estate at will appears to turn upon the person at whose will the estate is held. If that person is the grantor, his heirs or assigns, the estate is an estate at will, whilst if that person is a stranger the estate is a freehold determinable.

In the present case, the equitable interest of the appellant in the land, as distinguished from the money arising from its sale, is determinable at the will of the trustees who are the devisees of the testator. They have the legal estate, and are not strangers, in the sense in which we understand that word to be used in the above extract from Serjeant

(13) 41 Law J. Rep. C.P. 20; Law Rep. 7 C.P. 202.

Spencer v. Harrison, C.P.

Manning's note. Moreover, it is their duty to sell, and so terminate the appellant's interest in the land.

These circumstances render the appellant's equitable interest in the land much more like an equitable estate at will than an equitable estate for life or lives, or other larger interest, as required by the statute in order to entitle him to be registered as a voter for the county.

The same conclusion may be arrived at by another mode of reasoning. It is plain that the appellant has no equitable estate or interest of inheritance in the land. In the event of his death such interest as he has devolves as personal estate upon his executors or administrators; nothing descends to his heir. If the appellant has any freehold interest in the land, it must, therefore, be something less than an estate of inheritance; it must be an estate for some life or lives. No such estate is expressly given him by the testator, nor was any such estate ever contemplated by him; quite the contrary, he intended the sale to be immediate, and we do not see upon what principle an estate for life or lives can be implied when it is not necessary to give effect to the will under which alone the appellant derives his title.

It is curious that the precise point now before us is not apparently covered by any reported decision. But *Melling v. Leake* (14) goes far to shew that the appellant is not even tenant at will to the trustee, and that the appellant has no estate in the land in the proper sense of that expression. Moreover the cases of *Bennett v. Blaine* (15) and *Freeman v. Gainsford* (16), in which *Baxter v. Brown* (2) and the bearing of the equitable doctrines of conversion on rights of voting were fully discussed, appear to us to be rather in favour of the conclusion at which we have arrived than opposed to it. *Baxter v. Brown* (2) is open to the observation that it depended on the will of the *cestuis que*

trustent whether there should be a sale or not. In the present case the settlement of the daughter's share precludes the appellant from keeping the land as land, even if they wish to do so. For the reason we have given we are of opinion the decision of the Revising Barrister should be affirmed, and that the appeal should be dismissed with costs.

Decision affirmed.

Solicitors—Ridsdale, Craddock & Co., agents for Robinson, Sons & Gill, Blackburn, for appellant.

[IN THE COMMON PLEAS DIVISION.]

(Appeal from Revising Barrister's Court.)

1879. } SARGENT (appellant) v. RODD
Nov. 20. } (respondent).

Parliament—Borough Vote—Notice of Objection—Description of Objector—Parish—41 & 42 Vict. c. 26. s. 4.

The Parliamentary Borough of Liskeard consists, first, of the municipal borough which is part of the parish of Liskeard; secondly, of so much of the parish of Liskeard as is not within the municipal borough; and thirdly, of the parish of St. Cleer. Each of these places has separate parochial officers and rates, and for the purpose of distinction the first is known as "the borough of Liskeard," and the second is known as "the parish of Liskeard." In a notice of objection to a person on the list of parliamentary voters for the borough, and given under 41 & 42 Vict. c. 26, the objector was described as being "on the list of parliamentary voters for the parish of the borough of Liskeard, Division 1,"—

Held, that such notice of objection was sufficient, as the borough of Liskeard was a parish as defined by section 4 of 41 & 42 Vict. c. 26, and the notice followed the words of the Form (I.) No. 2 in the schedule to such Act.

Appeal from the decision of the Revising Barrister for the Parliamentary Borough of Liskeard.

The question was as to the sufficiency

(14) 16 Com. B. Rep. 652; 24 Law J. Rep. C.P. 187.

(15) 15 Com. B. Rep. N.S. 518; 33 Law J. Rep. C.P. 63.

(16) 18 Com. B. Rep. N.S. 185; 34 Law J. Rep. C.P. 95.

Sargent v. Rodd, C.P.

of the notices of objection to the name of the appellant being on the list of parliamentary voters for the borough. The notice of objection served upon the appellant was signed by the respondent thus—

“William Rodd,”

“of Higher Lux Street, on the list of parliamentary voters for the parish of the Borough of Liskeard, Division 1.”

The notice of objection to the overseers was signed by the respondent in like manner as the above, and was addressed “to the overseers of the parish of the borough of Liskeard.”

The parliamentary borough of Liskeard consists of—

First. The municipal borough of Liskeard, which is within and forms part of the parish of Liskeard, but has separate parochial officers and rates; secondly, so much of the parish of Liskeard as is not within the municipal borough of Liskeard, and which has separate parochial officers and rates; and thirdly, a part of the parish of St. Cleer, which has also separate parochial officers and rates.

For the purpose of distinction the part of the parliamentary borough firstly hereinbefore described is known as and called “the borough of Liskeard,” and the known description of the parochial authorities of that part is “the overseers of the borough of Liskeard,” whilst the part secondly hereinbefore described is known as “the parish of Liskeard,” and the overseers of such part are known and described as “the overseers of the parish of Liskeard.”

It was urged, on the part of the appellant, that the said notices of objection were bad, because, *inter alia*, the description of the objector was incorrect, insufficient, and misleading, there being, as it was said, no such list as “the list of parliamentary voters for the parish of the borough of Liskeard, Division 1,” and no such place as “the parish of the borough of Liskeard,” and that the expression “the overseers of the parish of the borough of Liskeard,” contained in the address to the notice to overseers, did not describe sufficiently or correctly the persons to whom such notice should be addressed.

The respondent contended, on the other hand, that the notice of objection con-

taining the description of the objector followed the precise words of Form (I.) No. 2 in the schedule of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), and that the words “for the parish of the borough of Liskeard” were in accordance with the definition of the term “parish,” as defined in section 4 of the said Act.

The Revising Barrister held, that the notices of objection were both sufficient, and struck the appellant's name off.

Arthur Charles, for the appellant.—There being in this case two places, one known as the borough of Liskeard, and the other known as the parish of Liskeard, the description of the objector as being “on the list of parliamentary voters for the parish of the borough of Liskeard” is misleading, since it leaves it in doubt in which place he is to be found, and whether he is in the municipal or parliamentary borough. The case is distinguishable from that of *Moon v. Andrew* (1), where it was held sufficient for the objector to describe himself as being “on the list of voters for the borough of Penryn,” although the borough of Penryn for parliamentary purposes consisted of several places having separate overseers, of which the borough of Penryn was only one, as the description at the end of the notice was to be held to refer to that division of the borough which was so known as the borough of Penryn. But in that case there was no such place as the parish of Penryn within the borough of Penryn, and therefore the notice could not so mislead as the notice would in this case, where one of the places of which the borough consists is known as the parish of Liskeard.

[LORD COLERIDGE, C.J.—The borough of Liskeard is a parish within the words of section 4 of 41 & 42 Vict. c. 26, which enacts that “the term ‘parish’ means a place for which a separate poor-rate is or can be made, or for which a separate overseer is or can be appointed.” Is it, then, a misdescription to describe the parish accurately according to the Act?] It is not right to follow the form, if by

(1) 38 Law J. Rep. C.P. 97; Law Rep. 4 C.P. 461.

Sargent v. Rodd, C.P.

so doing the notice will be misleading. Section 8 states that "the forms in the schedule to the Act or forms to the like effect, varied as circumstances require, shall be used for the purposes for which the same are applicable." Therefore, though Form (I.) No. 2 has at the end, "on the list of parliamentary voters for the parish of," it is not to be blindly followed, whereby so doing it would have a misleading effect; and, in such a case as the present, the word "parish" should have been omitted, and the objector should have described himself simply as being "on the list of parliamentary voters for the borough of Liskeard." The case of *Crowther v. Bradney* (2) is an instance of the description being insufficient, where there were two places having separate overseers within the parliamentary borough, and the description might apply to either of them.

Edward Clarke appeared for the respondent, but was not called upon.

LORD COLERIDGE, C.J.—I am of opinion that the description of the objector is sufficient, because it is accurately given in the words of the Act of Parliament. There are in this borough three separate localities—one is called the borough of Liskeard, a second is called the parish of Liskeard, and the third the parish of St. Cleer, and each of these localities has separate parochial officers and rates. Now the objector in his notice of objection is to describe the parish on the list of voters for which he is to be found, and here he describes it as "the parish of the borough of Liskeard." The borough of Liskeard, having separate parochial officers and rates, is a parish within the meaning of the Act, as declared by section 4, and therefore the locality called the borough of Liskeard is properly described as a parish. It is said, however, for the appellant, that although that be so, and although the notice follows the words of the form given by the Act, yet it is bad if it misleads, and that this notice was likely to mislead. I should hesitate before I held that this notice was

bad on that ground, because, if it follows the words of the Act, it is the fault of the Legislature, and not of the objector, if any one is misled by it. But I think that no one here could properly have been misled by such a notice as this, and that the Revising Barrister was right in deciding that it was sufficient.

DENMAN, J., and LINDLEY, J., concurred.

Decision affirmed.

Solicitors—Young, Jones & Co., agents for Rogers & Son, Helston, for appellant; Bell & Steward, agents for Carlyon & Stephens, St. Austell, for respondent.

Hobbs v. Midland Railway St. L. Ct. 322.
4. P. v. Midland Railway St. L. Ct. 322. 12. 2. 22

[IN THE HOUSE OF LORDS.] *Lawrence*
 1879. } BETTS v. THE GREAT EASTERN RAIL-
 Nov. 4. } WAY COMPANY. *Thurton*
By 5228
Ch 261

Lands Clauses Consolidation Act, 1845
 (8 & 9 Vict. c. 18), s. 127—*Railway—*
Superfluous Lands—"Required for the
Purposes of the Undertaking."

Lands acquired by a company under the provisions of the Lands Clauses Consolidation Act, 1845, and not sold or used for the purposes of the undertaking within the period specified in section 127, are not "superfluous lands" within that section, if at the end of that period there is a purpose within the company's Act to answer which the land is retained in good faith by the company.

This was an appeal from a judgment of the Court of Appeal affirming one of the Court of Exchequer. The case is reported in the Courts below in 43 Law J. Rep. Exch. 4 (where the facts are fully stated), and 47 Law J. Rep. Exch. 461, and in Law Rep. 8 Exch. 294 and 3 Exch. Div. 182.

The action was brought by an adjoining landowner to recover, as superfluous lands under the Lands Clauses Consolidation Act, 1845, certain small strips of land which had been compulsorily taken by the company under the powers of its Act. All the strips were contiguous to the railway, and all, with one exception,

(2) 15 Com. B. Rep. N.S. 536; 33 Law J. Rep. C.P. 70.

Betts v. Great Eastern Rail. Co., H.L.

formed a single piece adjacent to the Diss station. One piece was used as a lair for cattle travelling by the railway. Granaries, coal-sheds, and a public-house had been erected on other strips, and were let out to tenants; and two strips were let out as garden ground. The outlying strip was a piece of waste land which had formerly been part of a road, and was retained in case it should be necessary to restore the old line of road. Evidence was given at the trial before Channell, B., in 1870, that the lands were required for various purposes connected with the company's undertaking, but that owing to want of funds the necessary works for adapting them to those purposes had not been executed. The verdict was entered for the defendants, with leave to the plaintiff to move to enter it for him.

A rule obtained in the Court of Exchequer to enter the verdict for the plaintiff was discharged at the hearing. The plaintiff appealed by way of a case stated for the opinion of the Exchequer Chamber under the Common Law Procedure Act, 1854, section 39. The appeal came on for hearing in February, 1878, before the Court of Appeal, which affirmed the judgment of the Court below.

The plaintiff appealed.

Benjamin (Merewether and R. Williams with him), for the appellant.—At the end of the prescribed period the company cannot retain the land merely because they intend at some future time to use it; there must be some immediate purpose for which it is required. The jury have found that there were railway purposes for which the land was required, and that it was *bona fide* retained to serve those purposes. But the company cannot be allowed to retain the land indefinitely without using it for their purposes. The time that has elapsed since the expiration of the prescribed period without the land being used shews that it was not required at the end of that period. The principle which should govern the case is stated by Lord Hatherley in *The Great Western Railway Company v. May* (1). The meaning of the Act was that the land

must be either used or sold within the prescribed period. A liberal construction allows land to be retained when there is a reasonable prospect that it will shortly be used. But if the construction be extended to such cases as the present, what is the use of prescribing a limit of time at all?

Wills and Austin Metcalfe, for the respondents, were not called upon.

THE LORD CHANCELLOR (EARL CAIRNS).—The appeal in this case is brought before your Lordships from the unanimous judgment of the learned Judges of the Court of Exchequer, confirmed as it was by a judgment equally unanimous of the Court of Appeal. In the few observations I have to make upon the case I should be extremely sorry to say a word which would in any way tend to the relaxation of the most wholesome provisions of the Lands Clauses Consolidation Act with regard to superfluous lands. I know of nothing in the law which is more necessary, and which has been more wholesome in its operation, than the way in which that Act deals with railway companies and other companies who are armed with compulsory powers for taking land. It has been the object of the Legislature, in conferring those powers, to enable the company to exercise them for the purposes of the Act, and only for the purposes of the Act—for the purposes of the undertaking which was authorised by Parliament, and for no other purpose. The object of Parliament was, that companies so created and so armed with parliamentary powers should not become traffickers or dealers in land, or persons entitled to use and obtain land for any purpose but the one particular purpose which was authorised by Act of Parliament. The object of the Act has had full effect given to it in the decisions which have taken place in your Lordships' House and elsewhere upon it, to some of which reference has been made in the course of the argument; and your Lordships will have to deal with those decisions in connexion with the particular facts of the case which is now before you. I will call your Lordships' attention to three matters with regard to what is called the

(1) 43 Law J. Rep. Q.B. 233; Law Rep. 7 H.L. 283.

Beattie v. Great Eastern Rail. Co., H.L.

superfluous land in this case, of which it is said that, not having been sold by the railway company at the end of ten years, it should be held to revert to the adjacent landowners. The first observation I would make with regard to the whole of the pieces of superfluous land (I make the observation as to all of them, although the case of the appellant as to three has been abandoned in the course of the appeal), as to all the pieces of land, including those with which the appeal is still occupied. A glance at the map shews to anyone who looks at it that they are pieces of land small in extent, and then, with regard to the larger of them, immediately adjacent to the railway, and not only to the railway, but to an important station of the railway, and they are pieces of land connected with the station, and connected with the modes of access to the station. The next observation I would make is this, that the case of the appellant having come to be considered before a jury, in the trial before a jury evidence was given by the engineer and by the traffic manager of the line—and the evidence which those persons gave was not contradicted by any evidence upon the other side, and so far as I can see was not shaken in cross-examination—and those persons, as I read their evidence, stated this clearly and distinctly, namely, that the land was originally acquired for the purposes of the railway company (that, indeed, is not disputed), and that when the termination of the decennial period had arrived there were perfectly specific and declared purposes (I mean declared in the evidence of these professional advisers of the company) which would be served by the retention of this land, and in order to serve which the land was retained; that is to say, there were purposes connected with the maintenance and well-being of the line which the railway company had in view, and for which purposes they were retaining these pieces of land. It is perfectly true that these witnesses did not say, "We mean to carry out these purposes within a specified or specific time;" and I do not see that they were asked the question, "Are you prepared to say within what limit of time you will be able to determine these objects?" Certainly

the witnesses did not state any period at which the purposes would be carried out. But then this evidence has been before a jury, and the jury have heard the witnesses, and have heard the cross-examination, and in answer to the questions put to them by the learned Judge gave their verdict in this form: "We find that the whole of the lands in question were taken solely for the purposes of the Act; that they were and are duly fenced off from the adjacent lands; and that they have ever since been and still are *bona fide* retained for the purposes of the Act." Now the jury could only come to that conclusion by accepting the evidence given by the witnesses, which I have referred to, who stated the purposes inside of the Act for which the land was required; and therefore I understand the jury to say, "We find as our verdict that the land is retained *bona fide* by the company for the purposes within the Act which have been stated to us." I would use the word "retained" here as meaning, "We, the jury, find that the reason why this land is not superfluous land is because it is required for the purposes of the Act, and it is retained to answer those purposes." If the verdict does not mean that, I do not know what it can mean; and it seems to me to be a verdict consistent with the evidence given to the jury. I am bound to say that, as I understand the object of the Legislature with regard to superfluous lands, it is, that if it can be stated in good faith at the end of the ten years that there is a purpose within the Act to answer which the land is retained in good faith by the railway company, they are entitled to retain it. That exhausts the whole case, and it appears to me that the decision of the two Courts from which the appeal comes was entirely right, and I submit that the appeal should be dismissed with costs.

LORD PENZANCE.—Your Lordships have before you in this case, in the form of a map, an illustration of the precise position which the lands occupy, and the relation in which they stand to the railway and the station to which they are contiguous, and the question is whether with respect to these lands, regarding

Betts v. Great Eastern Rail. Co., H.L.

the evidence which was given at the trial, and regarding the verdict at which the jury arrived, your Lordships can say that these lands are superfluous lands, and lands which ought to have been sold, and, not having been sold, ought to have been returned. At the trial there was no want of definiteness whatever in the evidence given on the part of the company as to the purposes for which they desired to retain these lands. One witness was asked, with reference to this land, whether it was the only land at the station on which the siding accommodation could be increased, and stated that that was the fact, and he also stated that it would be impossible for the company to give up the land, as it was not only required for sidings, but also for a new road which it was desirable to make in a north-west direction. These passages in the evidence appear to me to put forward a perfectly definite and reasonable object for retaining this land to be used for the purposes of the company. It was partly to increase the siding accommodation of the station, which could not be increased in any other way, and partly to open a new road. They formed this definite intention, according to the evidence of the witnesses, and a jury have been asked the question, whether the land was retained for the purposes of the company, and have had it pointed out to them that the company could not retain the land for any collateral purposes or any indefinite purposes, and the jury thought that the whole of the land was taken for the purposes of the Act, and was retained *bona fide* for the purposes of the Act. I quite agree with what has fallen from my noble friend, that the ground put forward for retaining this land was a genuine and honest purpose, and that the land was retained for that purpose, and that purpose alone, and I can see no ground for saying that these are superfluous lands. With respect to the general proposition which the learned counsel has put before us, I can well conceive that there might be cases in which it would be very difficult to lay down a clear and definite line as to the period within which a purpose of this kind ought to be carried out. No doubt the

ten years have expired, and the company have done nothing; but if the company have a *bona fide* object in view (and it appeared to the jury that their object was *bona fide*) it does not appear to me that mere neglect to carry that purpose into effect in any way alters the case. I will merely say, that, looking at the circumstances of the case, and looking at the nature of the land and its position, I should be inclined to ask your Lordships to confirm the judgment of the Court of Appeal, that these lands were not superfluous lands, but were retained by the company for reasonable purposes entirely within the bearing of the Act.

LORD BLACKBURN.—The Act of Parliament for a very wise and obvious reason enacts that where it gives powers to a company to take lands compulsorily, if those lands are not required after a certain period (which in this particular case is ten years) for the purposes of the Act, the company are not to sell such superfluous lands, but they are to go to the adjoining landowners. I have no doubt the Legislature perfectly intentionally meant by that, that the lands should be used for the purposes of the Act, but, if they were not required for the purposes of the Act, that they should not uselessly be retained. But in this case it is not only proved that the lands were acquired with the intention of complying with the purposes of the Act, but that they are still *bona fide* occupied for those purposes, and are still required. A great deal of argument has been used at your Lordships' bar upon this point, that there is no fixed or precise time mentioned for the railway company using the land, that they have said—"We have a scheme for a specific purpose, but we cannot tell how we shall carry it out; we shall do that when we are rich enough, and when we shall be rich enough we cannot say," and that would open the door to a railroad company to evade the Act in taking and occupying land. But as to that I can only say, that it seems to me that all it amounts to is saying that the jury decided upon evidence (subject to the control of the Court, which could grant a new trial upon the ground of the verdict

Betts v. Great Eastern Rail. Co., H.L.

being against evidence) that the lands were *bona fide* required for the purposes of the Act. The requirements are very strong if the lands are not required, but the jury have found that the lands are retained for the purposes of the Act. If the jury had found that they were not required for the purposes of the Act, then that would be under the control of the Court; but it is no ground for moving the Court to say that there may be conceivable cases in which the finding would be otherwise. Looking at the particular case, it seems to me that the jury were perfectly justified in the decision that they came to. I will not repeat what has been already said by my learned brothers, but I just wish to point out that the strips of land are so situated close to the station, that upon a review of the matter it seems a very probable thing that the railway company would wish that they had means enough to open an access from the railway station to the north-west part of the undertaking, and they would thus save a mile or two. The jury have found that the purposes are *bona fide* purposes, and I see from the evidence of the engineer and the goods traffic manager, who would know most about it, that they said the purpose was *bona fide*. Then when we are asked to say that these lands could not be in point of law required for the purposes of the Act (the jury having found that they were) merely on the ground that it does not appear on some original plan that the lands were marked down for a particular purpose, and that it does not appear when it is to be done, it really comes to this, that the intention cannot be carried out until the Great Eastern Company get funds. There was ample evidence to justify the finding, as far as I can see; and not only do I think that such finding was not wrong, but it was the finding I myself should have come to.

*Judgment appealed against affirmed,
and appeal dismissed with costs.*

Solicitors—Hayes, Twisden, Parker & Co., agents for T. W. Salmon, Diss, for appellant; C. A. Curwood, for respondents.

*Night, Harwood vol 862 445,
Beaton v. English 52 L.R. 2388
" " 53 286 134
201*

[IN THE QUEEN'S BENCH DIVISION.]

1879. { CROOKES AND ANOTHER v. ALLEN
Dec. 20. { AND THE MONTREAL OCEAN
STEAMSHIP COMPANY.

*Ship and Shipping—General Average—
Exceptions in Bill of Lading—Injury to
Goods by Water employed to extinguish
Fire—Liability of Shipowner for not pro-
curing Adjustment of General Average.*

A bill of lading, by which the shipowner undertook to deliver the goods at a port to a railway company, to be by them carried inland and delivered to the consignees, contained an exception, "that the shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, or for any claim, notice of which is not given before the removal of the goods." On the voyage a fire broke out, and the cargo was damaged by the admission of water to extinguish the fire. The ship put back, and the shipowners delivered the cargo up, without taking security from any of the cargo owners, or taking any step for procuring an adjustment of general average:—

Held, first, following Schmidt v. The Royal Mail Steamship Company (45 Law J. Rep. Q.B. 646), that the shipowners were not exempted from contribution to general average by the clauses in the bill of lading; and, second, that they were liable to an action by a shipper of goods for neglecting to take the necessary steps for procuring an adjustment of the general average, and securing its payment.

This was a case tried before Lush, J., and reserved for further consideration. It was argued before him, at Westminster, on the 23rd of November, by

Herschell and J. O. Mathew, for the plaintiffs.

O. Russell and French, for the defendants.

Curr. adv. vult.

The judgment, which fully sets out the facts and arguments, was (on 20th of December) delivered by

LUSH, J.—The plaintiffs are shippers of goods on board the *Sardinian*, a steamer belonging to the defendants' company,

Crookes v. Allen, Q.B.

for conveyance from Liverpool to Montreal. In the course of the voyage a fire broke out in the hold, which made it necessary to scuttle the ship, in order to protect the whole from destruction. The water materially damaged the plaintiffs' goods, and occasioned a general average loss. The ship returned to Liverpool; the cargo was discharged, and handed over by the defendants to the Liverpool Salvage Association, to be distributed and disposed of as might be most for the benefit of the parties concerned. The complaint against the defendants is, that they refused to give any assistance to enable either the association, or the underwriters, or the persons whose goods were so damaged, to get an average statement made out, or to take any steps to enable the plaintiffs to recover contribution. They delivered up the cargo without taking the usual security from any of the owners of the cargo, and the plaintiffs were not only without the benefit of such security, but without the means of ascertaining in what proportion the several cargo owners were liable to contribute, or even who, besides the defendants, were the contributing parties. The defendants' reason for adopting so unusual a course avowedly was because they considered the ship not liable to contribution, and they based their claim to immunity from general average on a clause in the bill of lading. By this instrument the defendants undertake to deliver the goods at the port of Montreal (unless prevented by certain specified perils) unto the Grand Trunk Railway, by them to be forwarded "upon the conditions before and after expressed," thence per railway to the station nearest to Toronto, and at the said station delivered to the consignees at a through tonnage freight. Then follow a number of minute stipulations and exemptions, amongst which is the following:—"The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, or for any claim notice of which is not given before the removal of the goods, nor in any case for more than the invoiced or declared value of the goods, whichever shall be the least." This case is, in my opinion, not distinguishable from *Schmidt v. The*

Royal Mail Steamship Company (1). Although the words "fire, and the consequence thereof," which are the words relied on in that case, are here found in the previous enumeration of perils, the words in question must, like those, be construed to have reference to and to qualify their liability as carriers. I adopt the words which I used in that case, and repeat that the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average, and unless the contrary appears the words used must be so construed. The argument receives additional force in the present case from the fact that, in the clause in question, the carriage on board the ship and the carriage by railway are linked together. Goods may be damaged in their transit in ship or on the railway, but general average contribution can only arise in respect of damage on ship. It was stated, by the counsel for the defendants, in the course of the argument, that these words were introduced in order to get over the case just referred to, and to relieve the shipowners from general average contribution. If the words fairly bore that construction, another and a more serious question would have arisen, a question which might equally have arisen if the claim was one strictly within the meaning of this clause. The long list of excepted perils, and the much longer list of exemptions and qualifications, of which the clause in question is one, and which seem designed to exonerate the shipowners from all liability as carriers, and to reduce them substantially to the condition of irresponsible bailees, are printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight. The clause in question comes in about the middle of thirty closely packed small type lines, without a break sufficient to attract notice. If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution, a clause which not only deprives the shipper of an ancient

(1) 45 Law J. Rep. Q.B. 646.

Crookes v. Allen, Q.B.

and well-understood right, but which might avoid his policy, and deprive him also of all recourse to the underwriter, he ought not only to make it clear in words, but also to make it conspicuous, by inserting it in such type, and in such a part of the document, as that a person of ordinary capacity and care could not fail to see it. A bill of lading is not the contract, but only the evidence of the contract; and it does not follow that a person who accepts the bill of lading which the shipowner hands him, necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them, or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms. Notwithstanding the concluding sentence of these small-typed thirty lines, which says, "In accepting this bill of lading, the shippers or other agents of the owner of the property carried, expressly accept and agree to all its stipulations, exceptions and conditions, whether written or printed," I should have thought it right if the stipulation in question bore the meaning contended for, to give the plaintiffs an opportunity of supplying, by means of an official inquiry, information as to the circumstances under which the goods were shipped, and the bill of lading was taken, and whether the special clauses of this remarkable document were brought to their notice, or were read by them before they accepted it. It is unnecessary in the present case to ascertain these facts, because the clause has not the meaning which the defendants ascribe to it, and the only question is the liability of the ship to contribute. The next question is whether a shipowner is bound to exercise the power he is invested with when a general average loss has arisen, and to afford the means in his power for adjusting the average claims and liabilities, and secure their payment to the parties entitled. It seems strange that such a point has not been formally decided in this country. It has been de-

cided in America, and in favour of the shippers. I am not aware that it has ever been judicially questioned here; and I can only account for the absence of direct authority by supposing that the universal practice has been accepted as proof of the obligation. It is clear that the shipowner has a lien for general average on the whole of the cargo liable to contribution, and can require, before he parts with it, security for its due payment. In early times the master, when he had jettisoned part of the cargo to save the whole adventure, took and rendered contribution in kind. The ordinary course now is, and has been for a very long time, for the shipowner to require before he delivers the cargo, an average bond or agreement for the payment of what shall be found due from each shipper for his proportion of the loss. He is the only person who has the power to require security. The right to detain for average contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled, and of collecting the amount; and the usage has always been substantially in accordance with this law, and has become part of the common law of the land. I am therefore of opinion, first, that the bill of lading does not exempt the shipowner from contribution to a general average loss; and, secondly, that he is liable to this action, for not having taken the necessary steps for procuring an adjustment of the general average, and securing its payment. This is all which I am required to decide, and my judgment will therefore be entered for the plaintiffs, with costs.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; Gregory & Co., agents for Hill & Dickinson, Liverpool, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { COULTHART (PUBLIC OFFICER OF THE
Dec. 9. { STALYBRIDGE, HYDE AND GLOSSOP
BANK) v. CLEMENTSON AND AN-
OTHER.

Principal and Surety—Continuing Guarantee—Revocation of Guarantee—Death of Guarantor, Effect of—Notice of Withdrawal of Guarantee, what is sufficient.

A continuing guarantee is not ipso facto revoked by the death of the guarantor. But notice of the death of the guarantor and of the existence of a will, given to the holder of the guarantee, is constructive notice of the determination of the guarantee as to future advances.

This was an action which came on before Bowen, J., at the Liverpool Summer Assizes, 1879.

The learned Judge reserved the case for further consideration, and it was argued before him, at Westminster, during the Michaelmas Sittings.

The facts and arguments sufficiently appear from the judgment.

Ohannell (J. W. Mellor with him), for the plaintiff.

O. Russell and Orompton, for the defendants.

Our. adv. vult.

The following judgment was (on Dec. 9) delivered by

BOWEN, J.—This is an action brought by a bank upon a continuing guarantee against the executor of a deceased guarantor.

Messrs. E. & J. Clementson, cotton brokers and spinners, in the county of Chester, had a banking account with the bank of which the plaintiff is the registered public officer. In the year 1867 the bank required security for the advances which were likely to be made to Messrs. E. & J. Clementson, and on the 24th of August, 1867, a written guarantee was executed by Nathaniel Lawton, the deceased, and the defendant, Joseph M. Clementson, who is now Nathaniel Lawton's executor (and sued as such).

The material part of the guarantee is as follows:—

"We, the undersigned Joseph Moxon Clementson, of Dukinfield, in the county of Chester, cotton spinner, and Nathaniel Lawton, of Micklehurst, flannel manufacturer, do hereby jointly and severally undertake and agree to guarantee to the proprietors of or partners in the said banking copartnership for the time being the due and punctual payment when required of all such sums of money as may have been or may be from time to time advanced or paid by or from the said banking copartnership, or which the same copartnership may have already paid or become liable to pay, or may hereafter pay or become liable to pay, for or on account of the said Edward and John Clementson, or their order, on any account whatsoever, with interest, commission and other banking charges upon such sums.

. . . . And we jointly and severally further agree as follows, namely, that this guarantee or engagement shall be considered a continuing guarantee, and shall not be withdrawn, but shall continue in full force until three months after notice to the manager of the said banking copartnership in Ashton-under-Lyne in writing under our hands of our intention to discontinue or determine the same."

Advances were duly made by the bank under this guarantee down to the death of the testator Nathaniel Lawton, on the 19th of December, 1875, at which date the firm of Messrs. E. & J. Clementson were considerably indebted to the bank. It was admitted, however, that sufficient sums of money after notice of the death had been paid into the account and generally appropriated to the current account to cover any balance which was in fact owing at the date either of the death or of such notice. Upon the other hand, if the guarantee was not determined in law by death or notice of the death of the testator, it was admitted that the bank, who continued their advances up to May, 1878, to the firm of E. & J. Clementson, were entitled to recover under this guarantee a large sum of 3,000*l.* or thereabouts, which, in case of difference, is to be settled hereafter by a referee.

The cause was tried, before myself and

Coulthart v. Clementson, Q.B.

a special jury, at Liverpool, when it was agreed that the jury should be discharged, and that the Court should have power to draw all reasonable inferences of fact. The evidence as to what had passed between the bank and the defendant, as Nathaniel Lawton's executor, after Nathaniel Lawton's death is not very clear. From a feeling of mutual courtesy the parties refrained from cross-examination of one another at the trial. It appeared that the bank knew of the death of Mr. Lawton, but had received no written notice of it addressed specially to themselves. On the 12th of February, 1876, however, the defendant as executor had published in the proper newspapers advertisements under 22 & 23 Vict. c. 35, requiring the creditors of the deceased Nathaniel Lawton to send in particulars of claims to the solicitors of the executors on or before the 14th of May, 1876. The bank and their officers were cognisant of this advertisement, as well as of Nathaniel Lawton's death. Under the testator's will one-third of his estate was to be in trust for the children of the testator's sister Sarah who should attain twenty-one years, in equal shares; one-third for the children of his deceased brother John Lawton who should attain twenty-one; and the remaining one-third to the brother of the testator, M. H. Lawton. Some of the children were minors. M. H. Lawton, before any claim made by the bank, got his share and spent it.

It was admitted that the bank knew who were the executors, and that, without knowing the terms of the will, the bank knew that the estate was going, one-third of it to the testator's brother, and two-thirds to the children of the testator's brother and sister, some of whom were infants. The defendant, who was a brother of the partners in the guaranteed firm, Messrs. E. & J. Clementson, had become liable to the bank as a guarantor jointly and severally with Nathaniel Lawton under the guarantee in question. He called at the bank shortly after the appearance of the advertisement, and saw the manager, Mr. Coulthart. The following is the account given by the defendant of the interview:—"I went to the bank to see if they could advance some money

on a large public building, the Conservative Hall; and Mr. Coulthart agreed to do so. Then he said, 'I see by the notice in the paper that your brother-in-law is dead. Do you know that you are responsible for 3,000*l*.?' And I was not aware of it, but was quite agreeable to be so, knowing my brother to be in good circumstances. He asked me how they were doing. I told him I knew all their affairs, and told him they were doing as well as they could be doing at the time. That is all that passed, to the best of my recollection. We should never have paid the share out if we had thought it was subject to liability." The defendant was not cross-examined; but it was stated, on behalf of the bank, that Mr. Coulthart's recollection of the conversation differed from the defendant's; and by consent a written memorandum of the interview made by Mr. Coulthart at the time was put in as containing the substance of the evidence which Mr. Coulthart was prepared to give, and was to be taken as if he had actually deposed to it. The memorandum was as follows:—"Mr. Clementson called, and said he would sign a new letter of guarantee for 4,000*l*., or allow the existing one to continue, as might be most agreeable to the directors."

In May, 1878, the guaranteed firm, Messrs. E. & J. Clementson, fell, as I have stated, into difficulties. The bank, to whom they were indebted heavily for advances, exceeding the amount of the guarantee, claimed under the guarantee to be repaid the same by the defendant as executor of the testator, and brought this action. For the defendant, it was contended that the testator's estate was not liable for advances made after the testator's death, or at all events after the bank received notice of his death. For the bank, it was argued that no notice was given which was equivalent to a notice of the withdrawal of the guarantee; and that the proper inference to be drawn from these facts was that the bank had a right to and did still suppose that the guarantee was to continue. If it were established that after the death of the testator the parties had dealt together on the footing that the guarantee was at an

Coulthart v. Clementson, Q.B.

end, the case of *Harris v. Fawcett* (1) would apply, and the estate would not be liable. But I do not decide this case on that ground, though I am not convinced on the present materials alone that the bank may not after the testator's death have been looking to the liability of the defendant as joint and several guarantor on the guarantee, and have considered the guarantee determined as regarded the testator and his estate. It is possible, however, that the executor himself supposed the guarantee to be at an end, while the bank entertained no definite opinion on the subject. It would be difficult for me to express any clear view about the matter, as the evidence leaves me still in some doubt about it. It is not necessary, if my judgment be well founded, for me to decide the point. I am of opinion that the notice with which the bank in the present case was affected amounted to a discontinuance, so far as future advances were concerned, of the guarantee. A guarantee like the present is not a mere mandate or authority revoked *ipso facto* by the death of the guarantors. It is a contract; and the question at what time and on what notice it ceases to cover advances is a question of the construction of the contract. In the case of such continuing guarantees as the present, it has long been understood that they are liable as a matter of law to be withdrawn on notice. Various explanations have been offered of this reasonable though implied limitation. The guarantee, it has been said, is divisible as to each advance, and ripens as to each advance into an irrevocable promise or guarantee only when the advance is made. This explanation has received the sanction of the Court of Common Pleas in the case of *Offord v. Davies* (2). Whether the explanation be the true one or not, it is now established by authority that such continuing guarantees can be withdrawn on notice during the lifetime of the guarantor; and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guaran-

tee irrevocable and to go on for ever? It would be absurd to refuse to read into the lines of the contract in order to protect the dead man's estate a limitation which is read into it to protect him while he is alive. On the argument of the present case, it was virtually conceded that the provision as to three months' notice related only to the guarantor's life, and there being no corresponding provision as to a notice being given on his death, the guarantee could be legally determined at any time after the guarantor's death by a proper notice to that effect. But there remains the question, What is the proper notice? To answer this question we must consider the change which a guarantor's death has effected in the situation. The notice cannot any longer be given by the guarantor: he is dead. The executor of his will is guardian of his estate, and if a notice is to be given by anyone, the executor would seem to be the person to give it. But must the executor give special notice that the guarantee is withdrawn, or is it not enough that the bank should be warned of the death of the testator and the devolution of his estate to others? In many cases the executor has no option to elect to continue the guarantee. Surely it would in such cases be idle to insist on special forms of withdrawal of a guarantee which nobody has a right to continue. Notice of the death and of the existence of a will is notice of the existence of trusts which may be incompatible with the continuance of the guarantee. If, indeed, under the testator's will the executor has the option of continuing the guarantee, then, from the absence of any specific notice of withdrawal, the bank may perhaps, in spite of notice of the death, properly assume as against the estate that the guarantee is not to be determined. But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator and of the existence of a will is constructive notice of the determination, as to future advances, of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guarantee by notice cannot any longer be a giver of notices; that his estate has passed to others who have trusts to fulfil;

(1) 42 Law J. Rep. Chanc. 502; Law Rep. 15 Eq. 311; 8 Ch. 866.

(2) 12 Com. B. Rep. N.S. 748; 31 Law J. Rep. Q.P. 819.

Coulthart v. Clementson, Q.B.

and it is easy for them to ascertain what those trusts are. If those trusts do not enable the executor to continue the guarantee, then the bank has constructive notice that the guarantee is withdrawn. If, indeed, the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself, and such a provision will of course bind the estate. Here there is no such provision. Judgment will therefore be entered for the defendants, with costs.

Solicitors—Milne, Riddell & Mellor, agents for Robert Evans, Ashton-under-Lyne, for plaintiff; Johnson & Weatheralls, agents for Redfern & Son, Oldham, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } HAWKSLEY v. BRADSHAW AND
Dec. 4. } ANOTHER.

Practice—Pleading—Action for Libel—Inconsistent Defences—Denial of Libel and Payment in Court—Lord Campbell's Act (6 & 7 Vict. c. 96), s. 2—Embarrassing Defence—Order XXVII. rule 1.

Denial of a libel cannot be pleaded together with a plea of apology and payment of money into Court under Lord Campbell's Act (6 & 7 Vict. c. 96), s. 2.

The plaintiff brought an action for libel against the defendants, as publishers of a certain newspaper, for libel. The defendants by their statement of defence denied the libel, and also pleaded an apology and payment of money into Court by way of amends,—Held, that the latter plea could only be allowed where the cause of action was admitted,—Held also, that the statement of defence was "embarrassing."

Berdan v. Greenwood (47 Law J. Rep. Exch. 628) distinguished.

This was an appeal by the plaintiff from an order of Field, J., made at chambers, allowing a defendant in an action for libel to deny the libel, and also to pay money into Court by way of amends.

The action was brought by Mr. Hawksley, a civil engineer and the chief engineer of the Nottingham Waterworks Company, against the printers and publishers of the *Nottingham Journal*, for an alleged libel in that paper, imputing to him improper conduct in his profession.

The alleged libel was contained in an article headed, "The Nottingham Corporation and the Water Company," in which this passage occurred: "The company's engineer is anxious not to give up the undertaking, and is also exceedingly anxious to push forward with all possible vigour new works which are not needed, and which will probably not be remunerative if completed."

The plaintiff alleged that this related to him in his professional capacity, and imputed that he was anxious to push forward with all possible vigour new works which were not needful and which would probably not be remunerative, not *bona fide* for the purpose of meeting public wants or for any purpose consistent with the plaintiff's duty and honour, but for the purpose of unfairly increasing the price of the company's undertaking to the Corporation of Nottingham, and for the purpose of increasing the plaintiff's emoluments as engineer to the company.

The defendants in their defence, after denying the imputation and meaning alleged in the statement of claim, and saying that, without the alleged meaning, it was true in substance and fact, and related to a matter of public interest, and was published *bona fide* and under such circumstances as to be privileged, went on to plead as follows:—

"Alternatively, the defendants say, that if the alleged libel was published under such circumstances as to be defamatory of the plaintiff, which they do not admit, it was contained in a public newspaper, ordinarily published at intervals not exceeding one week, called the *Nottingham Journal*, and was inserted in such newspaper without actual malice and without gross negligence, and before the commencement of this action, the defendants inserted in the said newspaper a full apology for the said libel, according to the statute in such case made and pro-

Hawkesley v. Bradshaw, Q.B.

vided (1). The defendants bring into Court the sum of 40s. by way of amends for the injury, if any, sustained by the plaintiff, by the publication of the said libel, and say that the said sum is enough to satisfy the claim of the plaintiff in respect thereof."

Murphy (Julyan Dunn with him), for the plaintiff.—The question here is whether in an action for libel a plea of payment into Court is permitted, if accompanied with a total denial of the cause of action. It will be contended, on behalf of the defendants, that the case is governed by the decision in *Berdan v. Greenwood* (2). There the defendant was allowed to deny the cause of action and at the same time to pay a sum of money into Court. That, however, was an action upon a contract, and the principle

(1) By Lord Campbell's Act, 6 & 7 Vict. c. 96. s. 2, it is enacted that "in an action for libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper, or other periodical publication, without actual knowledge and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication, a full apology for the said libel, or if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall, upon filing such plea, be at liberty to pay into Court a sum of money by way of amends for the injury sustained by the publication of the libel, and such payment into Court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts heretofore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions, in which it is lawful to pay money into Court under an Act, 3 & 4 Will. 4. c. 42, intituled, 'An Act for the further amendment of the law, and the better advancement of justice;' and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea." By 8 & 9 Vict. c. 75, s. 2, the payment of money into Court by way of amends, under Lord Campbell's Act, is made compulsory.

(2) 47 Law J. Rep. Exch. 628; Law Rep. 3 Ex. D. 251.

laid down was never intended to apply to a case like this which involves a vindication of character. "It may, however," says Thesiger, L.J., in delivering the judgment of himself and Brett, L.J., "possibly be that in some actions brought to try a right to or in respect of property which is denied, or to establish character which has been assailed, and in actions where the plaintiff is by the statement of defence charged with fraud, and perhaps in some other cases, it would be, as a matter of practice, improper to allow the defence of payment into Court concurrently with other defences." In *Spurr v. Hall* (3) payment into Court was not allowed to be pleaded in an action for nuisance, together with a denial of the right of action, and the Court of Appeal did not overrule that decision in *Berdan v. Greenwood* (2). Again, the nature of the defence that is here set up is "embarrassing" to the fair trial of the action within the meaning of Order XXVII. rule 1. This action is brought by the plaintiff with the sole object of clearing his character, and it will be very difficult for him to determine what course he ought to pursue, considering that the libellous character of the article is in issue. The point involved here was determined in 1846, and it was decided that the general issue and a special plea of apology and payment of money into Court under 6 & 7 Vict. c. 96. s. 2 to the same cause of action will not be allowed—*O'Brien v. Clement* (4). Parke, B., in his judgment points out some of the inconveniences that would otherwise arise. "We ought not," he says, "to allow this special plea together with the general issue; for if we were and the verdict on the general issue should be for the defendant, there would be a difficulty as to the judgment. What would become of the damages paid into Court because the special plea would shew on the record a cause of action in respect of which the plaintiff ought to recover?" They referred also to the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 21, by which

(3) 46 Law J. Rep. Q.B. 698; Law Rep. 2 Q.B. D. 615.

(4) 15 Mee. & W. 435; 15 Law J. Rep. Exch. 285.

Hawksley v. Bradshaw, Q.B.

the old procedure is maintained "save as by the principal or this Act or by any rules of Court may be otherwise provided."

Graham, for the defendants.—These defences may be pleaded together, as a matter of right. At all events this Court will allow them to be pleaded in the exercise of its discretion. The reasons given in *O'Brien v. Clement* (4) would apply to any case of payment into Court along with other pleas; moreover the old doctrine has been overruled by the Court of Appeal in *Berdan v. Greenwood* (2). It is contended that, taking the libel as it stands, it is not a matter which ought to be complained of, or at all events the action is one which ought never to have been brought, for even if the jury should find against the defendants, no larger sum will be awarded beyond what the defendants have already paid into Court. The defendants plead a disclaimer of the libel, and also an apology under Lord Campbell's Act (6 & 7 Vict. c. 96), s. 2, which latter plea must now be accompanied with a payment of money into Court by way of amends, see 8 & 9 Vict. c. 75. s. 2.

[COCKBURN, C.J.—There is nothing in Lord Campbell's Act which entitles you to plead an alternative plea.]

The right to plead alternatively is given by the Judicature Acts and rules—see Order XIX. rule 18, and these should be read in conjunction with Lord Campbell's Act.

[COCKBURN, C.J.—Lord Campbell's Act only allows payment into Court with an apology where a libel is admitted, not where it is denied. That Act never intended that you might both set the plaintiff at defiance, and also plead a payment into Court.]

Under the Judicature Acts any plea may be allowed, whether in the alternative or not, and the old rules as to payment of money into Court have been swept away.

[MANISTY, J.—The leave to plead several matters, which was necessary prior to the passing of the Judicature Acts, has been abolished, but the Court has the same control over the pleadings as before.]

The judgment of the Court of Appeal amounts to this, that there is no power to strike out a defence unless it is embarrassing and in contravention of Order XXVII. This cannot be deemed an embarrassing pleading within the meaning of Order XXVII. rule 1. The case might, perhaps, have been different, had the defendants paid into Court substantial damages, because such a proceeding would admit the libellous meaning attributed by the plaintiff, and the latter might be embarrassed in having to decide whether he ought to accept the sum as paid, particularly as the damages might be large if the article had the libellous meaning imputed.

Murphy replied.

COCKBURN, C.J.—I am of opinion that the decision given by my brother Field in relation to this matter is wrong, and that, consequently, this appeal must be allowed. That portion of the statement of defence which is objected to by the plaintiff is pleaded under Lord Campbell's Act, before the passing of which money could not be paid into Court in an action like the present. I know of nothing either in the Judicature Acts or rules which repeals or modifies the operation of Lord Campbell's Act. In considering the question it is necessary for us to go back a step and to look at the provisions contained in the Common Law Procedure Act, 1852, and it is manifest that, under that Act, money could not be paid into Court in satisfaction of an action of libel, and that the only means by which such course could be pursued was by having recourse to Lord Campbell's Act. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sec. 70, allowed a defendant in certain actions, by leave of the Court or a Judge, to pay money into Court by way of compensation or amends, with this express proviso, "that nothing therein contained shall be taken to affect the provisions of Lord Campbell's Act, intituled 'an Act to amend the laws respecting defamatory words and libel.'" Now the only change which the Judicature Acts have effected in this respect has been that whereas before that Act it was necessary to

Hawksley v. Bradshaw, Q.B.

obtain leave to plead several matters, it is no longer necessary to do so, but inconsistent pleas may now be set up by a defendant without any leave. But that only applies to matters which could have been pleaded before the Judicature Acts by leave, as being within the provisions of the 70th section of the Common Law Procedure Act, 1852, and has no reference to a matter such as this, which could not have been pleaded at all were it not for the provisions contained in Lord Campbell's Act. Therefore a defendant can only plead a plea framed under Lord Campbell's Act by complying with the conditions of the Act, one of which was that the payment into Court should be pleaded as an admission of the cause of action. The defendant to an action of this kind could not say in one plea that he denied the cause of action, and in another plea that he paid money into Court. The Judicature Act has made no alteration in the practice; it enables a party to plead several inconsistent defences, but not such as he could not have pleaded before the passing of the Act. It is unnecessary for me to enter at length into the law relating to the payment of money into Court, but I cannot help throwing out, as worthy of serious consideration, whether the right of paying money into Court under Order XXX., not being a defence *per se*, but being by way of amends, ought to be allowed to be tacked on to some other ground of defence, including a denial of the cause of action, or whether it ought only to be allowed subject to the same conditions as before, one of which was that it should be pleaded as an admission of a cause of action. It is sufficient, however, for us to say now that in actions of libel such a defence can only be pleaded as an admission of the cause of action.

There is another independent ground on which I have come to the conclusion that this appeal must prevail, which is, that the statement of defence is embarrassing, and, as such, is liable to be struck out under Order XXVII. rule 1. I make that observation, not with reference to this particular case, but to cases of libel in general. The plaintiff brings his action to vindicate his character, not

to get money, and it is embarrassing to him to have to consider whether the money tendered is as much as he could reasonably expect to recover by verdict (especially when it is paid into Court subject to a denial of the libellous character of the publication), and whether he could accept and take it out of Court without giving the opportunity to his opponent to say, "you shrank from the vindication of your character, but were sordid enough to take damages." I think therefore that, independently of the first ground, this pleading ought to be set aside as being embarrassing.

MANISTY, J.—I am of the same opinion. I cannot bring my mind to the conclusion that Order XXX. was ever intended to allow an admission of a cause of action and payment into Court in satisfaction of it, to be pleaded with other pleas which go to shew no cause of action; but I bow of course to the decision of the Court of Appeal on that point. I still think, however, with my Lord that it was never intended that a payment into Court under Lord Campbell's Act should be pleaded in defence of the action. No doubt in one sense the effect of the Judicature Acts and orders has been, to adopt an expression of Thesiger, L.J., to "sweep away the old forms and practice of pleading;" but how can it be said that a statement of this kind, which admits the cause of action and says so much money is sufficient, is a plea at all except so far as it relates to the amount of damages? I agree that inconsistent defences, properly speaking, may now be pleaded subject to the provisions contained in Order XXVII. But this is a case of libel, and it seems to me that I could only yield to the defendant's contention by coming to the conclusion that Lord Campbell's Act had been repealed. It is only on that assumption, as it seems to me, that it can be decided that a defendant in an action for libel may pay money into Court and at the same time put the plaintiff's character in issue. The point now raised before us is expressly left open by the decision of the Court of Appeal in *Berdan v. Greenwood* (2), and I agree with the Lord Chief Justice that the statement of

Hawksley v. Bradshaw, Q.B.

defence as it now stands cannot be allowed, both on principle and as being embarrassing. (5)

Appeal allowed.

Solicitors—Wansey & Bowen, for plaintiff;
Taylor, Hoare, & Taylor, agents for Bradshaw,
Nottingham, for defendants.

[IN THE COURT OF APPEAL.]

1879. } JONES AND ANOTHER v.
Dec. 11, 12, 13. } HOUGH AND ANOTHER.*

Shipping—Charter-Party—Conversion of Cargo—Breach of Contract in not signing Bills of Lading.

It was stipulated by a charter-party made between the plaintiffs and the defendants that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to do so, and sailed from the port of loading without having signed any bills of lading. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charter-party.

In an action by the charterers against the shipowners for conversion and for penalties,—

Held, that the plaintiffs could recover nominal damages for the breach of contract in not signing bills of lading as presented; but that there had been no conversion by the defendants of the cargo, as they had carried it for the plaintiffs, had intended to deliver the whole of it to the consignees of the plaintiffs, and had been prevented by the acts of the plaintiffs from completing the delivery.

Appeal by the defendants from the judgment of Lindley, J., on further consideration after trial without a jury.

Action to recover damages for breach of contract and for conversion of a cargo,

(5) So much of 6 & 7 Vict. c. 96. s. 2, as allows the defendant to pay money into Court is repealed by 42 & 43 Vict. c. 59, Schedule, p. ii., which also repeals certain words in 8 & 9 Vict. c. 75. s. 2.

* *Coram* Cockburn, C.J.; Bramwell, L.J.; Cotton, L.J.; and Theiger, L.J.

and for penalties under a charter-party made between the plaintiffs, the charterers, and the defendants, the owners of the steamship *Ellen*.

The charter-party was made on the 13th of June, 1877, and it was agreed thereby that the *Ellen* should go to Cardiff, and "there take on board as tendered a full and complete cargo of coke, . . . and being so laden shall therewith proceed to Bilbao . . . and there as ordered deliver the same alongside . . . on being paid freight at the rate of 9s. per ton of twenty cwt.; the ship paying trimming, wharfage, consulage, lights, pilotage and all other port charges whatsoever. . . . The freight to be paid as follows: one-third (if required) in cash on signing bills of lading, less three per cent. for all charges, and the remainder on the right delivery of the cargo in cash. A sufficient quantity of coal to be taken on board for ship's use . . . to be indorsed on bills of lading, which documents the master hereby agrees to sign as presented . . . within twenty-four hours after the cargo is on board, or pay 4d. per registered ton per day for each day's delay as damages."

It appeared at the trial that the plaintiffs had contracted to sell a cargo of coke to certain merchants, by name Ybarra & Co. at Bilbao, and they accordingly shipped on the 30th of June 564 tons of coke on board the *Ellen* at Cardiff under the above charter-party, and presented bills of lading in the ordinary form to the master for his signature. The master, however, declined to sign them, unless he were allowed to insert the following clause: "The vessel not liable for duties on cargo caused by non-arrival before the 1st of July," as there was some reason to suppose that the Spanish Government would charge extra duties after that date; and the ship sailed, no bills of lading having been signed.

The plaintiffs indorsed and sent the unsigned bills of lading and the invoice to Ybarra & Co., their consignees.

The *Ellen* arrived at Bilbao on the 4th of July, and the master began to discharge the cargo at Ybarra's wharf. When about thirty tons had been delivered, Ybarra, acting under instructions from the plaintiffs, informed the defend-

Jones v. Hough (App.), C.P.

ants that he should only pay the freight subject to a deduction of 10*l.* a day, being the amount of the penalty named in the charter-party, from the date of the presentation of the bills of lading at Cardiff. The master thereupon refused to complete the delivery of the cargo, and warehoused it at Olaveago for whom it might concern.

Lindley, J., gave judgment for the plaintiffs for 399*l.* 17*s.* 6*d.*, the value of the cargo of coke, holding that the master was not justified in insisting on the insertion of the clause as to non-liability for duties, and that there was a conversion of the cargo by his sailing from Cardiff without having signed the bills of lading.

The defendants appealed from this judgment, and also obtained in the Court of Appeal a rule *nisi* for a new trial on the ground of misdirection, surprise, that the verdict was against the weight of evidence, and that the damages were excessive.

Holl and Walker, for the defendants.—The plaintiffs contend that the defendants have broken the contract by not signing bills of lading; but the reason of the refusal was that the plaintiffs themselves declined to allow the master to insert a clause for the protection of the owners. The master was entitled to insert any clause which was not inconsistent with the charter-party. A bill of lading is an uncertain document; there is no statutory form, and masters are wont to insert clauses, as occasion may require, relating to the condition or measure of goods, to the contents of the ship, and to average.

[COCKBURN, C.J.—That comes to this, that one party can force the other to acknowledge his claim, and so to prejudge the whole case.]

But here one party had already committed a breach of the contract, and the other party was thus driven to take precautionary measures. This ship might have been arrested or otherwise proceeded against at Bilbao unless the clause were inserted.

[COCKBURN, C.J.—Would not this clause have barred the rightful claims of the consignees of the goods?]

No; it was merely a form of protest.

It would not have prevented an action being brought under the charter-party.

However this may be, there has been no conversion. There was none at Cardiff, for the ship proceeded to Bilbao direct, and commenced to deliver to the consignees of the plaintiffs. There was none at Bilbao, for delivery of the cargo began, and was only stopped by the acts of the consignees, who had received instructions from the plaintiffs, shewing that these last did not then consider there had been a conversion at Cardiff. The master was right to stop delivery. The claim for penalties was wholly unfounded. The clause as to penalties applies to delay in signing bills, not to a total refusal to do so. The plaintiffs did not desire to negotiate the bills of lading, and thus they were not damnified. Reliance will be placed on *Falke v. Fletcher* (1), but that case is to be distinguished on the facts. There was there a dispute as to the ownership of the cargo; there the plaintiff had not intended to pass the property in the goods, and therefore the defendant there did convert them.

Cohen and Jelf, for the plaintiffs.—The judgment of the learned Judge is right, and the rule obtained by the defendants should be discharged. The defendants never intended to sign the bills of lading as presented, and never intended to perform their contract; and the penalties run from the date of refusal. The master was not justified in leaving Cardiff without signing bills of lading. It is not necessary that there should be an intention to deprive the plaintiffs of the property; it suffices if they were deprived of the possession and the control of the goods for an indefinite time. The defendants did "an unauthorised act which deprived another of his property"—*Hiort v. Bott* (2). It is an unauthorised dealing with goods put on board ship under an inchoate contract for a master to sail away before that inchoate contract is completed—*Peck v. Larsen* (3).

(1) 18 Com. B. Rep. N.S. 403; 34 Law J. Rep. C.P. 146.

(2) 43 Law J. Rep. Exch. 81; Law Rep. 9 Exch. 86.

(3) 40 Law J. Rep. Chanc. 763; Law Rep. 12 Eq. 378.

Jones v. Hough (App.), C.P.

[BRAMWELL, L.J.—Perhaps the plaintiffs might have exercised an option to treat the acts of the defendants as conversion; but they certainly did not do so.]

If the parties were at cross purposes at Bilbao, that does not alter the fact that there was a conversion; and this is really the finding of Lindley, J., a finding of fact which is like a finding of a jury, which ought not to be set aside for the purpose of giving a judgment against the party in whose favour it stands. Such a finding should, if disapproved of, be set aside, and a new trial granted, as is indeed sought for by the rule of the defendants; but it is not competent for them to seek now to treat the finding of the learned Judge as of no effect, and thus to ask for the final judgment of the Court in their favour—*Krehl v. Burrell* (4).

COCKBURN, C.J.—We are all of opinion that this appeal must be allowed to a certain extent. We think that the plaintiffs are entitled to recover for the breach of contract which the master committed in not signing the bill of lading as it was presented, without the stipulation which he attempted to insert. Nevertheless, the plaintiffs have not thereby sustained any real damage, for they it was who prevented Ybarra & Co., their consignees, from completing the contract, and from taking the coke; the consignees were ready to complete, and the plaintiffs forbade them to do so. I am unable to agree with the learned Judge in holding that the mere departure of the vessel was equivalent to a conversion. I do not think that it was, and this case is, in my opinion, very different from *Peck v. Larsen* (3).

It was there held that a person who had put goods on board a general ship without any knowledge of the charter-party under which that ship was chartered, was, on discovering the nature of that charter-party, entitled to have his goods returned to him. That appears to be but reasonable; and if, in the present case, when the captain refused to sign the bills of lading, the plaintiffs had directed

him to return the cargo to them, different considerations would have arisen; but they did not do anything of the kind. The captain was bound to take the cargo pursuant to the charter-party, that is, he was bound to sign a bill of lading in the usual form, and he was also bound to take the cargo to Bilbao. He did the latter, and failed to do the former, but the plaintiffs made no protest as to this, and he proceeded with the full intention of delivering the cargo to their consignees, and so to fulfil the contract. Therefore, I am of opinion, that there has been no conversion of that cargo. Moreover, if the conduct of the defendants did amount to that which, at the option of the plaintiffs, could be treated as a conversion or not, then it is clear, I think, that the plaintiffs exercised their option not to treat the acts of the defendants as a conversion. They continued to deal with the cargo as though it belonged to them still, they treated the cargo when at Bilbao as their own, they proceeded to complete their contract with Ybarra & Co., and proceeded to attempt to enforce penalties under the charter-party. For Ybarra & Co. were willing to take the cargo, and to pay for it without receiving a signed bill of lading; but the plaintiffs interfered, and told them not to take it unless certain terms were agreed to by the captain of the ship. These terms the captain could not accept; he was bound to secure the full freight for the shipowners, and if he had submitted to receive the freight subject to the suggested deductions, the shipowners would have lost that portion of their freight, so that the captain was right to refuse to deliver the cargo to the consignees, who, acting under orders from the plaintiffs, refused to pay the freight. The captain was therefore compelled to warehouse the cargo, and to leave it there for whomsoever it might concern. Thus it is manifest that the plaintiffs dealt with this cargo at Bilbao in such a way as to assert a right of ownership, and consequently it cannot be said that there was any conversion. There has indeed been a breach of the contract, but the plaintiffs cannot recover anything beyond the sum of one shilling as nominal damages, and as each party has been in

(4) 48 Law J. Rep. Chanc. 262; Law Rep. 10 Ch. D. 420.

Jones v. Hough (App.), C.P.

the wrong, each party must pay their own costs.

BRAMWELL, L.J.—I am of the same opinion, and for the same reasons. I desire to add a few words on the jurisdiction and duty of this Court with regard to findings of fact by a learned Judge before whom a case has been tried without a jury. We ought in such case to give, on the materials before us, the judgment that the learned judge ought to have given, and if he should form an erroneous opinion with regard to a matter of fact, it is our duty to correct that opinion. We are, therefore, not precluded by his finding from considering the facts, and from correcting an error. There are cases, such as was *Krehl v. Burrell* (4), where a Judge selects issues of fact separately, and tries those issues first, and then his finding of fact must be appealed from within twenty-one days; but that is not the present case. Where there is a jury, and they find the facts, then this Court cannot be substituted for the jury; but where there is no jury, this Court can and ought to review a finding of fact by a learned Judge.

I am of opinion that there has been no conversion in this case; the goods were on board the *Ellen*, and the *Ellen* set sail for the very purpose of executing the contract made with the charterer. The case of *Falke v. Fletcher* (1) is clearly distinguishable.

Moreover, the plaintiffs did not treat the acts of the defendants as a conversion, they acted as though the cargo was still theirs, and their consignees actually accepted part of the cargo. It has been suggested, that the penalties under the charter-party are still running on; but I am of opinion that the argument on behalf of the defendants is right as to this, and that no penalties have accrued in this case. Under a contract such as a building contract, certain penalties may be incurred after a certain time until the building is finished. In such case there is a *terminus a quo* and a *terminus ad quem*, which definitely fix the time during which the penalties accrue. But that is not the case here. In this case there is no *terminus*, there is no period by

which you could measure the penalties, and for this reason, that the penalties only accrue in a case where a bill of lading has been given after delay, and not in a case such as this, where no bill of lading has been given at all. I have said that there was no conversion at Cardiff, I am also of opinion that there was no conversion at Bilbao, for the consignees only asked for the cargo on terms which they had no right to impose.

There has however been a breach of contract by the defendants, as the captain had no right to insert a special stipulation in the bill of lading, a stipulation which would beg the whole question, and prejudice it in favour of one party. I am not surprised at the conduct of the captain, as the plaintiffs had improperly told him he would be liable for extra custom duties, but still it was not warranted by law. The plaintiffs are therefore entitled to recover nominal damages; and I agree that each party ought to pay his own costs.

COTTON, L.J.—I agree with the judgments which have been delivered. I do not think that there would have been any need to apply for a rule for a new trial, save on the ground of surprise, for I think that, except in cases of which *Krehl v. Burrell* (4) is a sample, this Court has, as was decided in the recent case of *Potter v. Cotton* (5), full power to deal with every question of fact which may come before it on appeal from a Judge who tries a case without a jury.

In the present case the question is not of a verdict against evidence, nor is it a question of the demeanour of witnesses; it is a question of the proper inferences to be drawn from letters, and from evidence taken on a commission. We have to deal with conclusions of fact founded on such materials; and, all the materials being before us, we are bound to review the conclusion of fact to which a learned Judge has come; and if we disagree with it, we must reverse it. It is urged that the suitor is thus placed at a disadvantage, but if so, that is the consequence of his having agreed to dispense with a jury,

Jones v. Hough (App.), C.P.

and to try his case before a Judge alone. Without doubt, the Court of Appeal is always unwilling to interfere with the conclusions formed by a Judge on matters of fact; but in this case there were no separate issues of fact, and Lindley, J., finds no facts different from those which I should find; but he draws different conclusions from the same facts. With respect to the merits of the case, I agree with what has fallen from the Lord Chief Justice and Lord Justice Bramwell.

Ybarra & Co. were only ready to pay the freight subject to a deduction, and therefore the captain was right to refuse to deliver the cargo, and there was not any conversion in his so refusing. He did not give the cargo to some one to whom the plaintiffs did not intend it to be given, as was the case in *Falke v. Fletcher* (1). He did not deliver the documents of title to some person other than the consignees of the plaintiffs, as was the case in *Hiort v. Bott* (2), and therefore there was no conversion.

THESEIGER, L.J.—I am of the same opinion. As to the power of this Court to deal with the facts, I would say that cases do exist in which a Judge sitting alone, without a jury, may deal with special issues of fact, so as to separate those entirely from the rest of the case, as was the case in *Krehl v. Burrell* (4).

Such cases are, however, distinct from a case such as that with which we are now dealing. This case comes before us just as, prior to the Judicature Act, a case used to come before the Court of Appeal at Lincoln's Inn from a Vice-Chancellor; and, but for the motion on the ground of surprise, there would have been no need for an application to this Court for a rule for a new trial. If necessary, this Court could take additional evidence, and thus dispose of the case here.

I agree with the judgment of the Lord Chief Justice on the facts of the case. There was a breach of the contract at Cardiff, but there was no conversion there. Three cases have been cited, which are excellent examples of what may amount to conversion. In *Falke v. Fletcher* (1) there was a question as to the ownership of the goods: it was there held, that the

goods belonged in fact and in law to the plaintiff; and as the captain carried off the goods, and refused to sign a bill of lading, a conversion was committed, for it was manifest that the captain asserted a title in some person other than and in opposition to the title of the plaintiff. In *Hiort v. Bott* (2) the defendant had no title, and he desired to give the goods to the real owner, but he acted so as to assert dominion in himself and in his agent, for he signed a delivery order, and therefore there was a conversion. In *Peck v. Larsen* (3) it was attempted to make the shippers enter into a contract different from that which they had made, and the shippers were held entitled to have their goods returned to them.

The case now before us differs from each of these three cases. Here the shipowner was bound by his charter-party to carry the cargo to Bilbao, and to deliver it to Ybarra & Co., and he carried it without any intention of appropriating the cargo to anyone, save to the plaintiffs, or to those who claimed title under them. There was no conversion at Cardiff, nor was there any at Bilbao, and the damages arising from the original breach of contract in not signing bills of lading are but nominal. The captain was ready to deliver to the consignees of the plaintiffs, but he demanded, as he was bound to do, his freight. This was refused, save under conditions which amounted to a complete refusal, therefore the damages which have been incurred flowed, not from the original breach of the contract by the defendants, but from the wrongful demand of the consignees, acting under the instructions of the plaintiffs.

Judgment for the plaintiffs for 1s. damages for the refusal by the defendants to sign a bill of lading, and judgment for the defendants on the question of conversion.

Solicitors—Poppstone & Beddoe, agents for Vaughan, Newport, Monmouth, for plaintiffs; Lyne & Holman, for defendants.

[IN THE COURT OF APPEAL.]

1879. } OPPENHEIM v. JACKSON AND
Dec. 17, 18. } ANOTHER.*

Bankruptcy—Composition—Statement of Affairs—Name of Creditor inserted, but not for Debt in Question—Waiver by Attendance at Meeting—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126.

The plaintiff entered into a composition with his creditors, under section 126 of the Bankruptcy Act, 1869. In his statement of affairs presented at the meeting of creditors, he set down the defendants as his creditors for a certain amount, but set down a second debt really due to them as due to some one else. The defendants attended the meeting, tendered proof of the second debt, which was admitted, took part in the discussion, opposed the resolution for a composition, and when it was carried, declined to accept the amount of the composition:—Held, that the defendants were not bound by the resolution for composition as to this debt, because the plaintiff had not complied with the requirements of section 126 of the Bankruptcy Act, that there had been no waiver by the defendants, and that the case was governed by *Ex parte Lang* (5 Law Rep. Ch. D. 971).

Appeal by the plaintiff from the judgment of Coleridge, C.J., on further consideration.

The case is reported 48 Law J. Rep. C.P. 441.

The plaintiff claimed to recover 500*l.*; the defendants set up a counter-claim for 1,100*l.* To this the plaintiff pleaded a composition under the Bankruptcy Act, 1869, by which he alleged the defendants were bound, and which would reduce the amount of the counter-claim, so as to leave a balance in his favour.

It appeared that the defendants acting as agents for the plaintiff had guaranteed his contracts with three of his creditors, who were merchants, and had consequently become liable to pay to those merchants 1,100*l.*, the amount of the plaintiff's debt to them. In the statement of affairs presented at the meeting of creditors, the plaintiff set down the debt

of 1,100*l.* as due from himself to the three merchants, and also entered a separate debt of a smaller amount as due from himself to the defendants.

One of the partners of the defendant firm attended the first meeting of the creditors, and tendered proof of the 1,100*l.* which was admitted, he then took part in the discussion, opposed the resolutions and did not accept the amount of the composition which was resolved on.

COLERIDGE, C.J., on further consideration, gave judgment for the defendants, holding that they were not bound, in respect of the debt of 1,100*l.*, by the resolutions for composition.

The plaintiff appealed.

Mathew and Crump, for the appellant.—Assuming that the defendants were the real creditors, and admitting that the sum of 1,100*l.* was really due to them, still it is submitted there was a sufficient statement of the affairs of the plaintiff. Such a statement, when supplemented by affidavit and duly registered, is made by section 127 of the Act conclusive evidence that the resolutions for composition were duly passed. Even if the defendants were not bound in the first instance, still they must now be held to be bound, inasmuch as they waived any irregularity that there may have been, for they attended the meeting of creditors, they claimed to prove, their proof was admitted, they took part in the discussion, and they challenged a vote, so that they waived those conditions which exist for their own benefit, as was said by Mellish, L.J., in *Ex parte Carew* (1), they made themselves parties to the proceedings, and consenting parties to the jurisdiction of the Court, as was said by Lord Blackburn in *Breslaue v. Brown* (2). The judgment of the learned Judge is founded upon *Ex parte Lang* (3), but *Breslaue v. Brown* (2) was not cited in that case, and further, the creditor there withdrew his proof, so that he could be considered as not present at the meeting,

(1) 44 Law J. Rep. Bankr. 67; Law Rep. 10 Ch. App. 308.

(2) 3 App. Cas. 672; 47 Law J. Rep. C.P. 729.

(3) Law Rep. 5 Ch. D. 971.

* *Coram* Bramwell, L.J., Brett, L.J., and Cotton, L.J.

Oppenheim v. Jackson (App.), C.P.

Ex parte Orde (4); *Campbell v. Im Thurn* (5), shews that creditors can come in voluntarily and attorn to a jurisdiction and thereby make themselves bound by resolutions which would not otherwise bind them.

BRETT, L.J.—On the admission which was made in this case, it is obvious that the real creditors were the firm of brokers who had, at the request of the plaintiff, made themselves the principals in the transaction. The three merchants had a right to sue Oppenheim, as they had sold out against him, so that there was a real debt which the brokers, the defendants, had paid or become liable to pay, as they had made themselves liable at the request of Oppenheim, the original debtor; thus, therefore, at the time when the statement was presented the brokers were the creditors, and not the merchants; therefore the debtor by mistake, or by not enquiring, did in fact make a wrong statement of the names of his creditors, for he omitted the name of one of his creditors and inserted the names of some who were not any longer creditors of his.

The real creditor, however, attends the meeting of creditors, offers proof of the debt, and votes in the minority. That, therefore, brings this case within the authority of *Ex parte Lang* (3), and it is exactly in point; it is a decision of this Court and is unimpeached. It has been suggested that Lord Blackburn has intimated in *Breslauer v. Brown* (2) that if facts such as these came before him, he should advise the House of Lords to give a different decision; but facts such as these were not then before the House, and we have only to dismiss this appeal in accordance with the decision in *Ex parte Lang* (3).

COTTON, L.J.—I am of the same opinion. The question is whether the estate of the plaintiff has been discharged from the claim which arises by way of counterclaim in this action. The case is one within section 126 of the Bankruptcy

Act of 1869, and the person who claims his discharge must bring himself within the provisions of that section. Was the amount of the debt due to the defendants correctly stated in the debtor's statement? I think not, for other persons and not the defendants were stated to be the creditors of the plaintiff. Now no discharge can be given by creditors who are not named in the statement as creditors, and so in this case under section 126 of the Act no discharge results. It is, however, said that the brokers, the defendants, were present at the meeting and voted, and that they are therefore bound; that point was decided, and unfavourably to the appellant, in *Ex parte Lang* (3), which covers this case, and which we must follow, as it has never been overruled. It is said that in *Ex parte Lang* (3) the creditor withdrew his proof, and therefore that the case is different from this. I think not. The retirement of the creditor there was not, as is required by the rules, at the meeting; and as the point was raised in argument, we must assume that James, L.J., dealt with the case as though the creditor had not retired. When it is sought to bind dissenting creditors, it is, I think, the intention of the Act that the provisions of the Act should be strictly pursued.

BRAMWELL, L.J.—I am of the same opinion. *Ex parte Lang* (3) is completely in point, and the apparent hardship of the rule is obviated by the fact that there is a power of amending the statement.

Judgment affirmed.

Solicitors—W. A. Crump & Son, for appellant;
John Rae, for respondents.

(4) Law Rep. 6 Ch. App. 881.

(5) 45 Law J. Rep. C.P. 482; Law Rep. 1 C.P. D. 267.

Sum. Schward 49 L. 362 330.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } ROBINSON AND COMPANY v.
Dec. 8. } DAVIES AND COMPANY.

Evidence, Admissibility of—Evidence taken upon Commission—Secondary Evidence received upon Commission abroad—Time to object.

Where in an action a commission had issued to take evidence abroad, and both parties being represented, secondary evidence had been received of the contents of a written document without objection,—

Held, that it was not competent to one of the parties afterwards, upon the hearing of the reference of the cause before an arbitrator, to dispute the admissibility of the evidence so taken and returned by the commissioners in the depositions.

This was in form an application to revoke the submission to the arbitrator of an action which came on for trial at Newcastle before Bramwell, L.J., when a nominal verdict was entered for the plaintiffs, subject to a reference. The real object of the application was to obtain an expression of opinion from the Court as to the admissibility of certain evidence which the arbitrator had rejected, but which it was understood that he was willing to receive if the Court should decide that he might properly do so.

The plaintiffs were shipowners, and sued the defendants, merchants of New York, for freight under a charter-party, by which the defendants had chartered plaintiffs' ship to load bacon and lard at New York, to be delivered at Hamburg. Freight was to be paid upon gross weight delivered at Hamburg, and the plaintiffs had been paid according to the weight appearing on the bills of lading. The contention of the plaintiffs, however, being that the bills of lading incorrectly stated the weight of the lard, they tendered evidence of the actual weight delivered to the consignees at Hamburg, and claimed the difference as balance of freight due from the defendants.

A commission had issued, to which the defendants were parties, to take the evidence of the consignees at Hamburg, upon which the defendants were repre-

sented by one of the commissioners, who was their agent at Hamburg. The plaintiffs produced upon the commission copies of invoices of the lard sent to the consignees, from which it appeared that the gross weight was in excess of that which was entered on the weight notes attached to the bills of lading. No account was given of the original invoices, nor why copies only were produced; but the witnesses were examined upon the contents of the copy invoices, and gave evidence as to the goods and weights to which they referred, and such examination was returned by the commissioners in the depositions, without any objection having been made on the part of the defendants to such evidence, or to the non-production of the original invoices. The copy invoices were attached to the depositions, and returned with them by the commissioners.

On the hearing before the arbitrator, counsel for the defendants objected to the reception of the copy invoices and the evidence based upon their contents, on the ground that the absence of the original documents was not accounted for. The arbitrator accordingly rejected the evidence.

Cave (G. Bruce with him), for the plaintiffs.—Although we move to revoke the submission, the plaintiffs are really only desirous that the Court should direct the arbitrator as to the question of the reception of the evidence to which defendants have objected. This course was adopted in *Hart v. Duke* (1), where the Court, upon being satisfied that the arbitrator would act upon what they laid down, discharged the rule, after hearing argument upon the real question of the admissibility of certain evidence before him.

In the present case the objection ought to have been taken upon the commission, and the plaintiffs were entitled to assume that it would not be raised afterwards when they would not be prepared with the original evidence. It would give a most unjust advantage to a party if he could lie by, and then defeat his opponent by raising an objection of which he had

(1) 32 Law J. Rep. Q.B. 55.

Robinson v. Davies, Q.B.

given no notice at the stage when it properly arose, and when it could have been in all probability answered.

Edge, for the defendants.—The rule as to the admissibility of evidence is strict and well known. Secondary evidence cannot be given without accounting for the original document, and the fact that there was one irregularity committed upon the commission will not make the copies of the invoices evidence before the arbitrator, and the irregularity is a good objection when the plaintiffs propose to make use of the depositions and copies on the reference—*Steinkeller v. Newton* (2).

In *Ohitty's Practice*, 11th edit. p. 386, it is stated that objectionable questions or depositions, or any part of them, may be excluded at the trial, though not by the party who put them in, and this is supported by Lord Campbell's judgment in *Lumley v. Gye* (3), where he says, that if hearsay evidence be admitted on a commission in Prussia, the whole deposition may be repudiated.

[LUSH, J.—But that is on the assumption that, by the law of Prussia, objection could not have been taken before the commissioners.]

LUSH, J.—I have no doubt that the depositions are receivable before the arbitrator. No improper questions were put to the witnesses, there was no interference with the conduct of the examination by a third person, as suggested in *Lumley v. Gye* (3), where the Prussian law of evidence places the examination of witnesses entirely in the hands of the Judge; and so the reasoning in that case is distinguishable from that applicable to the present one.

The only question for us is whether it is now competent to the defendants to object that the commissioners received copies of the invoices instead of the originals. If counsel had appeared for the defendants, and he had accepted copies without objection he clearly could not be heard now to raise the objection. But the parties were represented, and the commissioner who represented the de-

fendants might have objected to the non-production of the original invoices. If he had done so, and had been overruled, and the copies had been admitted despite his objection, the case would have been different; but this was not so, and I am of opinion that now the objection is too late. The rule will be discharged on the understanding that the arbitrator will receive the evidence, and proceed with the reference.

MANISTY, J., concurred.

Rule discharged.

Solicitors—H. C. Coote, agent for H. A. Adamson, North Shields, for plaintiffs; Gregory & Co., agents for Payne & Son, Liverpool, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. SIR ROBERT
Nov. 19, 20. } GARDEN.

Defamatory Libel—Jurisdiction of Magistrate on Criminal Charge of Libel—Evidence of Truth of Libel, when admissible—6 & 7 Vict. c. 96 (Lord Campbell's Act), ss. 5 & 6—30 & 31 Vict. c. 35. s. 3.

[For the report of the above case, see 49 Law J. Rep. M.C. 1.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. } DANBY (appellant) v. HUNTER
Nov. 28. } (respondent).

Highways—Name of Owner of Cart, when to be painted on it—Highway Act, 1835 (5 & 6 Will. 4. c. 50), s. 76—"Cart"—Customs and Inland Revenue Duties Act, 1869 (32 & 33 Vict. c. 14), ss. 18 and 19.

[For the report of the above case, see 49 Law J. Rep. M.C. 15.]

(2) 9 Car. & P. 313.

(3) 23 Law J. Rep. Q.B. 112.

[IN THE COURT OF APPEAL.]
 (Appeal from the Exchequer Division.)
 1879. }
 Dec. 10, 11. } LEIGH v. JACK.*

Action to recover Land—Presumption of Ownership by adjoining Owner of Soil of intended Highway—Dispossession of and Discontinuance of Possession of Land by Owner—Statute of Limitations (3 & 4 Will. 4. c. 27), ss. 2, 3.

The plaintiff granted to the defendant two pieces of land separated by, and each described as abutting on, a strip of land called a street, which the plaintiff intended to dedicate as a highway, but which was in fact never so dedicated.

For more than twenty years before action the defendant used this piece of land for the purposes of his business in such a way as to make it impassable, save for foot passengers. Within twenty years both the plaintiff and the defendant had repaired some railings which separated this intended street from an adjoining highway; and within the same period the defendant had first enclosed a small portion of the street, and then fenced it in at each end, where it abutted on two highways.

In an action to recover possession of the land,—

Held (affirming the decision of the Exchequer Division), that the presumption that the soil to the middle of a highway belongs to the owner of the adjoining enclosed land, does not apply where such land abuts on an intended highway which has not at the time of the conveyance been dedicated to the public.

Held, also, that the plaintiff had not been dispossessed by the defendant, nor had he discontinued possession within the meaning of section 3 of the Statute of Limitations.

Appeal by the defendant from a decision of the Exchequer Division in a Special Case stated by an arbitrator in an action brought by the plaintiff, the tenant for life of all the lands of which John Leigh died seised, to recover possession from the defendant of two pieces of waste land known as Grundy Street and Napier

Place. Grundy Street was a narrow strip of land running from east to west between two highways called respectively Victoria and Regent Road, and Napier Place was a triangular piece of land at the south-east end of Grundy Street adjoining Victoria Road.

The action was brought in April, 1876.

The Special Case stated that John Leigh had contemplated dedicating these two pieces of land as streets, and they were marked as streets on a plan which was prepared with a view to the sale of part of the estate for building; but they were never in fact used as highways.

Grundy Street was separated at the west end from Regent Road by posts and rails, which both John Leigh and the defendant had repaired within twenty years before action brought.

In 1854 John Leigh conveyed to the defendant the piece of land between Napier Place and Victoria Road, and adjoining Grundy Street on the south. The piece of land was described as follows:—

“All that piece of land situate, lying and being in the township of Kirkdale, within the borough of Liverpool, in the county of Lancaster, and on the east side of Regent Road, south side of Grundy Street, and west side of Napier Place, in Victoria Road, in Liverpool aforesaid, bounded on the north by Grundy Street, on the east by Napier Place, on the south in part by land formerly of the said John Shaw Leigh, but now belonging to the Lancashire and Yorkshire Railway Company, and on the remaining part by land lately conveyed by the said John Leigh to the said James Jack on which the said James Jack hath erected an iron foundry and other buildings, and on the west by Regent Road aforesaid; and which said piece of land intended to be hereby granted measures in front to Regent Road aforesaid 145 feet, to Grundy Street 252 feet 6 inches, to Napier Place 137 feet 5 inches, and on the south side thereof 297 feet 10 inches, and containing in the whole 4,259 square yards of land or thereabouts, being the said several dimensions and quantity, a little more or less. The shape, abutments and dimensions of the said piece

* *Coram Cockburn, C.J.; Bramwell, L.J.; and Cotton, L.J.*

Leigh v. Jack (App.), Exch.

of land are more particularly shewn by the plan thereof in the margin of these presents."

The 4,259 square yards were the total contents of the land south of Grundy Street, and did not include any portion of the site of that street.

In 1857 John Leigh conveyed to the Mersey Dock Trustees the piece of land lying to the north of the piece of waste land called Grundy Street. The description in that deed was as follows:—

"The said John Shaw Leigh doth by these presents grant and confirm unto the said trustees of the Liverpool Docks, their successors and assigns," *inter alia*, "all that piece or parcel of land situate in the township of Kirkdale aforesaid, bounded on or towards the south by a public road or street called Grundy Street, . . . together with the free use and enjoyment of all the said streets, roads and passages for all purposes in common with all other persons lawfully entitled to use the same."

The total contents did not include any portion of the site of Grundy Street.

In 1872 this piece of land was conveyed by the Mersey Dock Trustees to the defendant.

Immediately after the conveyance to the defendant of the first-mentioned piece of land, he caused a fence to be put along the northern boundary of Grundy Street, and he erected a foundry and ironworks along the southern boundary of Grundy Street, with windows looking out into that street and into Napier Place, and a gateway leading into Napier Place. From the time of taking that conveyance down to 1865, when he enclosed an oblong piece of ground on the south side of Grundy Street, the defendant, by placing a quantity of old graving-dock materials, screw propellers and boilers, and refuse from his foundry, over the surface of Grundy Street and Napier Place, rendered them impassable for carts and horses. Persons on foot did, however, occasionally down to that date pass along Grundy Street from Victoria Road to Regent Road.

In 1872 the defendant completely enclosed the pieces of land called Grundy Street and Napier Place, on the west and east sides respectively.

No complaint was made on behalf of the plaintiff or her predecessors with respect to any of the defendant's acts until 1875.

The arbitrator found, if it was a question of fact, that the defendant did not acquire a title by possession and user only to any portion of the land.

The Exchequer Division gave judgment for the plaintiff.

The defendant appealed.

O. Russell and W. Butler, for the appellant.—The defendant is entitled to the soil of Grundy Street. If that street had become a highway repairable by the public, then the presumption would have been that the soil of the road *usque ad medium filum viæ* had passed to the defendant by the conveyance of the land along which such road ran, and the soil of the whole of the road where the land on both sides belonged to the defendant. That presumption applies in this case, for the plaintiff has not rebutted it, and he did not reserve to himself the property in the soil of the road. The conveyances in the present case pass the soil of half the road; for, as was said by Willis, J., in *Simpson v. Dendy* (1), the "conveyance of land described as abutting on a road passes a moiety of the soil of the road, unless there be something to exclude it." General words in a conveyance pass half of the highway in such a case as this—*Berridge v. Ward* (2); and these principles apply also in the case of private ways—*Holmes v. Bellingham* (3). If it be said that this road was not actually made when the conveyance was executed, still it was sketched out and its boundaries plainly marked on the plan; and the facts of this case distinguish it from *The Plumstead Board of Works v. The British Land Company* (4), for the conveyances in that case shewed an intention not to pass the soil of the road, and that case was therefore within the principle of

(1) 8 Com. B. Rep. N.S. 433, at p. 472.

(2) 10 Com. B. Rep. N.S. 400; 30 Law J. Rep. C.P. 218.

(3) 7 Com. B. Rep. N.S. 329; 29 Law J. Rep. C.P. 132.

(4) 44 Law J. Rep. Q.B. 38; Law Rep. 10 Q.B. 16.

Leigh v. Jack (App.), Exch.

The Marquis of Salisbury v. The Great Northern Railway Company (5).

Words of grant must be taken in the sense which usage has applied to them, and therefore when, the presumption of law being well known, a grantor grants soil abutting on a road, he must be taken to intend to pass the soil of the road *usque ad medium filum viæ*—*Lord v. The Sydney Commissioners* (6).

If, however, the defendant is not entitled by virtue of the conveyances, still he is entitled by lapse of time; for the title of the plaintiff is barred by the Statute of Limitations, inasmuch as he has been "dispossessed or discontinued possession" for more than twenty years (7).

Herschell (with him *Gully* and *A. L. Smith*), for the plaintiff, was first directed to confine himself to the second point, and was then stopped by the Court.

COCKBURN, C.J.—I am of an opinion that this judgment should be affirmed. I think that, having regard to the conveyances under which the property in question has passed, the ordinary presumption of law does not arise.

The ordinary presumption is, that the landowners on either side of a highway are entitled to the soil of the road which runs through or bounds their land; and it is founded on the assumption that in making a road for public convenience, the owners of the adjoining land have sacrificed a portion of their property in order to devote it to public purposes.

Such a presumption is both reasonable

and useful when there is any uncertainty as to the person in whom the ownership of the soil is vested.

I do not, however, think that the presumption arises here, because we have to deal with a modern grant and modern conveyances: these speak for themselves, and there is no difficulty as to the ownership of the soil of this road. There is, therefore, no reason to make any presumption of law in this case; nor do I think that the grantor intended to divest himself of the ownership in the soil of that land, which was then waste land, although described on a map as an intended street.

Reliance however is placed on the Statute of Limitations; and it is said that the plaintiff and her predecessors have been dispossessed of the profits of this land for twenty years, and therefore that the claim of the plaintiff is barred. It is not really suggested the plaintiff has been dispossessed by anything, unless it be by the acts of the defendant; and the arbitrator has decided that the acts of the defendant did not amount to dispossession of the plaintiff, and with that finding I agree. The plaintiff did certainly not intend to discontinue possession of the land in question. It was part of the scheme of the owners of the land to make a street over it, and to dedicate part of their land to the public. It is clear that this was intended so to be done, and the acts of the defendant were not done with the purpose of defeating that intention. What the defendant did was to use the road as a man would use it who did not intend to commit a trespass, but who availed himself of the use of land while it was not otherwise used, and until it should be used in the way in which it was contemplated by both parties that it should be used. I am of opinion that a person does not necessarily discontinue possession of land because he does not actually use it himself or by his agent. The question is one of fact, to be settled by the circumstances of each case; and I am of opinion that in this case there has been no discontinuance of possession, and that the right of the plaintiff to recover what she seeks is in no way statute-barred.

(5) 5 Com. B. Rep. N.S. 174; 28 Law J. Rep. C.P. 40.

(6) 12 Moore P.C. 473.

(7) 3 & 4 Will. 4. s. 2, enacts that no land or rent shall be recovered but within twenty years after the right of action accrued. This is reduced to twelve years by 37 & 38 Vict. c. 57. s. 1, which came into operation on the 1st of January, 1879.

3 & 4 Will. 4. s. 3, enacts that the right to bring an action to recover land shall be deemed to have first accrued when the person claiming such land shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession.

Leigh v. Jack (App.), Exch.

BRAMWELL, L.J.—I am of the same opinion. The first question is, What passed by these conveyances? Now, to construe or apply a document, I think that it is always necessary to look at the surrounding facts. The rule is that if I say I sell an estate at Dale, and that estate is bounded by roads, then that sale would pass to the purchaser those roads *usque ad medium filum vie*. Again, if I sell a field at Dale, then the half of a road would pass also if that road bounded that field; that is, if a man describes the limits of the property intended to be conveyed, and that property abuts on a road, then those boundaries do not exclude that which he intended to convey, and will include the road *usque ad medium filum vie*.

When these conveyances were executed there was no existing street, and I see no reason to suppose that the grantor intended to convey to the grantee half of the soil over which he intended to make a street. Surely he could have made this street either broader or narrower than he perhaps then intended to do; but if the property in the soil of the intended street passed by the conveyance, then the grantor could in fact have been prevented by the grantee from making the road at all. I do not think that this can be the case; and I think the grant did not include the soil of the road *usque ad medium filum vie*.

I do not think that the case is quite so plain as to the northern half of the intended street; but I think that the reason of the thing is to hold that the presumption to which reference has been made does not apply, but to say that the property granted is described by metes and bounds. Suppose that the words in the conveyance had been "intended street," could it then be said that the plaintiff had granted away the soil, and that he could be prevented from making the street? I think not; and I am of opinion that the defendant and the dock trustees have no title to half the land over which the then intended street has since been made.

I think, further, that the section of the Statute of Limitations provides for two possible cases. The first is, where a man has been dispossessed of his property; the second, where he has discontinued pos-

session. It is difficult to suppose a case of complete discontinuance of possession of a house, for very little would suffice to shew a continuance of possession; but it is conceivable that a man might, in the case of a stray piece of land, go out of it and keep out of it, and do nothing to it for twenty years, and so discontinue possession. The plaintiff might have done so here; he might not have repaired the gate, not have offered to let, never have looked at it or gone near it by himself or any agent, and then I think he would have discontinued possession. This is, however, a question of fact, and a fact which it is difficult to establish against an owner of land. I understand the arbitrator to have stated the relevant facts, and to have drawn his conclusions—to have said, if it was a question of fact for him, that he finds that the plaintiff has not discontinued possession. I do not think he is wrong, for it is necessary that the defendant should shew dispossession or discontinuance of possession; acts of trespass by the defendant are not enough, he must go further. It is, however, in evidence that the plaintiff repaired a fence within twenty years, and that shews that he has not discontinued possession. The arbitrator has found that the defendant has not so dealt with the land as practically to evict the plaintiff, and therefore I think that there has been no dispossession, and that the plaintiff is entitled to the judgment of the Court.

COTTON, L.J.—Neither of the two conveyances purports in terms to convey the land in question to the defendant, so that he is obliged to rely on the old presumption of law which obtains in the case of roads the dedication of which is of ancient date. It is a presumption which is well known, clearly defined, and founded on reason; it is a presumption which applies, moreover, to existing roads; and no case has been cited in which a conveyance of land adjoining something which it is intended to make into a road at some future time has been held to pass the right to half the soil of that road when it shall be made. In such a case the grantor still retains the ownership of that land, and still retains over it his rights, which have

Leigh v. Jack (App.), Exch.

not been diminished by any public rights such as result from the dedication of land to the public. The presumption of law on which reliance has been placed is easily rebutted; and in such a case as the present I think that many circumstances would require to co-exist to establish the presumption. I am of opinion that it does not arise where there was only an intention to dedicate a street hereafter.

I do not think the case of the land which passed by the second conveyance is really different. The street was not in existence at the time of the conveyance; it was, indeed, marked out, but it was not made, nor was it dedicated to the public as an existing highway. It is not necessary to decide the question now, but I may say that I do not think that the presumption would arise in the case of land laid out for building sites and sold in plots bordering upon roads intended to give access to the houses when built.

As to the question of the Statute of Limitations, I am unable to discover any facts which can be said to amount to dis-possession of the plaintiff by the acts of the defendant. I do not think that the plaintiff can be said to have discontinued possession. It is not necessary that an owner should actually be in possession in person, for though absent he may still in the eye of the law be in possession. He does not discontinue possession because he does not actually use or personally enjoy property, the nature of which prevents there being such use or enjoyment in the absence of the owner. It is in every case necessary to look at the nature of the property; and if that is done in the present case, the conclusion is that as the acts of the defendant did not oust the plaintiff, so also the plaintiff has not himself discontinued possession, and therefore the contention of the defendant fails.

Judgment affirmed.

Solicitors—Sole, Turner & Knight, agents for Dodge & Phipps, Liverpool, for appellant; Gregory & Co., for respondent.

[IN THE EXCHEQUER DIVISION.]

1879. }
Nov. 7, } THE SINGER MANUFACTURING
10, 29. } COMPANY v. CLARK.

Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93)—Rights of True Owner of Pledge.

The Pawnbrokers Act, 1872, which in sect. 25 provides that "the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn-ticket, and he is thereby indemnified for so doing," governs the rights between pawnbroker and customer only, and the pawnbroker who delivers the pledge to the person producing the pawn-ticket is not indemnified against the true owner, without whose consent the pledge has been made, but the true owner is entitled to enforce his rights at common law by action.

CASE stated on appeal from the Southwark County Court of Surrey.

On the 16th of October, 1878, the plaintiffs let a sewing machine to Elizabeth Smith, who took possession of the machine, under a written and signed agreement to pay the plaintiffs a rent of 2s. 6d. per week, to keep the machine in good order, and not to remove it from her custody, with the proviso that if she did not duly perform the agreement the plaintiffs might terminate the hiring and retake the machine.

No payment was made under the agreement by Elizabeth Smith to the plaintiffs; and it was admitted, on the part of the defendant, that at the time in question the bailment had been determined, and the plaintiffs were entitled to the possession of the machine.

On or about the 30th of November, the machine was pledged with the defendant in the name of Brown, for a loan under forty shillings, but whether by Elizabeth Smith or by some other person with or without her consent, did not appear.

On the 9th of December, the machine was seen on the premises of the defendant, which were licensed for the business of a pawnbroker, and thereupon the

Singer Manufacturing Co. v. Clark, Exch.

agents of the plaintiffs served the defendant with a written demand of possession. The defendant refused to deliver up the machine on the ground that the demand was not a notice in compliance with the Pawnbrokers Act, 1872.

It was admitted that the plaintiffs were not the holders of the pawn-ticket relating to the pledge, and did not tender to the defendant the amount of the loan and profit due upon the pledge.

On or about the 13th of January, 1879, the defendant delivered the machine to a person producing the pawn-ticket relating thereto, on payment of the loan and profit. On the 22nd the plaintiffs commenced this action in trover and for wrongful conversion of the machine, and claimed 7l. 17s. as damages.

The County Court Judge gave judgment for the defendant with costs, leaving for the opinion of the Court the question whether the action was maintainable, notwithstanding the provisions of the Pawnbrokers Act, 1872.

Benjamin (L. Smith and Candy with him), for the appellants.—The right of the plaintiff to recover is not taken away by the Pawnbrokers Act (35 & 36 Vict. c. 93). That Act applies only as between a pawnbroker and his customer, and not as between a pawnbroker and a third person whose goods have been wrongfully pledged. The plaintiffs might have proceeded under section 29, which provides that "any person claiming to be the owner of a pledge but not holding the pawn-ticket . . . may apply to the pawnbroker for a printed form of declaration, which the pawnbroker shall deliver to him, and if the applicant delivers back to the pawnbroker the declaration duly made before a Justice by the applicant and by a person identifying him, the applicant shall thereupon have, as between him and the pawnbroker, all the same rights and remedies as if he produced the pawn-ticket." But the plaintiffs had the option of proceeding by action. Section 30, which allows the Court before which proceedings are taken to order the payment of the loan or any part to the pawnbroker, applies to criminal proceedings, and assumes that the pawnbroker has been instrumental in

assisting the owner to recover his property. These provisions do not shew that it was intended to take away the right of action. The true owner is not bound to proceed under the statute, but may enforce his right at Common Law. The statute could not have intended to force the true owner to pay a loan made to his wrong doer. He cited *Wilkinson v. King* (1), *Packer v. Gillies* (2) and *Peet v. Baxter* (3).

J. Brown (Hollings with him).—The plaintiffs ought to have made the declaration provided in schedule 3. form iv. "Declaration when pledge claimed by owner." This form and the notes to it are made part of the Act by section 3. The note says "unless this printed form is taken before a magistrate and declared to, and signed and delivered back to the pawnbroker, the articles mentioned will be delivered to any person producing the pawn-ticket." Section 25 provides that "the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and subject to the provisions of this Act, the pawnbroker shall, accordingly (on payment of the loan and profit), deliver the pledge to the person producing the pawn-ticket, and he is thereby indemnified for so doing." The defendant has literally fulfilled this section, and is entitled to the indemnity. *Wilkinson v. King* (1) was a *Nisi Prius* case, briefly reported, and not taken to the Court in banc. It arose under a different Act with different words. He cited *Burslem v. Attenborough* (4) and *Vaughan v. Watt* (5).

Candy, in reply.—Section 25 applies only to persons entitled to redeem the pledge, and not to persons who are no parties to the contract of pawn.

Our. adv. vult.

The judgment of the Court (6) was (on Nov. 20) delivered by—

HAWKINS, J.—The question in this case

- (1) 2 Campb. 335.
- (2) 2 Campb. 336, note.
- (3) 1 Stark. 472.
- (4) 42 Law J. Rep. C.P. 102.
- (5) 6 Mee. & W. 492; 9 Law J. Rep. Exch. 272.
- (6) Huddleston, B.; and Hawkins, J.

Singer Manufacturing Co. v. Clark, Exch.

is whether the true owner of an article, which has without his knowledge or consent been pledged with a pawnbroker for a sum under forty shillings, is entitled, in exercise of his common law right, to recover it or its value from the pawnbroker by action, notwithstanding the pawnbroker has returned it to the pawner, who has redeemed it; or whether his common law right so to do has been taken away by the provisions of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). The facts being all fully stated in the special case, it is unnecessary to repeat them. On the part of the defendant, the pawnbroker, it was contended that he, having delivered up the pledge to the person who for the time being was the holder of, and produced the pawnticket, was, by the 25th section, indemnified for so doing against all the world, including, of course, the true owner; and that the notice and demand served upon him whilst the pledge was yet in his custody operated as nothing in the absence of such a declaration as is prescribed in section 29, and the form of which is given (No. 4) in the third schedule to the Act. It was not, and could not be denied that at common law the plaintiffs would be entitled to recover. They were the owners of the article pledged, and entitled to the possession of it; for the bailment to Smith, the pawner, was determined by her pledging it to the defendant—see *Cooper v. Willomat* (7), where it was held that on a wrongful sale by a bailee to a *bona fide* vendee, the latter was liable in trover to the bailor. Here, instead of a wrongful sale, it was a wrongful pledge; but the same law applies; and the delivery back to the pawner, after notice of the plaintiffs' title and demand, was clearly a wrongful conversion, unless it was protected by the provisions of sect. 25—see *Peet v. Baxter* (3), *Packer v. Gillies* (2), *Hoare v. Parker* (8). In construing the provisions of the Pawnbrokers Act, 1872, some assistance will be derived from a clear understanding of the relations between the pawner and the pawnee, independently of all statutory enactment. In the case of an ordinary

pledge, there is no doubt an implied undertaking on the part of the pledgee to re-deliver to the pledgor the article pledged on payment by the latter of the sum advanced, with interest; but there is, on the other hand, an implied undertaking on the part of the pledgor that the property pledged is his own, or that he has the authority of the owner to pledge it, and that it may safely be delivered back to him. The undertaking on the part of the pledgee to re-deliver is, however, not an absolute one, but is subject to this—that the pledgor has the title he warrants himself to have, and if it turns out that he is not the owner, and had no authority from him to pledge, the pledgee may restore the property pledged to the person lawfully entitled to it—see *Cheeseman v. Exall* (9). Further assistance to a correct understanding of the statute and the intention of the Legislature will be acquired by bearing in mind one or two matters of common knowledge relating to pledges and pawntickets. In the first place, it is a very common occurrence for a pawner to dispose by sale or gift of his pawn-ticket to another person, with the intention to confer on the vendee or donee a right to redeem the article pledged, and by the accidents of life it constantly happens that the pawner loses or accidentally destroys his ticket, or has it stolen or fraudulently obtained from him. It is also a very common practice for the owners of articles upon which they desire to obtain loans to employ other persons to pledge such articles for them, in which case the person so employed, and who actually delivers the article to the pawnbroker, is in law the pawner, and in his name the ticket is made out, and it not rarely happens that this ticket is retained by the pawner, and not delivered over to the employing owner. It was to meet such and similar contingencies (among other things), that the Pawnbrokers Act, 1872, in substitution of the Acts which previously existed on the subject, was passed; partly for the protection of pawnbrokers, partly also for the protection of pawners and owners of property pledged. We come now to consider the provisions of the sta-

(7) 1 Com. B. Rep. 672; 14 Law J. Rep. C.P. 219.

(8) 2 Term Rep. 376.

(9) 6 Exch. Rep. 341; 20 Law J. Rep. Exch. 209.

Singer Manufacturing Co. v. Clark, Exch.

tute itself, in construing which it must constantly be borne in mind that it recognises a clear distinction between the pawnor of goods and the owner for whom or by whose consent they were pawned. This is apparent on reading section 12, which makes it imperative upon the pawnbroker to keep such books as are described in the 3rd schedule, by reference to which it will be seen that in the pledge-book (form No. 1) the name and address of the pawnor (who by section 5 is described as "a person delivering an article for pawn"), and also the name and address of the owner, "if other than the pawnor," are required to be inserted in separate columns. It is obvious that in using the word "owner" in the form in which the pledge-book is to be kept, the Legislature contemplated only the owner assenting to or on whose behalf the pledge is made, for it would be absurd to suppose they would recognise the taking by a pawnbroker knowingly of a pledge without the owner's assent. By section 14 a pawnbroker is required to give to the pawnor a pawn-ticket, and he is prohibited from taking a pledge in pawn unless the pawnor takes the pawn-ticket; and on reference to the form of ticket given in schedule 3, it will be seen that the name of the pawnor is inserted, and not that of the owner. By section 16 every pledge is redeemable within twelve months from the day of pawning; the Act does not in words say by whom the pledge is redeemable, but it is obvious that, *prima facie*, the pawnor who makes the pledge is the person to redeem it, for the contract, as we have pointed out, is between him and the pawnbroker. We now come to section 25, upon which we think great light is thrown by the matters to which we have adverted. It enacts that "the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and, subject to the provisions of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn-ticket, and he is hereby indemnified for so doing;" and is followed immediately by section 26, which enacts that "a pawnbroker shall

not (except as in this Act provides) be bound to deliver back a pledge unless the pawn-ticket for it is delivered to him." It is clear to our mind that in these two sections the Legislature intended only to provide for the delivery back of the article pledged to the person entitled to redeem, and as between the pawnor and the pawnbroker to compel the latter to recognise, in the absence of grounds for belief to the contrary, the possessor of the ticket as the person so entitled, and to presume him to be the lawful holder of it, without further investigation of his title; and should it so happen that the ticket is presented and the pledge redeemed by a person who has, in fact, no title to the ticket, to protect and indemnify the pawnbroker against any claim by the real pawnor, or anybody to whom he may have transferred his title, or the owner who has sanctioned the pledge. This construction seems to us to give full effect to and to be the true interpretation of section 25. In our judgment that section in no degree affects an owner whose property has been pledged against his will. He is in no sense "a person entitled to redeem the pledge," or privy to the contract of pawn. His claim rests on a title paramount, which is unaffected by the dealing between the pawnbroker and his customer. Section 25 does not say that the holder of the ticket shall be presumed to be the "owner," but that he shall be presumed to be the person entitled to redeem, or, in other words, the person entitled to represent the pawnor, whose title is altogether inconsistent with that of an owner whose property has been unlawfully pledged against his will. To our mind it is very clear that the Legislature did not in the sections relating to the redemption of pledges intend prejudicially to affect the rights of such owners as we have last referred to, otherwise a valuable jewel pledged for the sum of five shillings or ten shillings by a fraudulent person without title would, if unredeemed within a year, become under section 17 the pawnbroker's absolute property—a state of things too monstrous to bear a moment's consideration. In the course of the argument

Singer Manufacturing Co. v. Clark, Exch.

there was much discussion upon section 29 of the Act. In that section we find nothing militating against the views we have expressed; that section was, as was stated in the preamble to it, intended for the protection of owners of articles pawned, and of pawners not having their pawn-tickets to produce, that is to say, persons entitled to redeem, but who for some reason or other are unable to produce these tickets; and it points out the machinery by which this protection is to be made available. The first words of sub-section 1 evidently contemplate the case of such an owner as the Act requires to be named in the pledge-book to which we have already referred, namely, an owner whose property has been pledged by his authority, and which, therefore, of course, must be redeemed before the pawnbroker can be called upon to deliver it back. It is true the section in terms does not limit its operation to such owners, and we can well understand and appreciate the reasons for this. It probably is that the Legislature had it in view to enable an owner whose goods are pawned without his authority, if he thinks fit so to do, to put himself in the same position as an owner whose goods have been pawned by his consent, that is to say, to abandon his legal right and to adopt the pledge, and so give himself a title to redeem it, as many a person would doubtless gladly do, where an article of value is pledged for a trifling sum, rather than incur the trouble and expense of insisting upon his paramount title; but if an owner avails himself of this privilege, which it is at his option to do, he must adopt the machinery provided for him. We do not deem it necessary further to discuss this section, in which not a syllable is to be found indicative of any intention to interfere with the common law right of owners of property unlawfully pledged. Sections 30 and 36 appear to us only to afford additional protection to the owners. After much consideration, we have arrived at the conclusion that section 25 justifies the pawnbroker only to this extent, namely, in treating the owner of a pawnticket as the person lawfully entitled to hold it; that the indemnity

given by that section is limited to and protects the pawnbroker only against the pawner, the owner who has authorised the pledge, and all those who claim title under them; and that none of the provisions of the statute were intended to affect, nor do they affect, the common law right of an owner of property pledged against his will who claims by title paramount to that of the pawner. The appellants, the plaintiffs, are therefore entitled to our judgment.

Judgment for appellants; leave to appeal.

Solicitors—J. N. Mason, for plaintiffs; C. Thorp, for defendant.

Bank of Norfolk - Arbitrated 25.2.96 2385.

[IN THE COURT OF APPEAL]

(Appeal from the Queen's Bench Division.)

1879.	} HILL AND OTHERS v. THE MANAGERS OF THE METROPOLITAN ASYLUMS DISTRICT.*
Nov. 25,	
26, 27, 28.	
Dec. 18.	

Nuisance—Statutory Authority to establish Asylums—Power of Statutory Superior to sanction an Act resulting in a Nuisance—Authority given by Statute, how to be pursued—Liability for Nuisance of Local Authority acting under direction of Local Government Board—Small Poz Asylum under Metropolitan Poor Act, 1867 (30 Vict. c. 6).

A hospital for small poz was erected by the defendants, a body created under the Metropolitan Poor Act, 1867, and the plan pursued by them was sanctioned by the Local Government Board. In an action by neighbouring occupiers for damages for a nuisance, the jury found that the hospital was a nuisance, and that the defendants had not exercised all proper and reasonable care in carrying it on:—

Held, that the defendants would not be protected by the sanction of the Local Go-

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

Hill v. Managers of Metropolitan Asylums District (App.), Q. B.

government Board if what was sanctioned was not legal; and that the statute under which the defendants acted did not authorise the creation of a nuisance or interference with private rights.

Appeal by the plaintiffs from an order of the Queen's Bench Division directing a new trial.

Appeal by the defendants from the judgment of Pollock, B., on further consideration.

Action for damages and for an injunction in respect of an alleged nuisance resulting from the erection and maintenance of a small-pox hospital, brought by the owners of neighbouring houses against the Managers of the Metropolitan Asylum District, who are incorporated under the Metropolitan Poor Act, 1867 (30 Vict. c. 6).

The jury found in substance that the hospital was a nuisance, that it caused damage to the plaintiffs, and that the defendants did not take sufficient care in the erection and management thereof. Pollock, B., gave judgment for the plaintiffs.

The facts of the case and the findings of the jury will be found stated at length in the judgment of Pollock, B., on the argument before him on further consideration (reported 48 Law J. Rep. Q.B. 562).

The defendants obtained in the Queen's Bench Division a rule for a new trial, which was afterwards made absolute.

The two appeals were now heard together.

Herschell (with him *Bompas* and *Finlay*) for the plaintiffs.—The order of the Queen's Bench Division for a new trial should be discharged, for the findings of the jury are warranted by the evidence, and the judgment entered on them is right. If the findings are right, then there can be no legal justification; for a public body such as the defendants are cannot establish a nuisance when it has no power of offering compensation to those whom it injures. A railway company is authorised to create some degree of nuisance, and it is compelled in carrying out the provisions of its statute to do as little

damage as possible, and to give reasonable compensation for that damage. A railway company is authorised to make a line over a specified district; but the statute on which the defendants rely does not authorise this particular hospital to be placed in this particular spot. Neither the size of the hospital, nor the size of the site, nor the amount of land surrounding it is specified, so that this hospital does not come within the principle that, where the Legislature authorises a named thing in a named place, any nuisance which follows is authorised and justified by the statute. In this case the Act contains no provisions which would lead the Court to the conclusion that it contemplated the creation of a nuisance, and, indeed, section 7 provides that for "each district there shall be an asylum or asylums," so that the Legislature never contemplated the erection of so large a hospital as this, or the aggregation of so many patients; and the only reference to small pox will be found in section 69.

The Legislature has only authorised the managers to do such things as are comprised within the intention of the Act, and these too in a lawful way: they could not erect a building so as to block up the plaintiffs' ancient lights, nor can they create any other form of nuisance.

It is contended that the acts of the defendants have been authorised by and were in obedience to orders of the Poor Law Board, or rather the Local Government Board, which has succeeded to the powers of the Poor Law Board; but that is not so, for the Board has only given its sanction to what the defendants proposed to do, so as to enable them to raise the necessary funds. The power to take land and to provide asylums was vested in the defendants; the Board could not specify the spot on which the asylum was to be placed, the site was selected by the defendants, and the Board in a letter which, though somewhat like an order in form, is really only a sanction, approved of their act. The Board could do no more than this, for it has no authority to order the defendants to do an illegal act; it cannot order them to build an asylum exclusively for small pox, it can refuse to pass the plans; but it cannot order the

Hill v. Managers of Metropolitan Asylums District (App.), Q.B.

defendants to create a nuisance, or to act so as to interfere with the rights of others, nor can it protect them when they so act even if it should so desire.

There is a clear distinction laid down in the cases between a general authority to do a general act and a special authority to do a specified act, and this will be found to be supported by the judgment of the Court of Appeal in *The Attorney-General v. The Colney Hatch Lunatic Asylum* (1), *The Queen v. The Bradford Navigation Company* (2), and by *Olowes v. The Staffordshire Potteries Waterworks Company* (3). Reliance is placed by the defendants on some dicta in *Hawley v. Steele* (4), but in that case the objects to be attained were very different, and they could only be attained in one way, it is therefore to be distinguished; moreover, there a subsequent statute had been passed recognising the use to which the land had been put. The cases of *The King v. Pease* (5), and *The Hammersmith Railway Company v. Brand* (6), are not in favour of the defendants' contention, for in those cases the Legislature had empowered the railway companies to construct certain works according to a defined plan over certain defined lands. If the right of action by individuals for a wrong be taken away, it must be done by express words, and if it is desired to justify under a statute, it must be shewn that the provisions of the statute have been strictly followed—*Jones v. The Festiniog Railway Company* (7).

The Attorney-General (Sir John Holker), Willis, Anderson and Proudfoot, for the defendants.—The direction of the learned Judge was faulty in that he did not sufficiently explain what would constitute a nuisance, nor did he sufficiently separate the question of excess. It is not suffi-

cient that there should be both excess and negligence; but it must also be shewn that such excess and negligence actually caused injury to each of the plaintiffs.

The judgment of the learned Judge cannot be supported, for the defendants are not liable, inasmuch as they acted under the orders of the Board, and they had no option to act in any other way.

The managers are compelled by section 15 of 30 Vict. c. 6 to carry into execution the directions of the Board. By section 20 they are compelled to provide such things as the Board shall direct; by section 21 admission is to be as the Board directs; by section 22 the treatment is to be such as the Board shall direct; by section 25 the number, duties and salaries of the officers shall be such as the Board directs; by section 15 the purchase or erection of buildings is to be made under an order of the Board; by section 28 the managers are made subject to the orders of the Board. The whole intention of the statute was to make the managers subject to the Board, and everything that they did was done in pursuance of orders issued by the Board.

The Attorney-General v. The Colney Hatch Lunatic Asylum (1) is not an authority against the defendants, for in that case there was a way in which the statute might have been carried out without the creation of a nuisance; nor is *Olowes v. The Staffordshire Potteries Waterworks Company* (3), for in that case also there would have been no nuisance if the Act had been properly carried out. *Hawley v. Steele* (4), although not an express authority in point, supports the view for which the defendants contend. *The King v. Pease* (5) shews that where a statute authorises an act to be done without any qualification, it must be taken to contemplate and to justify any interference with private rights which may result from the carrying out of the provisions of the statute, and the same conclusion is to be drawn from *Vaughan v. The Taff Vale Railway Company* (8) and *The Hammersmith Railway Company v. Brand* (6).

If the Board had power to make the

(1) 38 Law J. Rep. Chanc. 265; Law Rep. 4 Ch. App. 146.

(2) 6 B. & S. 631; 34 Law J. Rep. Q.B. 191.

(3) 42 Law J. Rep. Chanc. 107; Law Rep. 8 Ch. App. 125.

(4) 46 Law J. Rep. Chanc. 782; Law Rep. 6 Ch. D. 521.

(5) 4 B. & Ad. 30.

(6) 38 Law J. Rep. Q.B. 265; Law Rep. 4 E. & I. App. 171.

(7) 37 Law J. Rep. Q.B. 214; Law Rep. 3 Q.B. 733.

(8) 5 Hurl. & N. 679; 29 Law J. Rep. Exch. 247.

Hill v. Managers of Metropolitan Asylums District (App.), Q.B.

orders under which the defendants acted, then the defendants cannot be liable, as the remedy of the plaintiffs, if any, must be against the Board. If, however, the discretion as to the number of districts and asylums was not, by virtue of sections 7 and 8, placed in the Board, then there must be a discretion in the defendants, and if they have honestly exercised that discretion, to the best of their powers, in carrying out the provisions of the statute, they cannot be held liable for damages which may result from their acts—*Boulton v. Crowthor* (9), *Sutton v. Clarke* (10), *The Grocers Company v. Donne* (11), *The King v. The Poor Law Commissioners* (12).

Herschell, in reply.

Our. adv. vult.

BRAMWELL, L.J. (on Dec. 18).—I would begin by saying that this case has given me a great deal of trouble, and that I have found it a very difficult case to deal with in a satisfactory manner. If a new trial could be had without trouble, expense and annoyance, I should certainly be anxious to grant one. It is impossible to deny that a great many things have been brought forward which are well worthy of consideration, and which were not thoroughly sifted at the trial, notwithstanding the careful summing up of the learned Judge. But a new trial cannot be had for nothing, and thus it is that one is chary of making a rule absolute for a new trial. I am of opinion that there has been no misdirection by the learned Judge; he put every question that it was desired he should put. Doubtless, to these questions, the jury have found answers which are favourable to the plaintiffs, and this might, in fact, lead to some difficulty in the assessment and apportionment of damages. Was the hospital *per se* a nuisance to the plaintiffs—that is, was the aggregation of 500 small-pox patients in one spot an appreciable danger to the health of the persons whose residences adjoined the hospital? That is the ques-

tion, in truth, left by Pollock, B., to the jury, and I have no doubt they so understood it. The jury found that the mere collection of the patients was a nuisance, and that it diminished appreciably the healthiness of the plaintiffs' premises. We have to consider whether that finding is satisfactory. [His Lordship reviewed at length the evidence, and continued.] Now the verdict comes before us, somewhat discredited, from the Divisional Court, and it is impossible to say that it is satisfactory; and, therefore, I think there should be a new trial. The appeal of the plaintiffs from the rule granted by the Queen's Bench Division must be dismissed, or rather, as I think, it should be allowed, unless the defendants pay the costs of the former trial to the plaintiffs, and then the defendants can have a new trial. I feel strongly that the defendants ought to have given certain evidence or admitted certain evidence as to the way in which the hospitals at Stockwell and Homerton were conducted, which would have gone a long way to shew which way the truth was as to the effect of these hospitals, and I am disposed to think that, as they substantially suppressed that evidence, we are granting a new trial for their benefit and in their favour; and, therefore, they ought, as a condition of having the appeal of the plaintiffs dismissed, to pay to the plaintiffs the costs of the first trial.

If, as the defendants contended, they are in any event entitled to the judgment of the Court, there would be no use in granting a new trial; but I have a clear opinion that if it is plainly shewn that the hospital causes an appreciable nuisance to the neighbours, then the defendants have no defence at law, and cannot claim to be protected by the Act of Parliament.

The intention, purpose and effect of the statute is merely to empower that to be done which it contemplates may be done, without creating any liability on the part of those who establish the hospital. The statute does not create any fresh rights in the managers or in the Board against the public. It does not give the managers any power to create a nuisance so as to injure any person. It authorises

(9) 2 B. & C. 703; 2 Law J. Rep. K.B. 139.

(10) 6 Taunt. 29.

(11) 3 Bing. N.C. 34; 5 Law J. Rep. C.P. 307.

(12) 6 Ad. & E. 54.

Hill v. Managers of Metropolitan Asylums District (App.), Q.B.

the establishment of asylums, it nowhere authorises the establishment of small-pox hospitals; it says in effect that the managers may, not that they shall or must, receive small-pox patients in asylums; that is so far as they can do so without danger, and if they cannot do that without creating a nuisance, then they must not do it at all.

I think it was said that under section 18, which provides that the Board may direct a workhouse to be altered as they think fit, and then to be used as an asylum, the managers might erect a building so as to obscure ancient lights; but I am clearly of opinion that they could not do so, and that the effect of the statute is to give them power to do what it enables them to do, if they can do it without injuring anybody. It was also urged that the managers had done nothing but obey the orders of the Local Government Board; but that Board never ordered them to take such and such steps, it only sanctioned the expenditure and raising of money, and even if it had so ordered the managers, such an order would have been *ultra vires* and of no effect, if what they authorised would result in a nuisance to private persons.

BRETT, L.J.—I agree in all that the Lord Justice has said, except in so far as his judgment deals with the question of costs. I object to the order that the defendants should pay the costs of the former trial to the plaintiffs. I object on principle, and I must say with all deference that the order appears to me to be illogical, unprecedented, and of bad example, and, therefore, as it seems to me, unjust; unprecedented since the Common Law Procedure Act was passed, and a return to what has been especially abrogated, and to my mind undesirable and likely to form a bad precedent.

COTTON, L.J.—I agree with all that Bramwell, L.J., has said. I think that all that the statute effected was that it gave power to the managers to do for all London in the aggregate what before each parish or union could do separately for itself. I do not find any power given by the terms of the Act to the mana-

gers to do what they have done. If the statute had given the managers power to establish a hospital of this particular nature in a particular place, then I think that the managers would not be liable if they managed the hospital with due care, even though nuisances resulted. No such power, however, is given; the power that is given is not a power to the managers as against the public, but a power as against the ratepayers to raise the money necessary to carry out the statute. The managers have no power to interfere with private rights.

I do not think, and a reference to section 53 confirms this view, that it was intended to give the Metropolitan Asylums Board any greater powers or rights than were possessed by the vestries and unions which they replaced and to the powers of which they succeeded.

Appeal of the plaintiffs dismissed, on the condition of the defendants paying to them the costs of the former trial. Appeal of the defendants dismissed.

Solicitors—Bischoff, Bompas & Co., for plaintiffs;
Few & Co., for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN, on the prosecution
Dec. 2. { of REDFERN (respondent), v.
WHITE (appellant).

Public Health Act, 1875 (38 & 39 Vict. c. 55), sections 116, 117—Sale of Meat unfit for Human Food—Seizure by Inspector—Condemnation by Justice—Right of Owner to be heard.

[For the report of the above case, see 49 Law J. Rep. M.C. 19.]

[IN THE COURT OF APPEAL.]

1879. { PHILLIPS v. THE LONDON AND
Dec. 17. { SOUTH WESTERN RAILWAY
COMPANY.*

Damages—Personal Injuries—Railway Company—Breach of Contract of Carriage—Measure of Damages—Direction to Jury.

The right direction to a jury, who have to assess damages in an action for personal injuries sustained in a railway accident by a professional man making a large income, is that, in respect to the plaintiff's money loss, they should not attempt to arrive at an absolute or mathematically accurate compensation, but should give a fair and reasonable compensation, taking into consideration the amount of his income when the injuries were sustained, the length of time he has been deprived of that income, the probability of his having continued to earn it if he had not been injured, the prospect of his being able to earn anything in the future, and all the other circumstances of the case.

The distinction between such a case and the case of Hadley v. Baxendale (9 Exch. Rep. 341; 23 Law J. Rep. Exch. 179) pointed out.

This was an action to recover damages for severe personal injuries sustained in a railway accident by the plaintiff, who was a physician making a large income.

The case had been twice tried. At the first trial, before Field, J., and a special jury, the jury found for the plaintiff, with 7,000*l.* damages.

A rule nisi for a new trial, on the ground that the damages were inadequate, was then obtained and made absolute in the Queen's Bench Division, reported 48 Law J. Rep. Q.B. 698; and this decision was affirmed on appeal.

At the second trial, before Lord Coleridge, C.J., and a special jury—

Lord Coleridge, C.J., in summing up the case first pointed out that the negligence of the company was not disputed, and that the only question left was that of assessment of damages, and directed the jury to give such compensation as, under all

the circumstances of the case, they thought was fair and reasonable; that the question was one of common sense and of fact; that it was not expected or intended that the jury should give an absolute or perfect compensation, and it was impossible to do so because of the elements of doubt and uncertainty which existed in all of these cases as to whether the person injured might not wholly or in some degree recover, and common experience shewed that persons very seriously injured in railway accidents often did recover. That the jury were to give fair and liberal damages, because there could be no second assessment of damages, but they were not to give excessive damages, because there was no means of altering them if it turned out that the jury had been deceived; that the fair and reasonable amount to be given was to be made up by taking several ingredients into consideration. There was the pain and suffering, and the loss and damage, present and future, sustained by the injured person. In estimating the money loss, there was in the present case the loss, at any rate, for two years of the plaintiff's business.

After summing up the evidence which had been given as to what the plaintiff's income was at the time of the accident, Lord Coleridge, referring to nine instances of large special fees paid to the plaintiff by particular patients during the three years immediately before the accident, said, that he did not see at all why the confidence of the gentlemen who made those large payments should diminish, or their generosity, or why they should be the only nine people in the world who did those things, or why, if they ceased to do them, they should not be succeeded by others equally generous, but that the jury were to give the matter such weight as they thought fit. Subject to that observation the income came to about 5,000*l.* a year.

Lord Coleridge then proceeded to deal with the question of the plaintiff's future, and minutely summed up the medical evidence in the case, as to the chances of his being able to resume his profession or of his enjoying tolerable health, and concluded by saying that he left it to the jury, under all the circumstances of the case, to give such fair and reasonable

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

Phillips v. London and South Western Rail. Co. (App.), Q.B.

compensation to the plaintiff as they thought the facts warranted.

The jury assessed the damages at 16,000*l.*

The defendants moved in the Common Pleas Division for a rule *nisi* for a new trial on the grounds of misdirection and that the damages were excessive.

The Common Pleas Division having refused the rule,

Serjeant Ballantine (*J. Browne* and *Dugdale* with him), now moved for a rule *nisi* for a new trial in the Court of Appeal upon the same grounds.—Lord Coleridge misdirected the jury in pointing out that the plaintiff had already suffered two years' loss of income. Income ought not to be taken as the basis upon which damages are assessed. The position of the plaintiff, independently of his professional income, should have been taken into account in reduction of damages. It was proved in evidence that he had an income of 3,000*l.* a year apart from his practice. It is irrational and anomalous that railway companies who are compelled to charge uniform rates for carriage of passengers, should be liable to these enormous damages, if the person injured happens to be making a large income. The action is founded on a breach of the contract of carriage; the company have no notice that they are carrying a person in the position of the plaintiff, and the principle of *Hadley v. Baxendale* (1) ought to be applied to these cases, namely, that the damages are too remote as being such as were not in the contemplation of the parties to the contract. See also *Mayne on Damages*, 3rd ed. p. 19, and the judgment of Cockburn, C.J., in *Hobbs v. The London and South Western Railway Company* (2), where the general principle is stated. If the plaintiff's income at the time of the accident ought not to have been considered as a basis of compensation the damages given were excessive, and if the income can be so considered, there was still a misdirection in telling the jury that they might take into account the

special fees in estimating the income. These fees were exceptional payments not likely to recur, and ought to have been entirely disregarded.

BRAMWELL, L.J.—I am of opinion that there should be no rule in this case. I will deal with the last objection first. Lord Coleridge is supposed to have told the jury that they must take 5,000*l.* as the plaintiff's net income, and not make any deduction for the income said to be precarious because made up of special emoluments. If Lord Coleridge had said so I think it would be inaccurate, because it would be fairly open to the jury to refuse to reckon in the special fees in arriving at the average income, as being casualties which might not happen again. On the other hand I think it is equally wrong to say that the special fees ought to be altogether excluded from consideration. I am quite certain that the possibility and probability of their recurrence ought to be considered. Although a physician who has received special fees of 500*l.* may be unable to designate any other patient who will give him another 500*l.* the probability is that in the course of his life he will have not only one, but many other similar fees. But Lord Coleridge did not tell the jury not to take into account the precarious nature of these fees. In one passage of the summing up he says, "I do not see at all why, I will not say the wisdom, but why the confidence of the gentlemen who make these large payments should diminish, or their generosity;" and he finishes in this way, "I really do not see why these should be the only nine people in the world who do these things, and who will continue to do them, and why, if they cease to do so, they should not be succeeded by others equally generous, but you must give it such weight as you think fit. Subject to that observation, it comes to this, that the income is about 5,000*l.* a year." So that Lord Coleridge did not withdraw the precarious nature of these fees from the consideration of the jury but, if I may say so, dealt with it with perfect propriety in the summing up.

As to the main question, if we could

(1) 9 Exch. Rep. 341; 23 Law J. Rep. Exch. 179.

(2) 44 Law J. Rep. Q.B. 49; Law Rep. 10 Q.B. 111.

Phillips v. London and South Western Rail. Co. (App.), Q.B.

not guess the ground upon which the jury proceeded, I should say there was nothing so extraordinarily wrong in what they had done, as to induce us to disregard the opinions of Lord Coleridge and the Judges of the Common Pleas Division who are all satisfied with the verdict. But I do not think we ought to dispose of the case in that way, because we can thoroughly well judge, as my brother Ballantine invites us to do, on what principle the jury proceeded. They gave the plaintiff three years' income at the rate of 5,000*l.* a year, and the rest of the damages for his pain and suffering. I cannot say that I think that wrong. On the contrary, I think it is at the least right. They ought, at any rate, to have given him as much, the only misgiving I have, is whether they ought not to have given him more. Now what is the proper direction to give in a case of this description? I think the direction given by Lord Coleridge in the present instance is the usual and proper one. It is the common form of summing up, which, after trying a very great number of these cases, I never knew questioned until now; and it is this: "You must give the plaintiff a compensation for his money loss. You must give him a compensation for his pain and suffering. Of course it is almost impossible for you to do what can strictly be called 'compensate' him, but you must take a reasonable view of the case, and consider under all the circumstances what is the fair sum to be given him." I think that is the stereotyped form in which these directions are given to juries. As an instance, one continually has the case of some unfortunate labourer who has received an injury which has kept him out of work for, say six months. He says: "I was making 25*s.* a week when the injury was done." Then you tell the jury, "That is twenty-six weeks at 25*s.* a week." Then he says: "For ten weeks more I have been able to earn 10*s.* a week." You tell the jury, "that is ten times 15*s.*" Perhaps he adds: "I shall not get into full work again for twenty weeks; and you tell the jury, "that is twenty times 10*s.*" Then something is added for his doctor's expenses, and in that way you arrive at a

sort of compensation for his pecuniary loss. In the case of a professional man, and where, perhaps, you can get at no definite term during which the plaintiff will be unable to work, you direct the jury: "You must consider for yourselves how long this gentleman will be incapacitated from carrying on his profession, and you must give him compensation in reference to that." Of course, it is at all times open to you to say: "Possibly the labourer might not have been able to get work," or, "Possibly the professional man might have lost patients." All these contingencies (if they properly arise) ought to be taken into account and presented to the jury; but after all the fundamental direction is: "Give the man a fair and reasonable compensation for his pecuniary loss." I have always understood that to be the right direction, and I never heard it questioned until now. To say the truth, I do not see that wrong and anomaly in it which my brother Ballantine has pointed out. It is said to be unreasonable that, where two passengers are carried at the same fare, one of them if injured is a man who will recover 10,000*l.* against the company, and the other, if injured, will only recover 1,000*l.* It may be unreasonable as respects the passengers *inter se*, but it is not unreasonable between the company and the public. The company have taken their powers upon certain conditions, and one of them is, that if they break their contracts to use due diligence to carry safely and securely, they shall make compensation to persons injured by reason of the breach. If one man who has paid a half-crown fare, recovers 1,000*l.* from the company, and another man who has paid a half-crown fare, recovers 10,000*l.*, the legitimate conclusion perhaps may be that as respects the two passengers *inter se*, the one who recovers 1,000*l.* may have paid too much for his ticket, and the one who recovers 10,000*l.*, too little, but between them they have paid that which will compensate the company for the risk they run of becoming liable to passengers. Perhaps if the legislature thought fit to interfere and limit the liability of railway companies for very large amounts, they ought, at the same

Phillips v. London and South Western Rail. Co. (App.), Q.B.

time, to interfere and diminish the fares paid, part of which is insurance money. However it is not necessary to trouble ourselves with that consideration. The defendants have entered into a contract to use due diligence to carry safely and securely. They have broken that contract and they must indemnify the person with whom they contracted in a fair and reasonable way for the loss they have occasioned to him.

I may point out in conclusion, what to my mind is the utter dissimilarity between this case and that of *Hadley v. Baxendale* (1). There there was delay in the delivery of a chattel, and the plaintiff claimed certain damages—not done to the chattel itself but consequential upon the delay which he had proved. Here the damages claimed are done to the individual carried, and not damages in consequence of his non-arrival at a particular place at a particular time. The analogy would apply more to the case of goods of a different value than to consequential damages for delay, as in *Hadley v. Baxendale* (1). The Carriers Act allows railway companies to charge some additional sum for insurance on a declaration being made of the value of certain goods, but there are, of course, many classes of goods not within the Act, and though of different values, those goods are carried at the same rate.

I have gone into these different matters which are perhaps not of much consequence, because the whole effect of our judgment is that the set form of summing up has been observed in the present case, and there is no ground for supposing that the jury have given anything as damages beyond what that summing up authorises and directs. I think, therefore, we must refuse this rule.

BRETT, L.J.—I think we are bound to refuse this rule. After the almost innumerable number of times we have had to consider the question, I can have no doubt that the direction in this case was right according to the recognised rule of law. The action is for the breach of a contract to use due diligence to carry a person safely and securely. The damages are to be damages for breach of

that contract. Now the fundamental proposition no doubt is that you are to give the person as nearly as possible damages which will compensate him for the breach, and the injury which results from it. The injury is a complicated one. It is an injury to the body and an injury to him by reason of a pecuniary loss.

Now there has been for years a recognised rule of leaving this question of amount of damages to the jury. In the present case Lord Coleridge left it in this form—that the damages were to be such compensation as, under all the circumstances of the case, the jury thought were fair and reasonable, and to that he added afterwards that the jury must not attempt to give an absolute perfect compensation with regard to the money loss. Now I apprehend that both these propositions are correct and true, and that the reason why that general mode of leaving the question is right, is that human ingenuity has not been able to formulate a more correct proposition. If you try to make a more perfect proposition you are sure to state something which is wrong or omit something which ought to be stated. As to the second part of the proposition—the caution to the jury—the law is settled by authority, because in *Bowley v. The London & North Western Railway Company* (2), in a Court of Error it was held wrong to tell the jury that they could or ought to try to make an absolute compensation. By that I apprehend was meant a perfectly mathematical or arithmetical compensation. And the reason of that decision was that it was impossible for them to have all the circumstances before them which would enable them to make such compensation. In that case the Lord Chief Baron tried to direct the jury to a perfect compensation by telling them to calculate an annuity which would produce for a certain number of years, or for such years as they might think necessary, such a sum as the plaintiff was making yearly. The Court thought that direction wrong, because in attempting to make so perfect a compensation, the jury would necessarily be leaving out a number of circumstances which ought to be considered, and which no human ingenuity and no

Phillips v. London and South Western Rail. Co. (App.), Q.B.

evidence would bring before them. I am strongly of opinion that that decision was right.

Then as to the direction that the compensation must be such as, under all the circumstances of the case, was fair and reasonable. I say that has been the recognised mode of summing up, because it is impossible to make a better one. A Judge would not be sufficiently assisting a jury if he left that bare proposition to them. He is obliged to point out some of the circumstances which they are to take into consideration; and in considering the injured person's pecuniary loss I cannot doubt, where the loss is said to be by a person having a professional or trading income, that one of the principal factors to be considered is what is that income. The defendants' counsel, taking a view absolutely the converse of the decision in *Bowley v. The London & North Western Railway Company* (2), says that the jury ought not to take the income into account at all. That would be strange indeed. It seems to me clear that they must take the income into account, but the question is, how? Now if Lord Coleridge had told them in this case as a matter of law, that, but for the accident, the plaintiff would have made 5,000*l.* a year during the time he was disabled, I should have thought the direction wrong, because although the plaintiff is still alive, a thousand circumstances might have prevented him making that income if he had remained well. But Lord Coleridge did not so direct the jury. He told them they would have to consider what was the average income the plaintiff had been making; that the company had thrown no real doubt upon the plaintiff's evidence that he had practically been making 5,000*l.* a year; and that unless they could see circumstances which in any probability would have made that income less, they might well take it that plaintiff would have made that income during the time he was disabled. I apprehend that was right. Lord Justice Bramwell has pointed out generally the way in which a working man's earnings are to be dealt with. But you deal with them in the way

(2) 42 Law J. Rep. Exch. 153; Law Rep. 8 Exch. 231.

he has described on the assumption that there are no circumstances which would have prevented the working man earning the same wages during the time he was disabled. If, for instance, the railway company could shew that the plaintiff worked in a mill in Lancashire, and that all the Lancashire mills from the time of the accident to the trial had been closed, the jury ought to consider that fact, and say whether he could have earned the 25*s.* per week. As to compensation for money loss in the time to come, supposing there had been no accident, there are a thousand circumstances which might have prevented the plaintiff from earning a fixed income. He would be subject to the ordinary illnesses of life and to the ordinary vicissitudes of trade, and when you come to consider all the circumstances, of which evidence cannot possibly be given, it is beyond the region of practical life that an accurate arithmetical compensation can be given. No doubt the jury are wrong if they do not consider those circumstances as upon the doctrine of chances. You cannot give evidence of them, and a Judge can only leave it at large to the jury, telling them that all these circumstances and possible chances must be taken into account, and that they must give what twelve men of ordinary sense consider fair and reasonable compensation, without attempting to make it an absolute and accurate mathematical compensation.

I agree that it is a wrong direction to tell the jury that the proved income is the basis, in the sense that it is the only basis, of compensation. But Lord Coleridge did not so direct them. He only told them that it was a fact or one of the circumstances (to my mind in estimating the money loss it is the main circumstance) which is to be taken into account. Therefore that objection is founded upon an incorrect supposition of what the direction was.

It is said there is an anomaly because one small practitioner, who paid the same fare as another person making a large professional income, would receive 500*l.*, whereas the other receives 15,000*l.* for the same accident and the same personal injury. But though the personal injury

Phillips v. London and South Western Rail. Co. (App.), Q.B.

is the same to both, the pecuniary loss is not. The small practitioner would perhaps lose 300*l.*, whilst the large one lost 13,000*l.* I think it is right to say, that to a working man and a person of great wealth you should give the same amount for personal injuries, if the pain and suffering is the same. You should also give to each of them the expenses they have actually incurred, but with respect to the pecuniary loss you give to each of them as reasonably and nearly as you can something to repay the loss actually sustained. I can see no anomaly or injustice in this manner of leaving cases to the jury. The fundamental reason for this mode of summing up I have always understood to be that a more accurate definition cannot be given, and the law does not require an impossibility. I think, therefore, that the way, and the only way, Judges must leave the question to the jury in the future, is the way in which they have for so many years left it in the past.

COTTON, L.J.—I agree that there should be no rule. The plaintiff having established his right to a judgment against the company, is entitled, by way of damages, to a fair compensation for his suffering and also for his money loss. The misdirection complained of here is with respect to the latter, and the defendant's contention came to this, that in estimating the compensation the plaintiff's income must be entirely disregarded. That is as much as to say, that in estimating what is the money loss, you should leave out of sight altogether that which constitutes the money loss, namely, the loss of income which the plaintiff, but for the accident, would have earned, and was prevented by the accident from earning. In my opinion it is impossible to disregard the income if you are to estimate the money loss. The question still remains, whether or not the income was properly taken into account in this case. I will state my view of how it ought to be taken into account. You cannot by any mathematical process or rule of three sum arrive at a fair compensation for money loss, but taking the income you must look at its nature, the probability of its

continuance, how far it depends on favour, how far on exertion which may, or may not, be carried on for long, and having taken into consideration all the circumstances affecting it, say what is a reasonable sum to be awarded as compensation. A jury, of course, would not give the amount of his income as an annuity for the rest of the plaintiff's life, nor assume that the income would always continue as it did at a particular time, but the income must necessarily, in my opinion, be taken as a basis, if not the basis, of the compensation. Lord Coleridge told the jury, "You must give a fair compensation for money loss." He laid before them all the evidence relating to the income and to the special fees, and said they must consider whether the plaintiff's evidence was a fair representation of what the income was and was likely to be. In my opinion it would have been wrong to exclude the special fees entirely from consideration, because when a man has arrived at such a position in his profession as to have very large special fees paid to him, it is certainly for the jury to consider whether he will not receive them for the future. I think Lord Coleridge left the question of income properly to the jury. It was urged in argument that in estimating the damages, the fact that the plaintiff had an income independently of his income should be taken into account. I think that is not so. It does not make the money loss any less that the plaintiff has an independent income. It ought in my opinion to be considered with respect to his suffering, because he may suffer very much more from bodily injury when he is deprived of all means of support, and so unable to provide for himself that which will materially alleviate his sufferings.

Rule refused.

Solicitors—Hargrove & Co., for plaintiff;
M. H. Hall, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879.
 Nov. 29. } IRVINE AND COMPANY v. WATSON
 1880. } AND SONS.
 Jan. 12. }

Principal and Agent—Sale of Goods—Undisclosed Principal—Payment by Principal to Broker—Recourse of Seller to Principal.

Where a broker, acting within the scope of his authority, buys goods for his principal, and the seller knows that the goods are bought for a principal, but does not know the name of the principal,—Held, by BOWEN, J., that the principal cannot discharge himself from liability to pay the seller, by settling with the broker, unless such delay has intervened between the day fixed for payment in the contract and the date of such settlement as may reasonably lead to the inference that the seller no longer looks to the credit of the principal.

This was an action by the plaintiffs, merchants at Liverpool, to recover from the defendants, merchants at Leeds, the price of eleven casks of palm oil, bought for the defendants by Messrs. Conning & Co. as brokers. The case came on for trial before Bowen, J., and was reserved by him for further consideration. The facts are fully set out in the judgment, but the question involved was chiefly whether the defendants as undisclosed principals, who had paid Conning & Co. before any claim was made by the plaintiffs, could be required to pay over again to the plaintiffs; Conning & Co. having meanwhile failed.

Herschell and Kennedy, for the plaintiffs.—In this case the defendants having employed Conning to buy for them, made them their agents. Such employment as brokers gave Conning authority to enter into the contract for the defendants, and created a privity between vendor and purchaser. That being so, the vendor could sue the purchaser. This reduces the case to the question of how far payment by the purchaser to his broker before notice of who the vendor is, will relieve him from liability. There is no authority that it will, and it is treated as an open

question by Blackburn, J., in *Armstrong v. Stokes* (1). In *Campbell v. Hassall* (2), the brokers were brokers for both parties, but even then it was held that payment must be made strictly according to the terms of the contract. Here payment was not made so as to discharge the defendants even if the broker had authority to receive payment under the contract.

They cited also *Sykes v. Giles* (3); *Williams v. Evans* (4); *Barker v. Greenwood* (5).

Gully and Crompton, for the defendants.—The facts here shew that the plaintiffs sold to Conning & Co., not to the defendants. Though it was said that they were buying for a principal, yet no name was mentioned or asked for, and applications for payment were made to Conning as being absolute purchaser. But even if this is to be treated as a sale to an undisclosed principal, yet the defendants having before claim made paid the price to Conning for the plaintiffs, are no longer liable within the judgment of *Thompson v. Davenport* (6), which expressly excepts from the rule laid down as to the liability of the principal, the case where the principal has paid the agent, or where the state of the accounts between the agent and principal would make it unjust that the seller should call on the principal. The same doctrine is upheld in *Smyth v. Anderson* (7).

They cited also *Higgins v. Senior* (8).

Our. adv. vult.

BOWEN, J. (on Jan. 12).—The plaintiffs in this case are merchants, carrying on business in Liverpool. The defendants are merchants at Leeds. The action is brought to recover from the defendants the price of eleven casks of old Calabar palm oil. It is not denied that the

(1) 41 Law J. Rep. Q.B. 263; Law Rep. 7 Q.B. 598.

(2) 1 Stark. 233.

(3) 5 Mee. & W. 645; 9 Law J. Rep. Exch. 106.

(4) 35 Law J. Rep. Q.B. 111; Law Rep. 1 Q.B. 352.

(5) 2 You. & C. Exch. 418.

(6) 9 B. & C. 78.

(7) 7 Com. B. Rep. 39; 18 Law J. Rep. C.P. 109.

(8) 8 Mee. & W. 884; 11 Law J. Rep. Exch. 199.

Irvine v. Watson, Q.B.

defendants have had the oil, but the defendants resist the claim on the ground that the plaintiffs sold it, not to the defendants but to Messrs. Conning & Co., from whom the defendants purchased it, and the defendants also maintain that, even supposing Conning and Co. to have been agents and brokers of the defendants, and to have effected the purchase as brokers and agents, the plaintiffs nevertheless are precluded from suing the defendants as undisclosed principals for the price, the defendants having in the meantime, and before any claim was made, paid Conning & Co. for the goods in acceptances discounted at once by Conning & Co. The case was heard before a special jury and myself at Liverpool, when after the examination of Mr. Irvine, one of the plaintiff's firm, the jury was by consent discharged and the case was reserved for further consideration before myself, liberty being reserved to the Court to draw reasonable inferences of fact. The material facts of the case are as follows:—On the 10th of March, 1879, the defendants gave to Conning & Co. the order for the oil in question in a letter of that date, of which the following is the material extract:—"To Messrs. John Conning & Co., March 10th, 1879. We noticed last week that palm oil was very low. If you can buy Old Calabar at about 31*l.* to 31*l.* 5*s.* you may secure us about a score casks, including them in the same draft as the tallow. Yours truly, James Watson & Sons." On the 12th of March, two days after this letter, the manager of John Conning & Co. went to Mr. James Irvine, one of the plaintiffs' firm, and purchased eleven casks. He told Mr. Irvine that he wanted the casks for a principal in the country, but nothing further was said about such principal. A contract was thereupon made and reduced into writing as follows:—"Messrs. John Conning & Co. We have this day sold to you the following goods. [Then followed enumeration of the goods and price.] Customary allowances and public sale conditions. Payment cash (or before delivery, if required), allowing 2½ per cent. discount. p. James Irvine & Co., W. Geikie." The public sale conditions referred to in this document are

the public sale conditions of January, 1871, of the Liverpool general brokers, the 3rd and 6th of which are as follows:—"3. Brokers purchasing shall be responsible as principals unless they declare the name of the principals, such name being deemed satisfactory by the selling broker, not later than four o'clock on the day of the sale or at the time of the sale if after that hour. 6. Payments to be made as at present customary, and if required upon delivery. The delivery of part shall not be considered delivery of the whole."

Having effected the contract, Messrs. Conning & Co. wrote to the defendants on the 12th of March as follows:—"We have succeeded in getting you about ten tons fine old Calabar oil at 31*l.* 5*s.*, and are forwarding all in accordance with your instructions." It appears not to be infrequent in the oil trade to require payment of a portion of the price before delivery. But it is not invariable, and in the present case no such demand was made. It is also not infrequent after delivery to allow three or four days' grace before insisting on payment, but this is not a matter of universal practice or of right, but of courtesy, depending in each case upon the will of the parties. Delivery of eight of the casks was given by the plaintiffs to Conning & Co. on the 13th of March, and of the three remaining casks on the 15th. Exclusive of the question of the days of grace the price of eight of the casks became payable on the 13th, and of the remainder on the 15th of March. Upon the 15th of March the defendants paid Conning & Co. for the oil by their acceptance, which was received on the 17th and discounted on the same day. On or about the same day an invoice misheaded the 12th of March was forwarded by Conning & Co. to the defendants, a copy of which is as follows:—"Liverpool, 12th of March, 1879. Contract. Messrs. John Watson and Sons, bought per John Conning & Co. Payment cash, less 2½ per cent. Eleven casks of palm oil." [Then followed particulars of the casks and price.] No application was made by the plaintiffs to any one for payment until about the 17th or 18th of March. On or about the 17th

Irvine v. Watson, Q.B.

or 18th of March the plaintiffs applied personally to Conning & Co. for payment. Written applications for payment not unaccompanied in the end with threats were subsequently made by the plaintiffs to Conning & Co. on the 21st of March, and between that date and the 25th. On the 27th of March Conning & Co. stopped payment, and on the 28th of March, 1879, application was for the first time made by the plaintiffs to the defendants in a letter of that date. The defendants replied that they had paid Conning & Co. for the oil, and repudiated all liability to the plaintiffs, whereupon this action was brought. Whether Messrs. Conning & Co. were the agents of the defendants to make the contract which they made, or to bind the defendants thereby, is a question of fact. I think they had the defendants' authority to do so. The letter of the 10th of March appears to me to be an order to buy for and on behalf of the defendants in the way in which a broker may properly be requested to buy, namely, in his own name, but still as a broker and for a principal behind. This is exactly what Conning & Co. did, and I think that they had authority to and did bind the defendants by that contract, the terms of which were cash, less 2½ per cent. discount, or before delivery, if required. The next question is whether anything has happened to exonerate the defendants from liability under this contract.

There are two classes of sales through an agent to an undisclosed principal which it is necessary to distinguish.

1. Where the seller supposes himself to be dealing with a principal, but discovers afterwards that he has been selling to an agent, and that there is an undisclosed principal behind, the law allows the seller to have recourse on such discovery to the undisclosed principal, provided always, see per Lord Tenterden, C.J., and Bayley, J., in *Thompson v. Davenport* (6), that the principal has not meanwhile paid the agent, or that the state of accounts between the principal and agent does not render it unjust, i.e., inequitable, that the seller should any longer look to the principal for payment. This statement of the proviso which relieves the undisclosed

principal in certain cases from all necessity to pay the seller, was thought by Parke, B., and the other Judges in *Heald v. Kenworthy* (9), to be too large without further explanation, and they expressed the view that the only case in which the seller under such circumstances was precluded from having recourse to the undisclosed principal when discovered, was when the seller by some conduct of his own had misled the principal into paying or settling with his agent in the interim. The principal, such is the reasoning of the Court of Exchequer, has originally authorised his agent to create a debt, and the principal cannot be discharged from the debt unless the seller has estopped himself by his conduct from enforcing it against him. The Court of Queen's Bench in *Armstrong v. Stokes* (1), do not adopt this narrower version of Lord Tenterden's and Mr. Justice Bayley's proviso. They revert to the wider language used by Lord Tenterden, C.J., and Bayley, J., in *Thompson v. Davenport* (6), and it must now be taken to be the law that a seller who has given credit to an agent, believing him to be a principal, cannot have recourse against the undisclosed principal, if the principal has *bona fide* paid the agent at a time when the seller still gave credit to the agent, and knew of no one else except him as principal.

2. The present case is one that belongs to a distinct but analogous class. At the time of the dealing in the goods the seller was informed that the person who came to buy was buying for a principal, but was not told and did not ask who that principal was, nor anything further about him. *Thompson v. Davenport* (6) is the leading authority to shew that in such a case where no payment or settlement in account between the undisclosed principal and his agent has intervened, the seller may afterwards have recourse to the undisclosed principal. But what if the undisclosed principal has meanwhile innocently paid or settled with his agent? If indeed such payment or settlement is the result of any misleading conduct on the part of the seller, then no doubt the

(9) 10 Exch. Rep. 739; 24 Law J. Rep. Exch. 76.

Irvine v. Watson, Q.B.

general principle alluded to in *Heald v. Kenworthy* (9) would equally apply, and the seller could no longer pursue his remedy against the man he had misled. But is this the only proviso, or must a wider proviso still in the present class of cases be engrafted on the statement of the rule, similar to the proviso as finally sanctioned in *Armstrong v. Stokes* (1)? The case of *Armstrong v. Stokes* (1) was a case in which at the time of the sale exclusive credit had been given by the seller to the agent who bought in his own name as principal. In the present instance the agent bought, it is true, in his own name, but held out to the seller the additional advantage of the credit of an unnamed principal behind. What difference to the liability of the principal does this make? It is obvious that when, as in *Armstrong v. Stokes* (1), the seller deals exclusively with the agent as principal, the seller sells, knowing, if his buyer turns out to have a principal behind him, the principal will have, at all events, been justified in assuming, as the fact is, that the seller deals simply with the agent. The principal may be expected to arrange with his agent on this basis—If before recourse is had to him the undisclosed principal has put his agent in funds to pay, the seller cannot afterwards object that the undisclosed principal, who had a right to suppose his credit was not looked to in the matter, should have held his hand. The case is altered where the agent when buying states that he has a principal whose existence, though he does not name him, he is authorised in mentioning. I think that the liability of the principal, who under such circumstances pays his agent, to pay over again to the seller, must depend in each case on what passes between the seller and the agent acting within the scope of his authority, and on the precise nature of the contract which the agent had lawfully made. In the present instance the plaintiffs were informed that Conning & Co. bought as agents, and that they had an undisclosed principal in the transaction. The plaintiffs sold, trusting partly, but not wholly, to the credit of the agent, for in fact they relied on the credit of an un-

known or unnamed principal, to the disclosure of whose name they were entitled on demand. The contract was for cash; the price was, if not received before delivery, to be payable forthwith upon delivery. The essence of such a transaction is that the seller, as an ultimate resource, looks to some one to pay him if the agent does not. Till the agent fails in payment the seller does not want to have recourse to this additional credit. It remains in the background; but if, before the time comes for payment or before, on non-payment by the agent, recourse can be fairly had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller behind the seller's back of his credit. It surely must, at all events, be the law that in the case of sale of goods to a broker the principal known or unknown cannot, by paying or settling before the time of payment comes with his own agent, relieve himself from responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and if so, within what time? It seems to me that it can only safely be made if a delay has intervened, which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit, such a delay, for example, as leads to the inference that the debt is paid by the agent, or to the inference that though the debt is not paid, the seller elects to abandon his recourse to the principal and look to the agent alone. Here the defendants parted with the acceptance on the 15th, it was discounted on the 17th. The plaintiffs had only given delivery on the 13th of eight of the casks, and of three upon the 15th. It does not appear to me, without laying any stress on the question of the days of grace, that the defendants on the 17th of March had any reason at all to believe that the sellers of the goods, whoever they might be, had no longer any claim upon any one except the broker. The fact is the defendants trusted their own broker. They made a mistake and must pay for

Irvine v. Watson, Q.B.

it. The language of Lord Ellenborough in *Kymer v. Suwercroft* (10) is consistent with this view of the law, and is one which has since been adopted in *Heald v. Kemworthy* (9). Up to the 17th of March I see nothing accordingly which relieves the defendants from responsibility. Did the delay beyond that date and the failure of the brokers do so? If there was any reason to believe that in consequence of the delay the defendants' position towards their agents had been injuriously affected, then the defendants would to that extent be discharged. But I see no evidence that it was so. The defendants accordingly, in my judgment, remain liable for the price of the goods, and judgment must be given for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors—Field, Roscoe & Co., agents for Bateson, Liverpool, for plaintiffs; H. B. Clarke & Son, agents for Dunning & Kay, Leeds, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879.	} FORWOOD v. THE NORTH WALES	
Nov. 24.		MUTUAL MARINE INSURANCE
Dec. 20.		COMPANY.

Ship and Shipping—Marine Insurance
—Constructive Total Loss—Construction of
Bye-laws incorporated into Policy.

A vessel insured under a policy was so damaged by perils insured against that the cost of repairing her would have been more than she would have been worth when repaired, and the owner gave notice of abandonment without delay.

The policy, which was with a Mutual Company, and had incorporated in it certain bye-laws, declared that the acts of the assurer or assured in recovering, saving or preserving the property insured, should not be considered as a waiver or acceptance of abandonment. By one of the bye-laws it was provided that in the event of any ship being stranded or damaged, and not taken to a place of safety, the company might use all

(10) 1 Campb. 109.

possible means to procure her safety, the owner bearing his proportion of the expenses incurred; but that no acts of the company in pursuance of such power should be deemed to be an acceptance of any abandonment of which the assured might have given notice; and that the company, under any circumstances, should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured.

On action brought to recover for a constructive total loss,—Held, that the bye-law did not exclude constructive total loss, but only prevented the assured in case of partial loss from being able to claim any extraordinary expense, by way of salvage or otherwise, in addition to the cost of repairs; and that there having been a constructive total loss, plaintiff was entitled to recover.

This was an action tried before Lush, J., who reserved for further consideration the argument upon the admitted facts. The claim was on a policy of marine insurance for a constructive total loss of the ship insured.

Herschell and Barnes, for the plaintiff.

O. Russell and Trevelyan, for the defendants.

Our. adv. vult.

The following judgment, from which the facts sufficiently appear, was (on December 20th) delivered by

LUSH, J.—The only question raised before me in this case is whether the defendants are liable, upon the policy stated in the pleadings, for a constructive total loss. It is candidly admitted, in the statement of defence, that the vessel was, while the policy was in force, damaged by perils of the sea to such an extent that the cost of repairing would have amounted to more than the ship would have been worth when repaired; that a prudent uninsured owner would not have repaired her, but would have sold her unrepaired, and that the plaintiff within a reasonable time gave notice of abandonment, that in effect there was a constructive total loss; but the contention of the defendants is that the policy read in connection with the bye-laws excluded such a liability,

Forwood v. North Wales Marine Ins. Co., Q.B.

and confined the assured in such a case as this, where the ship remained, and might have been repaired as a ship, to claim as for a partial loss only.

There is nothing in the policy itself which sanctions such a defence. It states that in consideration of the person effecting it agreeing to become a member of the company, and to pay all contributions and other sums which, in respect of such insurance, shall become payable to the company, and in all other respects to observe and perform all things to be observed and performed on the part of the assured, according and subject to the bye-laws endorsed thereon, the company insured, lost or not lost, 1,000*l.* on the ship, valued at 3,600*l.* After enumerating the perils insured against, it expressed it to be thereby declared and agreed that the acts of assurer or assured, in recovering, saving or preserving the property insured, should not be considered a waiver or acceptance of abandonment.

This is the whole of the policy, and so far from favouring the notion that constructive total loss was to be excluded it assumes the contrary, and, in view of such an event, protects the assured, on the one hand, from being supposed to have waived his abandonment, and to have resumed the property by endeavouring to save it from utter destruction; and protects the assurer, on the other hand, from having any attempt which he might make for the same purpose interpreted against him as an acceptance of the abandonment. The argument, therefore, rests on the 24th bye-law, which is taken to be incorporated in the policy. It is not necessary to consider what would have been the rights of the assured if the bye-law had been at variance with anything found in the policy, for I am of opinion that the bye-law does not affect to deal with a constructive total loss, but with a different state of things. The first bye-law directs the form of the policies, and the bye-laws are endorsed upon it, and it would be strange if either of those bye-laws should contain anything contradictory of or inconsistent with the policy. Any construction which the words admit of must be adopted rather than this. There is, however, nothing ambiguous in them.

They are, "Every loss, by stranding or otherwise, shall without delay be made known to the manager, and all protests, vouchers, surveys and other statements, relating thereto, shall be sent to the manager, and laid before the directors, and be subject to the stipulations contained in these bye-laws. In the event of any ship being stranded or damaged, and not taken into a place of safety, it shall be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and any owner, or his representatives, refusing the co-operation of the agents of this company for the safety of such ship, shall suffer a deduction of not less than twenty-five nor over fifty per cent., as the directors shall determine in the settlement of the claim. And it is hereby provided, that the acts of the company or its agents, under or in pursuance of the power hereby reserved to the company, shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company; and the company, under any circumstances, shall only pay for the absolute damage caused by the perils insured against, which is in no case to exceed the sum insured."

The object of this bye-law undoubtedly was to limit the amount which the company would have to pay in the event of damage by the perils insured against, not, however, as I think, by excluding constructive total loss, but, in the first place, by securing the prompt removal of the damaged ship to a place of safety; and, secondly, by depriving the assured of the right he would otherwise have to claim any extraordinary expenditure, by way of salvage or otherwise, in addition to the cost of repairs. To this end, it requires immediate notice of the loss to be given to the company and empowers the company to take upon themselves the office of salvors, without compromising their right to question the propriety of any abandonment which might have been made, and to charge the assured his proportion of the expense. The proviso shews that the rule has no reference to a total loss, but contemplates a partial loss

Forwood v. North Wales Marine Ins. Co., Q.B.

only; and the last clause upon which the company mainly rely, declares that the cost of repairs only shall in such case be recoverable. The alternative, in my opinion, is not between partial and total loss, but between cost of repairs simply and cost of repairs *plus* salvage, or other expenditure incurred in conveying the ship to a port of refuge.

I am, therefore, of opinion that, upon the question submitted to me, the plaintiff is entitled to judgment.

Judgment for plaintiff.

Solicitors—Waltons, Bubb & Walton, for plaintiff;
W. W. Wynne, agent for Forshaw & Hawkins,
Liverpool, for defendants.

Goodhand & Nye & Co.
52 2 & 61 98

[IN THE QUEEN'S BENCH DIVISION.]
1880. { CHAPMAN v. THE MIDLAND RAIL-
Feb. 25. } WAY COMPANY.

*Practice—Costs on the Higher Scale—
Rules of the Supreme Court (Costs), Order
VI. r. 2.*

Order VI. rule 2, Rules of the Supreme Court (Costs), provides that costs on the higher scale shall be allowed "in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained":—

Held, that the rule applied to the particular class of cases specified in it, and to cases of trespass under an assertion of right, or where the damage is only incidental to the act complained of, or where the injury cannot be compensated for by damages, and did not include cases where the damage was of a temporary character.

This was an appeal from Field, J., at chambers, who had upheld the Master's refusal to allow the plaintiff's solicitor to tax his costs on the higher scale under the following circumstances:—

The plaintiff was owner of land adjoining

a railway which was in course of construction by the defendants. The contractors engaged in making the line, for their own convenience brought their carts across the plaintiff's land by making use of an occupation road from the highway to the railway works, which they had no right to do; and besides cutting up the occupation road itself, they trespassed upon some other parts of the field, and caused injury to the plaintiff by leaving gates open.

By his writ, and also by his statement of claim, the plaintiff claimed damages for the trespasses and an injunction against their repetition and continuance. The defendants paid 10*l.* into Court with their statement of defence, but the plaintiff, who had claimed 30*l.*, refused to accept it, and issue was joined. The venue was laid at Warwick, but as plaintiff was not successful in an attempt to compel the defendants to take short notice of trial, the cause could not be entered at the summer assizes, and stood over into the long vacation. The acts of trespass still continuing, the plaintiff moved for an injunction before the Vacation Judge, who granted it. Nothing further took place until November, when the defendants took out a summons calling on the plaintiff to shew cause why all proceedings should not be stayed on their paying a further 20*l.* into Court. This was not opposed, and plaintiff took out the 30*l.* in full satisfaction of all damages claimed in the action.

He then applied to the Master to allow the taxation of his costs on the higher scale, on the ground that this was an action for a special injunction within Order VI. rule 2, Rules of the Supreme Court (Costs).

A. Wills and R. S. Wright, for the plaintiff. —This was an action for a special injunction, for it was not as of right, but to be obtained, and in fact obtained, upon the merits. Then the fact that damages were claimed also does not take it out of the rule; for the question is, whether the injunction was not the principal relief sought. As to this, the plaintiff's contention is that the procuring the injunction certainly turned out to be the most

Chapman v. Midland Rail. Co., Q.B.

important thing, for by payment into Court the defendants admitted that they had no defence. *Flower v. The Low Leyton Local Board* (1) shews that the claim of damages as subsidiary relief does not prevent the injunction from being regarded as the principal object.

[LUSH, J.—But here plaintiff insisted on the importance of the damages; he would not take the 10*l*.]

The plaintiff had a right to damages to the extent of the injury actually done before action brought; but the continuance of the trespasses, which necessitated the application to Fry, J., conclusively proved the supreme importance of the original claim for an injunction.

[LUSH, J.—If the plaintiff had really attached importance to the injunction, he might have applied at once under section 25 of the Judicature Act, 1873; as it was, he waited till after issue joined.]

That was because, being thrown over the long vacation, the continuance of the trespasses rendered it necessary; otherwise he would have got speedy relief at the trial.

The practice in the Exchequer Division has been to allow higher scale costs in actions where an injunction is obtained.

[LUSH, J.—But the rule is limited to a particular class of actions. Can this be said to be within that class?]

W. G. Harrison and H. Sutton, contra, were not called on.

LUSH, J.—I regret that there should be, as has been said that there is, a difference in the practice of the several Divisions as to allowing costs on the higher scale; but as it is purely a question of the construction of the rule, and as I think it has a very plain meaning, I need not hesitate to express my opinion. I do not limit it by saying that the right to costs on the higher scale depends on whether or no there has been a claim in the writ for damages as well as for an injunction, nor on whether there has been an omission on the plaintiff's part, having claimed an injunction by his writ, in not moving for an injunction; although both

are elements to be taken into consideration in estimating that which is the real point, namely, What is the nature of the relief sought in the action?

Now what was complained of here was a trespass by using an occupation road without leave. This had not been committed in assertion of any right, nor was the use ever intended to be permanent; it was a wrongful act, a trespass committed merely for convenience by the contractors making the railway, and no permanent injury was contemplated or threatened. The injunction asked for therefore appended to this action of trespass was not the kind of injunction meant by this rule.

[His Lordship then read the rule.]

Now all these things mentioned here are cases where the damage is only incidental, or where it could not be estimated. It is therefore clear to my mind that the rule intended to distinguish between these and cases like the present, where there is no assertion of right, and no injury done which cannot be compensated for by damages. The learned Master and Judge were perfectly right, and this appeal must be dismissed.

MANISTY, J.—I am of the same opinion. If Mr. Wills' contention were right, all the words in the rule between "special injunctions" and "sought to be obtained" might as well be omitted. But the rule says special injunctions to restrain certain kinds of things, and it refers, not to all actions for special injunctions, but to those of a particular class. It was never meant that wherever in an action an injunction was asked for, the costs should be taxed on the higher scale.

Order affirmed.

Solicitors—Lousada & Emanuel, agents for R. & W. T. Shield, Uppingham, for plaintiff; Beale, Marigold, Beale & Groves, for defendants.

(1) 46 Law J. Rep. Chanc. 621; Law Rep. 5 Ch. D. 347.

[IN THE QUEEN'S BENCH DIVISION.]

1879.	}	THE PROTECTOR ENDOWMENT SOCIETY v. GEICE.
Dec. 20.		
1880.		
Jan. 12.		

Bond—Conditions—Repayment by Instalments—Proviso for immediate Payment on single Default—Penalty.

Plaintiffs having advanced 50l. to A. took the joint and several bond of A. and the defendant as security for the loan.

The bond was conditioned for the repayment of the loan in five years by quarterly instalments of 3l. 10s., if A. should live so long. The instalments were calculated so as to cover principal, interest, expenses and premium for the insurance of A.'s life. In case of default in payment of any instalment the whole of the instalments up to the end of the five years were to become immediately due and payable. Default was made and plaintiffs sued for the whole:—

Held, by BOWEN, J., on further consideration (distinguishing Thompson v. Hudson, 38 Law J. Rep. Chanc. 431), that the provision, being one which did not revive an old right, but which created a new one, was to be regarded as a penalty; and that equity would not allow the plaintiffs, by reason of the default in payment of an instalment, to claim and receive not merely their money back with interest and expenses, but also the unpaid premiums on a life insurance, which would no longer be kept up, and interest on a loan which would have ceased to be outstanding; and that the plaintiffs were therefore only entitled to the one instalment and interest.

This was an action which came on for trial before Bowen, J., without a jury, during the Michaelmas sittings in London, and was reserved by him for further consideration.

Herschell and Archibald argued for the plaintiffs.

Bompas and Fulton, for the defendants.

The learned Judge took time to consider his judgment.

The facts of the case appear sufficiently from the judgment, which, on the 20th of January, was delivered by

BOWEN, J.—This is an action brought upon a joint and several bond executed by one Charles Simpson as principal and the defendant and another as sureties, by which the obligors became jointly and severally bound to the plaintiff company in the penal sum of 100l., with conditions for making void the bond to which I will presently refer.

The plaintiff company are in the habit of advancing money on loan, and agreed to advance 50l. to Charles Simpson, the defendant being one of his sureties.

The loan was to have been paid in five years by instalments in case the debtor should so long live, the plaintiff company taking the risk of his death in the interim. The instalments were calculated so as to cover the principal of the loan, interest thereon, the expenses of negotiating it, and a margin representing a yearly premium for the insurance of the debtor's life.

The condition of the bond, so far as the same is material, is as follows.

“If the obligors or some or one of them, or some or one of their heirs, executors or administrators do and shall from henceforth on every 1st of September, 1st of December, 1st of March, 1st of June, until the 1st of June, 1882, inclusive of that day, or until the day of the death of the principal, if he shall die before that day, pay to the company or their successors or assigns, without demand, at their office, 34, King Street, Cheapside, 3l. 10s., or if the obligors, &c., shall and do in any or either of the events mentioned or indorsed on the present bond immediately pay to the company, their successors or assigns, not only any sum of 3l. 10s. which may have become due and payable, but all and every the sums of 3l. 10s. which would have become due and payable if the principal had outlived the said 1st of June, 1882, and such day had actually arrived; and if the obligors, &c., shall pay to the said company all costs, charges and expenses to be paid or incurred by the said company in enforcing or attempting to enforce the above written bond against the obligors, their heirs, &c., or otherwise incident to or consequent upon any breach or default of the foregoing conditions or any of them, then the

Protector Endowment Soc. v. Grice, Q.B.

above written bond or obligation shall be void, otherwise the same shall remain in full force."

Indorsed upon the back of the bond is the list of the events referred to in the within written bond, which includes, amongst others, the following event.

"If any sum within conditioned to be paid shall be in arrear and unpaid."

It appears from the above extract that the bond is conditioned in the alternative. It is to be void, first, if the instalments of 3*l.* 10*s.* are regularly paid till 1882, or till the death of the debtor, whichever shall first happen; or, second, if all the instalments which would have become payable in 1882 had the debtor lived so long are at any time paid up; and, as will be seen, there is a provision which makes the balance of instalments at once payable on failure of any single instalment.

Neither of the alternative conditions has been fulfilled. Default was made in payment of the instalment of 3*l.* 10*s.* upon the 1st of December, 1878. Thereupon the plaintiff company brought this action on the bond, claiming under the provision herein before set forth to be repaid immediately the entire balance of future unpaid instalments, amounting in all to 52*l.* 10*s.*

The defendant pleaded that the plaintiff company were seeking contrary to the principles of equity to enforce a penalty, and paying into Court 3*l.* 10*s.*, the amount of the unpaid instalments already due, asked to have the action dismissed.

If the provision which the plaintiffs desire to have enforced had merely been that on default of the instalments the unpaid balance of the principal money lent should become due and payable the case would have fallen under the principle laid down in *Thompson v. Hudson* (1). A provision reviving an original debt in case of breach of one of the terms on which the payment of the debt was alone postponed is not a penalty, being something more than a mere security for the payment of the instalment. The present case is different. On non-payment of a

single instalment the surety, if the plaintiffs' contention be correct, becomes liable to pay down a balance of unaccrued instalments, which really represent—first, the arrears of instalments actually overdue; second, unpaid principal and expenses; third, a margin calculated to cover interest, which, if the debtor had lived to the end of the five years' term, would by that time have become due; fourth, a further margin calculated to cover the annual premiums which if the loan had remained outstanding for five years would have been paid yearly during the period to meet the risk of the debtor's death. And the surety would have to pay this sum down, losing the chance that the debtor might die within the five years. Thus the company by a single default, if their present claim is maintainable, receive not merely their money back with interest and expenses, but a god-send in the shape of the unpaid premiums for a life insurance which no longer will be kept up and the future interest on a loan which will long have ceased to be outstanding.

To allow the company to require this advantage by reason of a default in payment of an instalment would be, I think, to allow them to inflict a penalty.

It is argued that the clause is part of the bargain between the parties, and a security not merely for the payment of the instalment but the original security on which the money was lent. So in one sense is every penalty for non-payment of interest. The question is not whether it is a part of the bargain but whether it is such a part as equity will enforce? not whether it is one of the terms on which the money was lent, but whether the main purpose of the term was to secure the payment of the instalment. If indeed all that was sought to be recovered was principal and expenses together with the arrears of the overdue instalments, the plaintiffs would be entitled to succeed; but the plaintiffs have not and do not ask this, probably because they do not want their money back—what they want is the god-send profit or bonus which is to arise from the non-observance of a money payment. The provision relied on is not as in *Thompson v. Hudson* (1),

(1) 38 Law J. Rep. Chanc. 431; Law Rep. H.L. Cas. 1.

Protector Endowment Society v. Grice, Q.B.

a provision which revives an old right, but a provision creating a new right, which is to come into operation on default in a payment of money. The principal obligation is to pay the 72*l.* by instalments. The provision seems to me to be a security for the performance of this obligation, in other words, it is a penalty.

It may be said that there is nothing unreasonable in the bargain sought to be enforced if the parties choose to make it, but that is not the question. The rule of equity which prohibits the infliction of penalties comes down to us from a time when borrowers of money were believed to require special protection against improvident contracts, but whatever the origin of the rule of equity, whatever its economical merits, it exists; and effect must be given to it when a case arises which falls within it.

The defendant has not paid into Court with his plea sufficient by a few shillings to cover his instalment with interest. I think the omission was accidental, and I treat it as an oversight. On payment to the plaintiff company or into Court of the additional sum necessary to make up the interest the defendant is to have judgment; costs up to the statement of defence are to be paid by the defendant; costs subsequent to the statement of defence by the plaintiffs.

Judgment for defendant.

Solicitors—T. H. Devonshire, for plaintiffs;
Cronin & Rivolta, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } BUTTON v. THE WOOLWICH BUILD-
Nov. 6. } ING SOCIETY.

Practice—*Appeal from County Court*—*38 & 39 Vict. c. 50. s. 6*—*Time for moving*—*Motion during Vacation*—*Jurisdiction of Judge at Chambers.*

Where a motion for a new trial of an action in the County Court is made to a

VOL. 49.—Q.B., C.P. & EXCH.

Judge at chambers in vacation, under section 6 of 38 & 39 Vict. c. 50, it must be heard and determined by him, and he has no power to adjourn it to the Divisional Court.

In this case, on the hearing of a plaint in the County Court of Kent, holden at Greenwich on the 15th of October, the Judge nonsuited the plaintiff.

Thereupon the plaintiff duly applied at chambers within the eight days to Bowen, J., for a rule *nisi* for a new trial. The learned Judge adjourned the case, and it came on again for hearing before Lindley, J., at chambers on the 24th of October. That learned Judge did not proceed with the hearing, but as the Michaelmas sittings were so close at hand adjourned it to the first day on which motions on appeal from inferior Courts were to be taken by the Divisional Court.

Atherley Jones moved accordingly.

[FIELD, J.—What power has a Judge at chambers, who has jurisdiction under section 6 to hear the matter in vacation, to adjourn it to the Divisional Court?]

The motion having been made within the time prescribed, the Judge, it is submitted, could adjourn the further hearing to another Judge at chambers if still in vacation, or to the Divisional Court if vacation was about to expire.

FIELD, J.—It has been decided that neither the Court nor a Judge can enlarge the statutory period within which a motion of this kind must be made (1). The Judge must therefore have entered upon the hearing, and that being so, we have no jurisdiction to hear the motion.

PER CURIAM (2).—The plaintiff must go back to Lindley, J.

Solicitors—E. Kimber, agent for J. V. Button, Woolwich, for plaintiff; S. W. Johnson & Son, for defendants.

(1) *Tennant v. Rawlings*, Law Rep. 4 C.P. D. 133.

(2) Field, J., and Manisty, J.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.	}	WEBB v. EAST.
BAGGALLAY, L.J.		
COTTON, L.J.		
1880.		
Jan. 21.		

Discovery—Letters written by Master in Answer to Enquiries as to Servant's Character—Libel—Privileged Communication—Production.

A master kept copies of the letters written by him in answer to enquiries respecting the character of a servant late in his employ. The servant commenced an action for damages against his master, alleging that the letters were libellous, and took out a summons for liberty to inspect and take copies of the copy letters :—

Held, that the copy letters were not privileged from production.

Quære—Whether, if the defendant had deposed on oath that the production of the letters would incriminate him, they would have been privileged from production.

This was an appeal from the Exchequer Division.

The plaintiff was a land and estate agent, and for eighteen months prior to the month of March, 1879, had been in the employ of the defendant, as steward of his estate.

In the month of March, 1879, the plaintiff quitted the service of the defendant, at the notice and request of the defendant, receiving from the defendant a favourable written character.

On the 9th of April, 1879, Lord Rosslyn, being satisfied with the written character of the plaintiff, engaged him as steward to manage his estates, and it was agreed between them that the plaintiff should enter on his duties on the 14th of April. Subsequently Lord Rosslyn refused to allow the plaintiff to enter on his duties, and dismissed him from his service on the ground that his Lordship had received letters from the defendant containing such statements respecting the plaintiff's character, that it was impossible for him to employ him as his steward.

Lord Rosslyn refused to deliver up the letters in question to the plaintiff, or give

him copies of them, on the ground that they were privileged communications; and thereupon the plaintiff commenced this action, alleging that the defendant in the letters in question falsely and maliciously wrote and published of the plaintiff certain defamatory matter, and claimed 3,000*l.* damages.

The defendant pleaded that the letters in question were confidential and privileged communications, and were written by him in answer to enquiries made by Lord Rosslyn as to the character of the plaintiff whilst in the employment of the defendant as his steward.

The defendant having, in answer to interrogatories delivered to him by the plaintiff, admitted that he held copies of the letters, the plaintiff took out a summons (which was adjourned into Court) that he might be at liberty to inspect and take copies of the letters.

On the 12th of December, 1879, the summons was heard before Kelly, C.B., and Stephens, J., who made an order in the terms of the summons.

The defendant appealed.

Fischer and E. E. Turner, for the appellant. — The letters are in their nature privileged communications, and, from the necessity of the case, are privileged from production; their production might tend to criminate the defendant—*Cartwright v. Green* (1); *Fisher v. Owen* (2). This is really a fishing application, and the Court under Order XXXI. rule 19, can order the question of express malice to be tried first.

Bompas and Smith, for the respondent. — Nothing is now privileged from production except title-deeds and communications between solicitors and their clients—*Bustros v. White* (3). It is no answer to say that the production of the letters might tend to criminate the defendant. He can only avail himself of that defence on oath, and he has not done so here. The plaintiff requires the letters for the very purpose of proving ex-

(1) 8 Ves. 408.

(2) 47 Law J. Rep. Chanc. 681; Law Rep. 8 Ch. D. 645.

(3) 45 Law J. Rep. Q.B. 642; Law Rep. 1 Q.B. D. 423.

Webb v. East (App.), Excm.

press malice—*Fisher v. Owen* (2); *Allhusen v. Labouchere* (4).

Fischer, in reply, cited *Hill v. Campbell* (5).

JESSEL, M.R.—In this appeal the question raised is, no doubt, one of very considerable importance as regards the interests of that large portion of society consisting of masters and servants.

The case for the present purpose may shortly be stated in this way: A steward of Sir Gilbert East left his service. He afterwards applied for a similar situation under Lord Rosslyn, who was willing to engage him, and did engage him, in fact, and of course subject to his character proving satisfactory. He wrote to Sir Gilbert East about the man, and received a letter in answer, giving the man what he thought was a bad character, and thereupon he declined the services of the man any more. The man then brought an action against Sir Gilbert East for libel. Of course, the substance of that action is that the material statements made as to his character are not only untrue, but are untrue, if I may so put it, to the knowledge of Sir Gilbert East, and were stated maliciously and not with the *bona fide* intention of giving the man a fair character, but with the view to prevent his getting a new service. The plaintiff has neither the letters that were written by Sir Gilbert East, nor any copies of them. Lord Rosslyn has the original letters. Sir Gilbert East has copies of them, and the plaintiff wishes to obtain inspection of those copies from Sir Gilbert East.

Now it is manifest that the copy letters in question are material on every issue in the cause. The nature of the charges, if charges they were, in the letters made against the servant, must have a considerable influence upon the decision of the issue as to whether they were false charges, also as to whether they were false to the knowledge of the defendant, and as to whether from their nature they were instigated by malice. It is impossible

not to see therefore that they are very material documents as regards the case. The defendant says that the documents are privileged. Now the documents are privileged in this sense. They are what are called "privileged communications," which I understand to mean this that *prima facie*, that is, in the absence of evidence to the contrary, they are to be considered as being given *bona fide* and without malice. In other words they are an exception to the rule that a man who libels another must justify the truth of the libel. It is for the plaintiff to prove the express malice, if I may so call it. But they are not privileged, as far as I am aware, in any other sense. I never heard before this case of a suggestion that such letters were privileged in the sense of being privileged from production except on the ground, which is now suggested, that they may criminate the defendants. Now it is obvious that that is impossible, unless the action ought to succeed, because they cannot be a libel unless the defendant was actuated by malice, and therefore he cannot plead that the documents would criminate him without at the same time confessing the action. If therefore such a defence could be available at all, it ought only to be available at the instance of a defendant who will undertake to swear that the production of the document will tend to criminate him. Now I am not at the present moment obliged to give, nor do I intend to give, an opinion as to whether documents could be protected from production by an allegation on oath that, if produced, they would criminate or tend to criminate the man, by which I mean that they could be made the subject of indictment against the person asked to produce them. I decline to decide that, which is not necessary for the moment to decide, not because I have not an opinion on the subject, but because it is not necessary for me now to decide it. But, even assuming for the purpose of argument, that such a ground could avail a defendant called upon to produce such a document, it is clear to my mind that it could only avail him on such terms as it could avail him in answering interrogatories or giving other discovery, namely,

(4) 47 Law J. Rep. Chanc. 819.

(5) 44 Law J. Rep. C.P. 97; Law Rep. 10 C.P. 222.

Webb v. East (App.), Excn.

upon his pledging his oath that to the best of his knowledge, information and belief, the result of his production of the document would be to criminate him. Now, as I have already said, it is quite impossible for the defendant in this case to make such an affidavit, and therefore there is no occasion to give him the opportunity of making it. He never would be advised to make it and would not make it. That being the case, it appears to me that these are documents which are not privileged from production, and that consequently the order of the Court below was right and ought to be affirmed.

BAGGALLAY, L.J.—I am also of the opinion that the production of these letters cannot be refused on the ground of privilege. That such documents are privileged in a certain and very common sense of the word is no doubt true, but they are not privileged documents within the meaning of the decision in the case of *Bustros v. White* (3), in which the question of what were documents entitled to protection on the ground of privilege arose, and was very fully considered by the Court, consisting of numerous Judges, who seem expressly to have decided the question. Now the marginal note in that case really describes what are the documents to which privilege applies, namely, that no document other than a document of title is privileged except a communication from the party's solicitor, or from an agent employed by or at the instance of the solicitor. But then it is said that the production can be refused on the ground that the inspection of the letters might tend to expose the defendant to criminal proceedings for libel. Now I am disposed to think that if that could be a sufficient reason for refusing to permit the inspection of the documents it is a reason which must be verified by the oath of the party who seeks to rely upon it. In this case, and probably for the very best of reasons, the defendant's advisers do not ask for the opportunity of making such an affidavit. Therefore it is not really necessary at all to consider what would be the effect of such an affidavit, if such an affidavit had been produced; and therefore I am clearly of

opinion that upon neither of the grounds alleged can the production of these letters be refused.

COTTON, L.J.—I am also of opinion that we cannot refuse production of these documents. The Court in these cases has not to exercise any discretion. If the plaintiff can claim production, it is as of right. The general rule is undisputed that a litigant, plaintiff or defendant, has a right to the production of all documents in the possession of his opponent which are relevant to the issues to be decided in the action. In the present case it cannot be disputed that the production of these letters is material both with regard to the question whether certain defamatory statements were made, and also upon the question whether or no they were made under such circumstances as to be privileged. Well, then, upon what ground can the defendant refuse production by saying that he is entitled to refuse that which otherwise is the plaintiff's undisputed right? It was put upon two grounds. One was that the production of the letters would tend to criminate the defendant, that is to say, would tend to subject him to a criminal proceeding for libel. Well, upon that point I agree that probably it would be better not to express an opinion as to whether or not that is any protection from production of documents. I have an opinion, but probably it will be better not to express it. But I agree with the rest of the Court that if that is a ground for refusing production, as it is for refusing to answer interrogatories, the protection must be claimed by the party seeking to protect himself from discovery in the same way as he seeks to protect himself from answering interrogatories, that is to say, by making an affidavit pledging his belief that the answering the question would tend to criminate him.

Now with regard to the other question of privilege. I think the whole argument upon the point of privilege depends upon the ambiguous meaning of the word "privilege." No doubt we are constantly in the habit of saying in actions that the Court may refuse production upon the

Webb v. East (App.), Exch.

ground that documents are privileged. What does that mean? It means they are privileged as communications between a party and his legal adviser. These documents, too, are no doubt privileged if the defendant is right that they were *bona fide* letters written in answer to enquiries about a servant. But privileged in what sense? Not privileged from production, but privileged in this sense that although they may contain defamatory statements the law under the circumstances will not impute malice, but, to enable the plaintiff in an action for libel upon them to sustain his action, he must shew that as a matter of fact they were written maliciously, that is to say, he must prove express malice. But to that extent, and to that extent only, does the word privilege extend. Then ought we to extend the rule as to privilege from production? No doubt it may be very inconvenient to order that production of such letters as we have in this case should be made, but for a long series of years the Courts of Equity have been strict in refusing to extend the rule as to privilege from production, and in my opinion we ought not now to make this extension, but ought to adhere to the old rule and say that privilege from production on the ground of the document being a privileged communication extends only within that rule which has been long established and acted upon by the Courts, that is to say, to privileged communications between a party and their legal advisers. I ought to add that the language of my judgment in the present case must not be taken in any future case as any intimation that I should not have directed the documents to be produced even if there had been an affidavit made by the defendant.

BAGGALLAY, L.J.—I may also say that I desire to keep my judgment open upon that point.

Appeal accordingly dismissed with costs.

Solicitors—Williams, James & Wason, for appellant; Parkers, for respondent.

[IN THE COURT OF APPEAL.]

1879. }
Nov. 13, 14. } SWANN v. BARBER AND CO.*

Ship and Shipping—Cargo on Ship's Account—Nominal Freight—Vendor's Lien—Shipper's Rights under Contract with Purchaser of Cargo.

The plaintiff shipped goods in his own vessel to be carried on the ship's account, a nominal freight of one shilling per ton being payable under the bill of lading. He subsequently sold the goods whilst in transit, for 65s. per 500 lbs., "including freight and insurance, freight to be reckoned at 60s. per ton." After intermediate sales, the defendants bought the goods whilst still in transit upon the same terms as to freight. The ship arrived at the port of discharge, and the defendants, having notice of the terms of the plaintiff's contract, paid him a sum on account of freight at 60s. per ton, and thereupon obtained delivery of the goods. In an action by the plaintiff to recover the balance alleged to be due for freight,—

Held, that the 60s. per ton agreed to be treated as freight in the plaintiff's contract for sale, was unpaid purchase-money, in respect of which he had a lien on the goods before delivery; that the defendant's conduct under the circumstances amounted to an implied contract to discharge the lien, and therefore that the plaintiff was entitled to recover.

The plaintiff's writ of summons was endorsed with a claim for 193l. 3s. 6d., the balance due from the defendants to the plaintiff for freight on a cargo of wheat *ex the Koh-i-noor*, at 3l. per ton.

The statement of claim referred to the endorsement on the writ as the particulars of the plaintiff's complaint. The statement of defence denied that any freight was due from the defendants to the plaintiff, or that the defendants were indebted to the plaintiff in any amount whatsoever, as alleged by the plaintiff in the endorsement on the writ, or that the plaintiff was owner of the

* *Coram* Jessel, M.R.; Bramwell, L.J.; Brett, L.J.

Swann v. Barber (App.), Exch.

vessel in respect of which freight was alleged to be due, or that he was entitled to recover the same or any part thereof.

By way of set-off and counter-claim, the defendants alleged that Balfour, Guthrie & Co. caused to be shipped on board the *Koh-i-noor*, in the port of Portland in Oregon, a cargo of wheat, to be carried by the plaintiff from Portland to Falmouth for orders, and thence to a port of discharge, and there delivered, upon the terms contained in a certain bill of lading, certain dangers and perils only excepted; and that the bill of lading provided that freight should be paid in cash, without discount, at the rate of one shilling per ton; that the bill of lading was duly endorsed to the defendants, and the property in the said wheat passed to them; that the delivery of the said wheat was not prevented by any of the excepted dangers and perils provided for by the bill of lading; that the plaintiff failed to deliver 290 sacks of the said wheat, the value of which, after deducting freight, amounted to 193*l.* 3*s.* 6*d.*, and the defendants claimed that sum.

By the reply the plaintiff joined issue upon the statement of defence, and denied all the allegations contained in the set-off and counter-claim, and averred that he duly delivered all the wheat shipped on board the *Koh-i-noor*, and that if all the wheat was not delivered, such delivery was prevented by the dangers and perils excepted in the bill of lading.

Issue was taken on the plaintiff's answer to the set-off and counter-claim.

The action was tried before Kelly, C.B., and a jury, at the Norwich Winter Assizes, 1879, when the following were the material facts proved in evidence or admitted:—

The plaintiff was the sole registered owner of the barque *Koh-i-noor*, of Kirkcaldy, in Scotland.

In December, 1876, a cargo of wheat belonging to the plaintiff was shipped by his agents, Balfour, Guthrie & Co., on board the *Koh-i-noor*, at Portland, in the United States, on the ship's account.

Bills of lading, dated the 6th of De-

cember, 1876, were signed in the usual form when cargoes are shipped on the ship's account, stating that the cargo was shipped in good order and condition by Balfour, Guthrie & Co., of San Francisco, on board the *Koh-i-noor*, then lying at Portland, Oregon, and bound for Queenstown or Falmouth for orders, "to be delivered in the like good order and condition at the aforesaid port of

, as ordered (all and every the dangers and accidents of the seas and navigation, of whatsoever nature or kind excepted), unto order or to its assigns. Freight for the said goods payable in cash, without discount, at the rate of one shilling per ton sterling," &c.

On the 26th of April, 1877, whilst the *Koh-i-noor* was on her voyage to England, the plaintiff, through his agents and ship's husbands at Liverpool, sold the cargo to Messrs. Hamilton & Co., "as per bill of lading, at the price of 65*s.* per 500 lbs. bill of lading weight . . . including freight and insurance. Freight for United Kingdom to be reckoned at 60*s.* per ton."

Hamilton & Co., whilst the goods were still in transit, sold them on the same terms as to freight to W. J. Leigh, of Liverpool, and W. J. Leigh sold them again whilst in transit on the same terms as to freight to the defendants. The defendants' contract, dated the 5th of May, 1877, was for the sale to them of the wheat "as per bill of lading, at the price of 68*s.* per 500 lbs. bill of lading weights . . . including freight and insurance, to a safe port in the United Kingdom . . . calling at Queenstown or Falmouth for orders . . . freight for U.K. to be reckoned at 60*s.* per ton."

On the ship's arrival at Falmouth, she was ordered by the defendants to Yarmouth, to discharge cargo. She arrived there on the 16th of May, and her cargo was in due course discharged and delivered to the defendants, who produced the bills of lading endorsed to them.

Prior to the cargo being discharged, the defendants sent to the plaintiff a cheque for 1,000*l.*, with a letter stating the payment to be "on account of freight." Part of the cargo on delivery was found to be sea-damaged, and there was also a

Swann v. Barber (App.), Exch.

short delivery, amounting to about seventy quarters of wheat less than the quantity stated by the bills of lading to have been shipped at Portland. After delivery, the plaintiff presented his freight account to the defendants, in which, after giving credit for the defendants' payments on account, a balance of 581*l.* appeared to be due to the plaintiff, freight being reckoned at 60*s.* per ton on 621 tons, which, as was admitted, were actually delivered to the defendants.

The defendants by subsequent payments reduced this balance to 193*l.* 3*s.* 6*d.*, which they refused to pay, on the ground that they were entitled to set off that amount against the plaintiff in respect of the short delivery of seventy quarters.

The plaintiff then brought this action. It was proved that during the voyage the *Koh-i-noor* encountered very bad weather, and the plaintiff alleged that the short delivery was owing to the ship having strained in the heavy seas, and the water having got into the cargo, and caused a great number of the bags of wheat to become heated and rotten. The defendants alleged that the short delivery was owing to all the quantity of wheat specified in the bills of lading not having been shipped at Portland.

Kelly, C.B., directed the jury that if they thought the short delivery was caused by the perils excepted in the bills of lading, the plaintiff was entitled to recover the amount claimed; but that if they thought it was not so caused, the defendants were entitled to set off the value of the short delivered portion against the plaintiff's claim, and were therefore entitled to a verdict.

The jury found for the plaintiff, and judgment was entered accordingly, execution being stayed in order to allow the defendants to move for a new trial.

A rule *nisi* for a new trial on the ground of misdirection was obtained in the Exchequer Division and made returnable in the Court of Appeal.

Bulwer and *Graham*, for the plaintiff, now shewed cause, and

Day and *Finlay*, for the defendants, supported the rule.

During the arguments *Ireland v. Livingstone* (1) and *Keith v. Burrows* (2) were referred to.

JESSEL, M.R.—The action no doubt is wrongly framed from a technical point of view, but the claim might have been amended, and we can give our judgment with reference to the real facts. Those are, that the shipowner was also owner of the goods, and he shipped them under a bill of lading which provided for payment of a nominal freight of 1*s.* per ton. Then there was a sale of the cargo afloat on the usual terms, "including freight and insurance," for 65*s.* per 500 lbs. bill of lading weights, with a proviso that the freight should be reckoned at the rate of 60*s.* per ton, which amounted to this, that part of the purchase money should be retained and treated as freight. That being so, the first purchaser sold the cargo to a second on similar terms as regards freight, and the second purchaser had notice and knowledge of the original contract. The second purchaser sold to the present defendants on the same terms as to freight and with the same notice. What at the time of the last sale was the right of the original vendor? He had bargained that he was to be paid the balance of the purchase money on the delivery of the cargo, and the defendants could not have obtained delivery without paying off the lien which the plaintiff had upon it.

The ship arrived at the port of call, and the defendants ordered her to Yarmouth, and before delivery paid 1,000*l.* on account of freight at the rate of 60*s.* per ton, and then invited the captain to complete delivery. That was done, and some balance remained due for the sum treated as freight on the cargo delivered, and for that balance this action has been brought. Then arose the quarrel.

It turned out that the cargo delivered was short of the bill of lading weights. The defendants say that the undelivered portion was never put on board, and the plaintiff says that it had

(1) Law Rep. 5 H.L. 395.

(2) 46 Law J. Rep. C.P. 452 and 801; Law Rep. 2 App. Cas. 636.

Swann v. Barber (App.), Exch.

been properly shipped, but that it was lost by perils of the sea, excepted in the bill of lading. The defendants having claimed to set off the value of that portion against the balance for freight, the jury have found that the short delivery was caused by perils of the sea, and therefore gave a verdict for the plaintiff.

I am of opinion that there was a clear liability on the part of the defendants to pay this balance. Their conduct amounted to an implied contract to discharge the plaintiff's lien. They had paid 1,000*l.* on account, and had taken delivery of the cargo on the understanding that they would pay the rest of the freight. I think the rule should be discharged.

BRAMWELL, L.J.—In this case there was no contract of affreightment; the shipowner was also owner of the goods, so that no freight could properly become due. Therefore the fact that a nominal freight of 1*s.* per ton was provided for in the bill of lading has no bearing on the case, and may be dismissed from consideration.

The plaintiff sold the cargo afloat, and I suppose that he and the purchaser were desirous of conducting the transaction on the same footing and in the same plight as if the plaintiff was the owner, and somebody else the shipper of the goods, and they agree that the sum to be paid is 65*s.* per 500 lbs., and that is to be divided into two sums, one representing the value of the commodity apart from the freight, the other denoting the rate of freight which would be charged by the shipowner if he had carried the goods for some other owner. They call the latter sum "freight." The former sum is paid by the purchaser upon the purchase being completed, the other remains in the situation and plight of real freight, and is to be paid on delivery of the cargo at the port of discharge. Under these circumstances it is manifest that the plaintiff would, as against his vendee if his vendee had not sold again, have a lien on the cargo for so much of the purchase money as was represented by the sum which they treated as freight. The plaintiff might have said, "If no freight is due to me, still part of the purchase money

which we have agreed to treat as freight is due to me." If the purchaser claimed to deduct a sum for the short-delivered portion *quoad* freight, I am inclined to think he might be entitled to do so, though it is not necessary to decide that here, but if the vendee claimed the return of a part of the purchase money because of the short delivery, he would, in my opinion, fail. The answer to him would be that he bought the cargo as shipped, and it was his misfortune that a part of it had been lost in transit. I think the right of the plaintiff would be the same as against his sub-vendee. It is difficult to see how he could lose the right to retain the goods until paid the purchase money. His right was that of an unpaid vendor who has a lien on the goods purchased. Then it is asked how he can bring his action when he has parted with the goods. In my opinion he may sue on an implied contract by the defendants to pay the purchase money which remained owing. The defendants with notice of the plaintiff's contract with Hamilton & Co. paid a sum on account and obtained delivery of the goods. It is said that there is no evidence that the defendants had notice. That point was not made at the trial, but I think there was evidence of notice, and that if it had been left to the jury they must have found in the plaintiff's favour. I am therefore of opinion that he is entitled to recover. If it was necessary to refer to authority, I think *Keith v. Burrows* (2) fully bears out what we have decided here.

BRETT, L.J.—I am of the same opinion. The whole case depends entirely upon the plaintiff's contract with Hamilton, and whether the defendants had notice of it. The intermediate contracts do not affect the question. In strictness and in point of law the 60*s.* reserved in the plaintiff's contract with Hamilton was not freight, but it might fairly be called "*quasi* freight." It is clear that by that contract the plaintiff had a lien on the cargo against Hamilton & Co. for the 60*s.* which was to be paid on delivery at the port of discharge. It is also clear on the evidence that when the ship arrived at Yarmouth the defendants had notice of

Swann v. Barber (App.), Exch.

the plaintiff's lien against Hamilton, which Hamilton by no conduct of his could have taken away. Knowing of the lien the defendants paid a sum on account of the sum treated as freight, and took delivery of the cargo, therefore they undertook that they would pay the 60s. per ton for the whole cargo shipped. It may be a satisfaction to merchants to know that in cases like the present the shipowner is a vendor with a lien for his unpaid purchase money, and that is the only way in which his position differs from that of being entitled to freight under the bill of lading.

Rule discharged.

Solicitors—Storey & Cowland, agents for C. Diver, Great Yarmouth, for plaintiff; G. Lockyer, agent for W. R. Archer, Lowestoft, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } MULLINS v. THE TREASURER OF
Feb. 20. } THE COUNTY OF SURREY.
Mullins v. Treasurer of the County of Surrey
Justice of the Peace—Order for Expenses
of conveying Prisoners to Gaol—27 Geo.
2. c. 3. s. 1—11 & 12 Vict. c. 42. s. 26—
40 & 41 Vict. c. 21. ss. 4, 28, 57—
"Period of Committal"—Prison Au-
thority.

The Prisons Act of 1877 (40 & 41 Vict. c. 21), has not transferred to the Secretary of State the liability for the expenses of conveying prisoners after summary conviction or committal for trial by a magistrate to the gaol named in the warrant. Such expenses still fall, as enacted in 27 Geo. 2. c. 8 and 11 & 12 Vict. c. 42, in Middlesex upon the overseers, and in other counties upon the treasurer of the county where the offence alleged against the prisoner was committed.

In an action brought by the plaintiff a SPECIAL CASE was stated by consent, and the following is the substance of the case:—

1. The plaintiff is a metropolitan police constable. On the 12th of August, 1879,

VOL. 49.—Q.B., C.P., & EXCH.

Lydia Burnard was convicted by the police magistrate at Lambeth in the county of Surrey, of being drunk and disorderly, and adjudged to be imprisoned in Her Majesty's prison at Westminster, in the county of Middlesex, for fourteen days, and a warrant of commitment addressed to plaintiff by the magistrate, commanded him to take her to the prison and deliver her to the keeper.

2. The plaintiff did as commanded.

3. Lydia Burnard had not money sufficient to bear the charges of her conveyance or any part thereof.

4. On the 14th of August, 1879, the magistrate, at plaintiff's request, ascertained the sum which ought to be paid to plaintiff for so conveying Lydia Burnard to be 1s. 6d., and did thereupon make an order upon, and directed defendant, as treasurer of the county of Surrey, to pay to the plaintiff the said sum of 1s. 6d. (according to 27 Geo. 2. c. 8).

5. Defendant refused to pay on the ground that the liability to pay such sum had been transferred from defendant to the Secretary of State, by the Prison Act, 1877 (40 & 41 Vict. c. 21).

6. On the 12th of August, 1879, John Allcroft was duly committed by the police magistrate at Lambeth, in the county of Surrey, to take his trial for felony committed in the said county; and by warrant of commitment addressed to plaintiff, the magistrate commanded plaintiff to take the said John Allcroft and convey him to Her Majesty's prison at Clerkenwell, in the county of Middlesex, and there deliver him to the keeper thereof.

7. Plaintiff did as commanded.

8. John Allcroft had not money sufficient to bear the charges of his said conveyance or any part thereof.

9. Afterwards, on the 14th of August, 1879, the said magistrate, at the request of the plaintiff, ascertained the sum which ought to be paid to plaintiff for so conveying John Allcroft at 1s. 6d., and, thereupon, according to the form of the statute 11 & 12 Vict. c. 42. s. 26, made an order upon and directed to defendant, as treasurer of the said county of Surrey, and ordered defendant to pay to the plaintiff the said sum of 1s. 6d.

2 L

Mullins v. Treasurer of Surrey, Q.B.

10. The defendant refused to pay on the same ground as above.

The Solicitor-General (Avery with him), for the plaintiff.—The question here is whether the Prison Act of 1877 has transferred the liability to pay the expenses of the conveyance to gaol of a prisoner convicted or committed for trial by a magistrate, from the treasurer of the county to the Secretary of State. This depends on the construction of section 57 of 40 & 41 Vict. c. 21 (1). The maintenance of prisoners, which is by section 4 thrown upon the Secretary of State, is defined to include "all such necessary expenses incurred in respect of a prisoner, for food, clothing, custody, safe conduct and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would,

(1) The Prison Act, 1877, 40 & 41 Vict. c. 21—Section 4. "On and after the commencement of this Act, all expenses incurred in respect of the maintenance of prisoners to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament."

Section 5. "Subject as in this Act mentioned—

(1) "The prisons to which this Act applies, and the furniture and effects belonging thereto; also (2) the appointment of all officers, and the control and safe custody of the prisoners in the prisons to which this Act applies; also all powers and jurisdiction at Common Law or by Act of Parliament, or by charter vested in or exercisable by prison authorities or the justices in sessions assembled in relation to prisons or prisoners within jurisdiction shall, on and after the commencement of this Act, be transferred to, vested in and exercisable by one of Her Majesty's principal Secretaries of State, in this Act referred to as the Secretary of State."

Section 57. "A 'prisoner' for the purposes of this Act means any person committed to prison on remand or for trial, safe custody, punishment or otherwise, and the 'maintenance of a prisoner' includes all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would, if this Act had not passed, have been payable by a prison authority, with this proviso, that nothing in this Act shall exempt a prisoner from payment of any costs or expense in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed.

if this Act had not passed, have been payable by a prison authority."

Now this must mean expenses from the time of his lodgment in prison, because until actually in the gaol the prisoner was under no prison authority at all. Prison authority, by 28 & 29 Vict. c. 126, is the justices in quarter sessions, and the treasurer is their officer for paying sums which they are liable to pay, and which are brought before them and passed. The liability intended to be transferred was of the payment of such sums as were payable by the justices in quarter sessions assembled.

Now the expenses of conveying prisoners to gaol was never payable by the prison authority or came before the justices in quarter sessions, though they were charged on the fund in the treasurer's hands. They were charged on this fund by 27 Geo. 2. c. 3. s. 1, and 11 & 12 Vict. c. 42. s. 26, unless the prisoner was himself able to defray them. The proviso in section 57 is really quite unnecessary, and cannot affect the enacting words of the section to which really it has no reference.

Herschell (E. Clarke with him), for the defendant.—It must be remembered that before the Prison Act each county had its own prison. Now, the Secretary of State may send any prisoner to any prison; the expenses, therefore, of conveying a prisoner to the gaol ordered, may be very different from those to which the county was previously liable. Under section 24 a magistrate may commit to a prison in an adjoining county. In construing section 57, it becomes important to see when a man is a prisoner, and by section 28 he is described as being a prisoner in legal custody whenever he is being taken to any prison in which he may be lawfully confined. It is clear, therefore, that "period of committal" in section 57, must date from the signing of the warrant by the magistrate; then the expenses of his safe conduct to prison were formerly charged on the county fund which is administered by the treasurer; the fund is created by the justices, the prison authority, and those expenses therefore are as much borne by the prison

Mullins v. Treasurer of Surrey, Q.B.

authority as any other expenses, for there is no distinction in the fund.

Then the proviso is only intelligible if the former part of the section intended to transfer to the Secretary of State all that the justices were liable to pay—the proviso was meant to preserve some liability which can only be that mentioned in 11 & 12 Vict. c. 42. s. 26.

The Solicitor-General (Sir H. Giffard), in reply.—The prison authority is not always the justices. In London it is the Lord Mayor, and yet the order under the Act of Geo. 2, would be on the treasurer of Middlesex, and under 11 & 12 Vict. c. 42 would be on the overseers of Middlesex.

LUSH, J.—The question raised here is one not free from doubt, but I am of opinion that the contention of the Solicitor-General is right, and that our judgment must be for the plaintiff. Under the Act of Geo. 2, the officer conveying any person committed to gaol by warrant is entitled to the expenses of so conveying him, and is to be paid out of any goods or money belonging to the prisoner in the county, if any, and if not is to be paid by the treasurer of the county by virtue of a warrant granted on the application of the officer by any magistrate of the same county.

Under Jervis's Act (11 & 12 Vict. c. 42. s. 26), the officer taking a prisoner under a warrant of commitment to the gaol mentioned in the warrant is also to be paid the expenses of doing so, and an order is to be made by the committing magistrate on the treasurer of the county where the alleged offence was committed. Now is there anything in the Prison Act of 1877, which takes away this obligation from the treasurer, and puts it on the Secretary of State?

It is impossible, I fully admit, to make all these sections harmonious and intelligible, and the construction I put upon section 57 makes the proviso in it absolutely insensible. Still I cannot find any words in the enacting part of the section which can be taken to comprehend the particular case now before us, namely, the expenses of conveyance to prison after conviction or after commitment for trial.

It says a "prisoner" means any person "committed to prison;" then, looking to section 4, this seems to signify actually in person, for that section speaks of the "maintenance of prisons and of the prisoners therein," as being what has been transferred as a liability to the Secretary of State, and it clearly refers to prisoners inside the walls. Recurring then to section 57, it would seem that "committal to prison" must mean reception into prison, and as the law then stood, expenses so defined would have been payable by the prison authority, who were the justices in quarter sessions, and all sums payable by them were paid by their treasurer.

All this, I think, would have been plain enough had the section stopped there, but then comes the unfortunate proviso, and to this I can give no effect. It has been put in as if *ex majori cautela*, but it refers to something which the section to which it is a proviso has not dealt with. There is not a word in the enacting part which can be taken to embrace the case of the prisoner before his reception into prison. I must, therefore, disregard it altogether, and as the former Act throwing this expense on the treasurer of the county is not repealed, I think that judgment must be given for the plaintiff.

MANISTY, J.—I am of the same opinion. I found my judgment mainly on the words, "such necessary expenses as would, if this Act had not passed, have been payable by prison authority." What is the meaning of prison authority here? Mr. Herschell says, we must read treasurer as representing the justices in quarter sessions. But if we look at the section in 11 & 12 Vict. c. 42, to which reference has been made, we see at once that this cannot be so, because there are two cases there provided for, namely, the county of Middlesex on the one hand, and other counties on the other. The expenses there dealt with, which are the very ones now in question, were to be paid in Middlesex by the overseers, and in other counties by the treasurer of the county. It would be very strange, therefore, if it were intended by the later Act to relieve the treasurers of all other counties from

Mullins v. Treasurer of Surrey, Q.B.

them, and leave the overseers of Middlesex still liable for these expenses. Taking the two sections together it is perfectly plain to my mind that section 57 never intended to deal with expenses, which in Middlesex would have been paid by the overseers, and in other counties by the treasurer. The prison authority is, therefore, distinct from the treasurer, as it is distinct from the overseers, and the treasurer remains liable for these expenses. I will only add that I agree that the proviso must be rejected.

Judgment for plaintiff.

Solicitors—Hare & Fell, Solicitors for the Treasury, for plaintiff; F. F. Smallpiece, for defendant.

Marsden v. Lancashire & Yorkshire S.D.C. 23/9.
Jones v. Curling [IN THE COURT OF APPEAL.]
53 L.J.C. 2374 (Appeal from the Common Pleas Division.)
 1879. }
 Dec. 3, 18. } COLLINS v. WELCH.*

Practice—Costs—Power of Judge to deprive Party of—Application at the Trial—Rules of Court, Order LV. rule 1.

A plaintiff, after a trial with a jury, recovered 12l. in an action founded on tort. The Judge, counsel for the plaintiff and the defendant being present, said that he should consider whether he ought not to deprive the plaintiff of his costs. The counsel for the plaintiff argued against the making of such an order; the counsel for the defendant did not address the Judge. The order was made:—

Held, affirming the decision of the Common Pleas Division, that the order depriving the plaintiff of his costs ought not to be rescinded, for that there had been a substantial compliance with the requirements of Order LV. rule 1.

Appeal by the plaintiff from a decision of the Common Pleas Division.

The action was brought to recover damages for loss and injury sustained by

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

the plaintiff through a collision between the plaintiff's and the defendant's carriages, alleged to have been occasioned by the negligent driving of the defendant's servant.

At the trial, before Denman, J., and a common jury, at the Croydon Summer Assizes, 1879, the jury found for the plaintiff; damages, 12l.

Denman, J., thereupon said that he must consider whether he should allow the plaintiff his costs.

Counsel on both sides were present, and no application to deprive the plaintiff of his costs was made by the defendant's counsel, though he had intended to make the application, if the matter had not been first mentioned by the learned Judge.

After hearing the plaintiff's counsel in opposition, Denman, J., ordered that the plaintiff should be deprived of his costs.

On appeal, the Common Pleas Division refused to rescind the order of Denman, J., and

The plaintiff appealed.

Dickens, for the plaintiff.—The Judge had no power to deprive the plaintiff of costs. Under Order LV. rule 1 (1), where the case has been tried with a jury, an "application made at the trial" is a condition precedent to the Judge's power to deprive a successful party of costs—see the judgment of Brett, L.J., in *Baker v. Oakes* (2). The rule was intended to give the Court the same jurisdiction as to costs as existed under the old practice of the Court of Chancery; but the Legislature had further to provide for cases tried before a jury, and thought well in such cases to give the Judge power to deal with costs only where there was an application made at the trial and good cause shewn. There was no such application here. The Court below decided on the

(1) Order LV. rule 1, provides that "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court. . . . Provided that, when any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

(2) 46 Law J. Rep. Q.B. 246; Law Rep. 2 Q.B. D. 171.

Collins v. Welch (App.), C.P.

authority of *Turner v. Heyland* (3), but it is submitted that the decision in that case was wrong.

He also referred to *Myers v. Defries* (4), and *Harris v. Petherick* (5).

A. Forster, for the defendant.—The material part of the proviso at the end of the rule is that good cause should be shewn—*Harris v. Petherick* (5); and that condition was fulfilled in the present case. There was also substantially “an application made at the trial” within the meaning of the rule. The defendant’s counsel intended to make the application, but was anticipated by the Judge.

Cur. adv. vult.

BRAMWELL, L.J. (on Dec. 18).—The question in this case turns on the construction of the concluding part of Order LV. I confess that I have had great trouble in dealing with this order. It provides that “where any action or issue is tried by a jury”—now actions are not tried by juries; they only try issues—“the costs shall follow the event.” What event? The event of the verdict of the jury, or of the judgment? and if the event of the judgment, what then has the finding of the jury to do with it? The rule then proceeds, “unless upon application at the trial for good cause shewn, the Judge . . . or the Court shall otherwise order.”

On the whole, I think that the order points to this, that if the Judge does take any step under it, he must do so at the trial; and I agree with the opinion that has been expressed by the learned Judges in the Court below. If it were not so, consider what might happen. Suppose that there is a controversy at a trial whether a certain document is a forgery, and that on that question the jury find for the defendant, but that the plaintiff, who claimed under the document a large sum which he fails to recover, still recovers some smaller sums which he claimed. Suppose also that the jury return the ver-

dict when all the parties have left Court, perhaps, as is sometimes the case, at the lodgings of the Judge, is it then to be said that, as there was no one present to apply to the Judge, he is unable to make an order depriving the plaintiff of costs? I cannot think so. There were two cases, as I understand from Denman, J.; in one he anticipated the counsel who were present, and made an order, in the other the counsel actually rose to apply for an order. That was, I think, equivalent to an application made at the trial; and I do not think that a Judge is disqualified from making such an order, because he anticipates the request of counsel. I am of opinion that such an order as this must be made at the trial.

BRETT, L.J.—I do not feel driven to be so severe on this order as Bramwell, L.J. I think it is capable of a fair meaning. The event mentioned is the event of the trial, that is, of the verdict and judgment. We ought not to fritter away the meaning of the order; and I think that it does place a practical limit on the power of the Judge. It requires three things: it requires an application, an application made at the trial, and good cause shewn. As at present advised, I am unable to concur with the opinion of Grove, J., and Lopes, J., in *Turner v. Heyland* (3), if indeed they have decided that a Judge can, of his own accord and without any motion made to him, make an order at the trial under Order LV. I think that substantially an application must be made at the trial, and good cause must be shewn. The word “good” is inserted, in my opinion, to provide for a review of the decision of the Judge. It takes the matter out of the rule which governs those matters which are peculiarly in the discretion of the Judge, and it gives an appeal to the Court. I do not say that it is absolutely necessary that counsel should speak first. If the Judge intimates what his intention is, and if the counsel on one side supports that intention, and the opposing counsel has an opportunity of shewing cause, then I think that that is sufficient. Sometimes, as has been said, the verdict of the jury is taken when none of the parties are present; but if the counsel in fact or by conduct agree that the trial shall be

(3) 48 Law J. Rep. C.P. 535; Law Rep. 4 C.P. D. 432.

(4) 48 Law J. Rep. Q.B. 446; Law Rep. 4 Ex. D. 176.

(5) 48 Law J. Rep. Q.B. 521; Law Rep. 4 Q.B. D. 611.

Collins v. Welch (App.), C.P.

in substance prolonged till the following morning, then I think that an application made at the sitting of the Court on the following day would be an "application made at the trial" within the order. In the case now before us, Denman, J., may have been the first to move; but both counsel were present, and they supported and opposed the intimated decision of the learned Judge, so that substantially an application was made at the trial, and the requirements of the rule have been obeyed, so that the appeal fails.

COTTON, L.J.—I think that in this case the application was, as a matter of substance, made at the trial, even though in form the learned Judge anticipated the counsel; and therefore the appeal must fail. I do not now desire to give any decision on the other points that have been raised. I do not at present incline to the opinion that "good cause" means that there may be an appeal on a mere question of costs; nor do I give any opinion whether, if there was no application made, the learned Judge could of his own motion make an order depriving a party of costs.

Judgment affirmed.

Solicitors—H. W. Christmas, for plaintiff; H. A. Lovett & Co., for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. }

Feb. 20. }

GILL v. DICKINSON.

Mines and Minerals—Rights of Owner of Minerals—Compensation for Disturbance of Surface—Bishopric of Durham—31 Geo. 2. c. 10—Custom.

By an Inclosure Act the waste lands of a manor were divided among several allottees, who were to be bound to contribute inter se to compensate any of their number whose allotments might be injured by the lord working the minerals. The minerals were reserved to the lord; and it was enacted that he should at all times thereafter hold and enjoy all mines, &c., together with the liberty of searching for and working the

said mines as fully and freely as he could have had or enjoyed the same if the Act had not been passed, and that without making any satisfaction for so doing:—

Held, overruling *Blackett v. Bradley* (31 Law J. Rep. Q.B. 65), on demurrer to a statement of defence which, in answer to a claim by one of the allottees against the lord for working the mines without leaving a sufficient support for the surface, set up the statute, and alleged that the lord had been used as of right to search for minerals and disturb the surface without making any compensation; that the Act having expressly authorised the lord to disturb the surface without making any satisfaction for so doing, the defence was good; and that it was not competent to the plaintiff to inquire into the question whether before the Act the lord could, consistently with the principle laid down in *Hilton v. Lord Granville* (13 Law J. Rep. Q.B. 193), have had such a right as it was averred that he had exercised.

Demurrer to statement of defence.

The plaintiff, as being the owner of certain lands in the county of Durham, sued the defendants for having so wrongfully, carelessly, negligently and improperly worked certain mines under the said lands, without leaving any sufficient support for the surface, that great parts of the land fell in and sank, and the plaintiff's estate in the land was greatly deteriorated in value.

To this the defendant pleaded that he worked the mines in question as assignee of the Bishop of Durham, and that by an Act of 31 Geo. 2. c. 10, which was an Enclosure Act, it was enacted that the Bishop of Durham, his successors and assigns, should and might at all times thereafter have, hold and enjoy all mines, &c., together with the liberty of searching for, winning and working the said mines, &c., as fully and freely as he or they might or could have had or enjoyed the same in case the Act had not been passed, and that without making or paying any satisfaction for so doing.

That it was further enacted that when or as often as any person or persons should suffer damage in his or their respective allotments by the searching for,

Gill v. Dickinson, Q.B.

winning and working of the mines therein, upon complaint thereof made by such person or persons so damnified to a justice of the peace, such justice was empowered and required to examine and inquire into such complaint, and finally to settle and assess the damages sustained, which damages should be borne by the occupiers of the several said allotments, &c.; that the allotments had been duly made according to the provisions of the Act, and that the land mentioned in the statement of claim was parcel of the waste so allotted; that from time immemorial, up to the passing of the Act, the Bishops of Durham had been used as of right to search for and work the mines lying in and under the said waste lands without leaving support for the surface, and without making or paying any satisfaction for any injury that might be caused by their so doing, and that since the Act they have worked the mines in the same way.

The Act of Parliament will be found fully recited in *Blackett v. Bradley* (1), where the pleadings in an exactly similar action are set out at length, and where the plaintiff obtained judgment on demurrer to a plea raising exactly the same defence as was set up in the present case.

Gainsford Bruce, in support of the demurrer.—This point is concluded by *Blackett v. Bradley* (1), where the attempt was in vain made to destroy the authority of *Hilton v. Lord Granville* (2). That case, however, decided that a custom to work mines so as to let down the surface could not be supported.

[LUSH, J.—But here there is an Act of Parliament authorising the Bishop to do so without making satisfaction.]

The Act was passed on the mistaken supposition that there was a prescriptive right to cause this damage without making compensation, which there could not be. The Act could not, therefore, reserve a right which did not exist.

[LUSH, J.—But does it not make it exist, and legalise it?]

This point was not raised in *Blackett*

v. Bradley (1); it was affirmed on the authority of *Hilton v. Lord Granville* (2) that such a right could not exist.

Herschell, contra.—There is a manifest distinction between this case and *Lord Granville's*, and it is strange that it was not pointed out in *Blackett v. Bradley* (1). In the old case the custom set up was to let down all the tenements on the manor—that would be a manifest derogation from the grant. Here the right claimed was under the waste of the manor. Whatever the lord could reserve by grant he could have by custom; and the House of Lords said that he could not reserve by grant such a right as to let down all the tenements in the manor; therefore he could not establish such right by custom—*Roubotham v. Wilson* (3). But this right could have existed, and it has been actually recognised and legalised by the Inclosure Act, which provides a mode of compensation to the allottee, who may be injured by the mining operations.

LUSH, J.—If I could have seen that in *Blackett v. Bradley* (1) the Court had had its attention called to the distinction between the facts in that case and those in *Hilton v. Lord Granville* (2), and to the closing words of the Act of Parliament, which enacted that the Bishop of Durham should enjoy all liberty of working the mines without making any satisfaction for so doing, I should have been bound to follow the decision in that case and leave the defendants to go to the Court of Appeal; but these matters were not brought to the attention of the Court; on the contrary, it was admitted that the case was within the authority of *Hilton v. Lord Granville* (2), and the Court was simply invited to say whether *Hilton v. Lord Granville* (2) had not been virtually overruled, and they decided that it had not.

Now I think that it is clear here that, whether the claim originally made was well founded or not, it was legalised by the Act of Parliament. The allottees all took the waste land, subject to the Act. The very words employed suppose that

(1) 1 B. & S. 940; 31 Law J. Rep. Q.B. 65.

(2) 5 Q.B. Rep. 701; 13 Law J. Rep. Q.B. 193.

(3) 8 H.L. Cas. 348; 30 Law J. Rep. Q.B. 49.

Gill v. Dickinson, Q.B.

the Bishop as owner of the minerals will do something which at common law will entitle the owner of the surface to compensation; and then the Act goes on to provide that the surface owner shall not be without compensation, by making all the allottees liable to contribute to the damages suffered by any particular allottee caused by the exercise of the powers of the Bishop of Durham in working the mines.

I think, therefore, that the plea is a good one which justifies what the defendant has done under this Act of Parliament.

MANISTY, J.—I am of the same opinion, and for the same reasons. The case is a peculiar one. The lord was the owner of the surface and of the minerals underneath, but certain persons had rights of common over the surface. Under these circumstances it is averred, and not denied, that the lord used to exercise his right of digging for minerals, and used to disturb the surface, without making any compensation to those whose rights of common were thereby interfered with.

Then came the Act of Parliament, which had the same effect as a deed between the parties, and provided that the lands should be enclosed, and that the lord was to continue to be at liberty to get the minerals. If it stopped there I might be inclined to construe the Act against the lord and in favour of the allottees, importing as a condition of the continuance of the lord's right to search for minerals the necessity of his making satisfaction for damage done. But I find not only an express enactment that the lord should not make any satisfaction, but also a compensation clause for the benefit of the allottee whose allotment might be damaged, and throwing the burden not on the lord but on all the other allottees.

For these reasons I think the plea good, and the demurrer must be overruled.

Demurrer overruled.

Solicitors—Gregory, Rowcliffes & Co., agents for W. Robinson, Darlington, for plaintiff; Ridsdale, Cradock & Ridsdale, agents for W. W. & W. J. Watson, Barnard Castle, for defendant.

[IN THE COURT OF APPEAL]

(Appeal from the Queen's Bench Division.)

1880. } COLLINS v. THE VESTRY OF PAD-
Feb. 23. } DINGTON.*

Practice—Time for Appealing—Final or Interlocutory Proceeding—Rules of Court, Order LVIII. rule 15.

A judgment on a question arising in an action, and stated in a special case for the opinion of the Court by the arbitrator to whom the action has been referred, is an interlocutory judgment, and must be appealed from within twenty-one days.

Appeal by the plaintiff from the judgment of the Queen's Bench Division on a Special Case stated by an arbitrator. The case is reported 48 Law J. Rep. Q.B. 345.

An action brought by the plaintiff against the defendants was referred to an arbitrator. The order of reference contained a clause empowering the arbitrator to state a case for the opinion of the Court on any point on which he might think it desirable to do so. A question was raised as to the construction of one part of a contract made between the plaintiff and the defendants, and the arbitrator stated a case requesting the opinion of the Court upon that question, and when the Court had given its decision, the arbitrator was to assess the damages.

The Queen's Bench Division answered the question in favour of the defendants, and gave judgment accordingly on the 1st of April, 1879. The plaintiff appealed, but not until more than twenty-one days had elapsed.

W. G. Harrison (Robins with him), for the defendants, took a preliminary objection.

This appeal is too late. The judgment of the Queen's Bench Division was an interlocutory judgment, and no appeal can be brought after the expiration of twenty-one days, Order LVIII. rule 15 (1). In this case the arbitrator only

* *Coram* Bramwell, L.J.; Baggallay, L.J.; Thesiger, L.J.

(1) Order LVIII. rule 15. "No appeal from any interlocutory order shall, except by special

Collins v. Vestry of Paddington (App.), Q.B.

stated one question which arose during the case, and that having being decided by the Court it is necessary for the parties to go back to the arbitrator.

Seymour and Bompas, for the plaintiff.—It is submitted that this judgment is final. It fixes the *status* of the parties, and that satisfies the definition given by Brett, L.J., in *The Standard Discount Company v. La Grange* (2). It is final as regards the matter before the Court and defines the rights of the parties. It has been held that an order allowing or overruling a demurrer is not an interlocutory order with regard to the time for appealing—*Trowell v. Shenton* (3).

If, however, the judgment be considered not to be final, still it is submitted the appeal is not too late, for there is a distinction between a judgment and an order, and it is only orders that must be appealed from within twenty-one days. By rule 4 of Order LVIII. "Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice." The provisions of rule 15 (1) of the same order, only apply to appeals from orders and not to appeals from judgments. The view is supported by the observations of Bramwell, L.J., in *The Standard Discount Company v. La Grange* (2). If, therefore, this is an interlocutory judgment, the time for appeal is not gone by. *M^r Andrew v. Barker* (4) does not dispose of this contention, for that was an interpleader issue, and in such a case the decision of the issue is not a judgment, as the issue is only to inform the conscience of the Court, and it is therefore necessary to apply to the Judge for a judgment.

BRAMWELL, L.J.—We are all of opinion that this appeal is too late. The question

leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year."

(2) 47 Law J. Rep. C.P. 3; Law Rep. 3 C.P. D. 67.

(3) 47 Law J. Rep. Chanc. 738; Law Rep. 8 Ch. D. 318.

(4) 47 Law J. Rep. Chanc. 340; Law Rep. 7 Ch. D. 701.

VOL. 49.—Q.B., C.P. & EXCH.

has been decided many times. It is clear that this is an interlocutory judgment, and I do not think that the distinction attempted to be taken is a valid one.

BAGGALLAY, L.J., and THESIGER, L.J., concurred.

Seymour applied for special leave to appeal, notwithstanding the lapse of time.

BRAMWELL, L.J.—Leave to apply is not required, but to obtain leave application must be made upon affidavits, and as, if this appeal were dismissed, some difficulty might arise as to the power of the Court to entertain the application, we will reserve our judgment until the plaintiff has had an opportunity of making the application.

Judgment accordingly.

Solicitors—McMullen, for plaintiff; J. H. Hortin, for defendants.

[IN THE EXCHEQUER DIVISION.]

1879. { THE OVERSEERS OF ST. WERBURGH,
Nov. 28. { DERBY (*appellants*) v. HUT-
CHINSON (*respondent*).

Poor-rate—32 & 33 Vict. c. 41. s. 16—
*Occupier going out before the Rate dis-
charged*—*Unoccupied Premises*.

[For the report of the above case, see
49 Law J. Rep. M.C. 23.]

Spencer Hall 50 L 36 L 375
Abbott & Andrews 51 L 36 L 642.

[IN THE EXCHEQUER DIVISION AND IN
THE COURT OF APPEAL.]

1879.

Nov. 20.

Dec. 15.

1880.

Feb. 17, 18.

MYERS v. DEFRIES AND
ANOTHER.

Practice—Costs—Action tried with a Jury—Several Issues—Event where Plaintiff succeeds on some Issues and Defendant on others—Rules of the Supreme Court, Order LV. Rule 1.

In an action brought to recover damages for, first, malicious proceedings in bankruptcy; second, libel and slander; third, trespass and conspiracy, and tried with a jury, the plaintiff obtained a verdict and judgment with a farthing damages upon the claim for libel, and the defendants obtained a verdict and judgment upon the other issues. Without any order having been made giving to the defendants any costs, a Master taxed in favour of the defendants the costs of the issues upon which they had succeeded:—Held by the Exchequer Division and by the Court of Appeal, affirming the judgment of the Exchequer Division, upon motion to review the taxation, that the defendants were entitled to those costs, and that the taxation was right.

Motion by plaintiff to review taxation of costs.

The facts are stated in the judgment of the Court, and are also shortly stated above in the head-note.

Murphy and Clay (on Nov. 20), for the plaintiff.—All law upon the subject of costs prior to the Judicature Acts, and not specially preserved by the Judicature Acts, is abrogated—*Garnett v. Bradley* (1), *Ex parte The Mercers' Company* (2). And under the Rules of the Supreme Court, Order LV. rule 1 (3),

(1) 48 Law J. Rep. Exch. 186; Law Rep. 3 App. Ca. 944.

(2) 48 Law J. Rep. Chanc. 384; Law Rep. 10 Ch. D. 481.

(3) Order LV. rule 1:—"Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the

the costs of issues cannot be taxed without a special order, although such costs might, prior to the Judicature Acts, have been taxed under rule 62 of the Rules of Hilary Term, 1853. A new system of pleading has been introduced, Order XIX. rules 1, 2 and 21. And there are no longer any separate issues raised by the pleadings. The word "issue" in the proviso to Order LV. rule 1 (3), refers to an issue directed by a Court or Judge, not to issues resulting from the pleadings. The "event" which, in the absence of a special order, costs are to follow, is the event of the action. In equity before the Judicature Acts, a party who succeeded generally in a suit had not to pay the costs of issues on which his adversary succeeded.

According to the construction of Order LV. rule 1 (3), for which the defendants must contend, there is hardly any room for the application of Order XXII. rule 4, which empowers the Court to make such order as shall be just with respect to any extra costs occasioned by denying in a defence allegations which ought to have been admitted. This case is not affected by *Blake v. Appleyard* (4); that was a case of counter-claim, and a counter-claim is in the nature of a cross-action. No hardship is involved in the construction for which the plaintiff contends, inasmuch as the Court has the fullest discretion with regard to costs, as illustrated in *Harris v. Petherick* (5).

Gates and Gore, for the defendants.—Upon the question whether rule 62 of Hilary Term, 1853, still subsists, section 21 of the Judicature Act, 1875, and the note at the head of the schedule of rules in that Act, are material.

[POLLOCK, B., referred to *Garnett v. Bradley* (1).]

Upon the true construction of Order LV. rule 1 (3), the defendants are en-

discretion of the Court . . . provided that where any action or issue is tried by a jury the costs shall follow the event, unless . . . the Judge . . . or the Court shall otherwise order."

(4) 47 Law J. Rep. Exch. 407; Law Rep. 3 Ex. D. 195.

(5) 48 Law J. Rep. Q.B. 521; Law Rep. 4 Q.B.D. 611.

Myers v. Defries (App.), Exch.

titled to the costs which have been taxed to them. Issues are still, substantially, raised by the pleadings, *Staples v. Young* (6), *Blake v. Appleyard* (4).

[POLLOCK, B., referred to *Parsons v. Tinkling* (7).]

The word "issue" does not mean simply an issue directed by a Court or Judge. If a plaintiff succeeds on one cause of action and fails on two others, it cannot be said that the event of the action is in his favour. In Chancery before the Judicature Acts, when a plaintiff instituted a suit for two objects, and succeeded upon one and failed on the other, the costs were apportioned—see the opinion of the Taxing Masters in *Saner v. Bilton* (8).

Murphy in reply.—In Chancery the costs of an issue were not taxed to a party who had been generally defeated in the suit without an order—*Daniel's Chancery Practice* (9).

The judgment of the Court (10) was delivered (on Dec. 15, 1879), by

POLLOCK, B.—The plaintiff, by his statement of claim, sought to recover from the defendants, Coleman Defries and Moss Defries, damages in respect of three distinct causes of action:—First, For malicious proceedings in bankruptcy. Second, For libel and slander. Third, For trespass and conspiracy.

The action was first tried in July, 1877, when a verdict was found on all the issues for the plaintiff against the defendants, Moss Defries and Coleman Defries.

A new trial having been ordered, the action was again tried, in May, 1878.

The jury on the second trial found a verdict for the plaintiff upon the claim for damages for libel, with a farthing damages, and for the defendants upon the other issues. The learned Judge directed the verdict and judgment to be entered for the plaintiff for a farthing

damages upon the claim for damages for libel, and verdict and judgment for the defendants upon the other issues, without making any order as to costs, and the Associate gave his certificate accordingly.

The plaintiff on the 8th of June, 1878, signed judgment in accordance with the certificate.

In August, 1878, the solicitors for the defendants, Coleman Defries and Moss Defries, served notice of motion to the Court to deprive the plaintiff of his costs and to direct the plaintiff to pay the defendants their costs of the action.

On the 17th of March, 1879, this Court made an order as follows:—"It is ordered that the plaintiff have no costs of the action herein, and that there be no costs of this motion on either side," and this order was subsequently affirmed by the Court of Appeal (11).

The Master, upon the taxation, refused to tax the costs of the issue found for the plaintiff, and taxed the costs of the defendants, Moss Defries and Coleman Defries, of the issues found for them. And upon this the plaintiff moved to review the taxation, upon the ground that there having been no order by the Judge who tried the cause, or by the Court, giving to the defendants any costs, they were not entitled to them (12).

Before the Judicature Act, 1873, this matter would have been governed by rule 62 of the rules of Hilary Term, 1853, made under the Common Law Procedure Act, 1852; which provided that "when issues in law and fact are raised, the costs of the several issues in law and fact will follow the finding or judgment." It was argued, however, for the plaintiff, that this rule was repealed, either expressly or by implication, by the Judicature Acts, 1873 and 1875, and the Rules made under the latter, and we think this is so. In the first place by Order XIX. rules 1 and 2, a new method of pleading, by statement of claim and statement of defence,

(6) Law Rep. 2 Ex. D. 325.

(7) 46 Law J. Rep. C.P. 230; Law Rep. 2 C.P. D. 119.

(8) 48 Law J. Rep. Chanc. 545; Law Rep. 11 Ch. D. 416.

(9) 5th edit. p. 1017.

(10) Pollock, B., and Huddleston, B.

(11) See dismissal of appeal, 48 Law J. Rep. Exch. 446; Law Rep. 4 Ex. D. 176.

(12) The plaintiff made his application in the first instance at Chambers, and the matter was referred, by Field, J., to the Court.

Myers v. Davies (App.), Exch.

is substituted for the old pleadings, by declaration and plea, and therefore the issues dealt with by the rule of 1853 cannot now be properly said to exist; and, secondly, by Order LV. rule 1 (3), a new rule is laid down as to costs, which is applicable to all proceedings in the High Court, and governs therefore costs in both the Chancery and Common Law Divisions; and this provides "that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the Judge before whom such action or issue is tried, or the Court shall otherwise order." The provision of this rule must be taken in conjunction with section 33 of the Judicature Act, 1875, which repeals any enactment "inconsistent with this Act or the principal Act," and although the provisions of the Common Law Procedure Act and of Order LV. rule 1 (3) are not in all respects inconsistent, they are so if taken in their entirety, since one makes costs follow the event, whilst the other makes them follow the event unless the Judge or the Court otherwise orders; and therefore it seems to us that, applying the well-known rules as to the repeal of an earlier by a later statute, which were so recently explained and acted upon by the House of Lords in *Garnett v. Bradley* (1), when this very rule was under consideration, it must be taken that the rule of 1853 is abrogated, and our judgment must depend upon what is the true construction of Order LV. rule 1 (3).

But, although this be conceded, it does not follow that when we come to consider what is the true meaning and effect of Order LV. rule 1 (3), we ought not to bear in mind what has been the general tendency of legislation, and rules, affecting the question of costs, where a plaintiff succeeds as to one portion of a claim and the defendant as to another, from the statute of James I, to the Judicature Acts, namely, that the costs followed the event, and that the successful party had them as of right. Remembering, then, these provisions, as laid down and acted upon for a long series of years, what is the intention of this rule, to be gathered from

its language? We think it is, that where by the statement of claim and statement of defence, or any further pleadings, more than one definite issue is raised and determined by the Judge and jury by whom the action is tried, and no order otherwise is given by the Judge, the word "event" is to be construed distributively; and if, in the same action, the plaintiff obtains a verdict and judgment as to one distinct cause of action, and the defendant obtains a verdict and judgment as to another distinct cause of action, there are two events, and the Master is to tax the costs accordingly.

It may be that in some cases where there are different findings of a jury in the same action there is but one judgment, and so but one event; for, as was pointed out by Bramwell, L.J., when this case was before the Court of Appeal (13), the word "event" cannot mean the verdict of the jury without judgment; and again, there may be cases in which there may be a finding of the jury, and even a judgment, upon some subordinate question raised by the pleadings, which could not properly be said to amount to an "event," and in which the Master, in the absence of some direction by the Judge who tried the cause, could only tax generally for the plaintiff or for the defendant. But here no such difficulty arises. The plaintiff claims in respect of three distinct causes of action, as to one of which he succeeds, and as to two of which the defendant succeeds, and hence there are three findings of the jury and three judgments; and we are unable to see why the defendants, who have expended costs in defeating the two causes of action in respect of which they have succeeded, may not say that the two events were in their favour as correctly as the plaintiff can say that one event was in his favour. And we think we ought not the less to give this construction to the rule, because we may foresee cases in which questions raised at a trial may be so subordinate to the real event of the action, or so indefinite, that a Master might properly

(13) 48 Law J. Rep. Exch. at pp. 447, 448; Law Rep. 4 Ex. D. at p. 180.

Myers v. Defries (App.), Excn.

say, although there have been many issues, there has been but one event. The answer to this sort of objection is that, in such cases, a direction must be obtained at the trial from the Judge who tries the cause, as is so frequently done in the Chancery Division.

The plaintiff further argued (failing his first contention) that this Court intended the order of the 17th of March, 1879, to be a final order upon the question of costs, and that the defendants, Coleman Defries and Moss Defries, not having obtained an order, in the terms of the notice of motion, for payment of their costs by the plaintiff, they are precluded from claiming of the plaintiff any costs either of the action or of any of the issues in the action. This argument ought not, we think, to prevail. It seems to us clear that the costs which were the subject-matter of the defendants' notice of motion, and which were dealt with by the order of the Court of the 17th of March, were the general costs in the action, and that the Court, when making that order, had not before them the costs of the two issues upon which the defendants succeeded, and therefore had no intention to deprive the defendants of them.

The result is that there will be no order, and the plaintiff must pay the costs of this motion and the costs at chambers.

The plaintiff appealed (14).

Murphy and Clay, for the plaintiff (on the 17th of February).—Before the Judicature Act the costs of "issues" were regulated by the Common Law Procedure Act, 1852, and the taxation was governed by rule 62 of the Rules of Hilary Term, 1853. The Judicature Act repeals those rules, for they are not specially preserved—*Garnett v. Bradley* (1), *Ex parte The Mercers' Company* (2). Order LV. rule 1 (3) was drawn with reference to Order XVII, by which a plaintiff was allowed a large liberty in joining causes of action in one claim, and it is submitted that the intention was to confine the right to a

party to have costs, to cases in which the whole event was in his favour. That view is supported by the decisions given before the passing of the Judicature Act, the principles of which would be in the minds of the framers of these rules—*Gribble v. Buchanan* (15), *Boodle v. Davies* (16), *Keeves v. McGregor* (17). The event is the net result after all the items on the various issues have been considered—*Chatfield v. Sedgwick* (18), *Field v. The Great Northern Railway Company* (19), and the net result is, in this case, in favour of the plaintiff.

Should the opinion of the Court be against the plaintiff on the construction of this rule, it is then submitted that, in this case, the defendants ought not to have their costs, as they have, by their conduct, led the plaintiff to believe that they would not claim them.

Gates and Edward Pollock, for the defendants, were desired to argue the question of the construction of the rule, and were not called on as to the last point made for the plaintiff.

The two questions are, What is the meaning of the word "event," and what are the costs which it is intended should follow the event? The judgment of the Exchequer Division is right on both points. The event mentioned in the rule under discussion is the event or result of each separate cause of action. Without doubt, in one sense, issues, using that word as it was used before the Judicature Act came into force, do not now exist; but issues do still exist in a certain sense, Orders XXVI. and XVII. Various causes of action can be joined in one claim—the claim, the defence, the counter-claim, all form one action: on these various issues may arise, of each of those issues there must be a result, and that result is an event. There is no difficulty in apportioning the costs where a plaintiff succeeds in some items of his claim, and fails

(15) 18 Com. B. Rep. 691; 26 Law J. Rep. C.P. 24.

(16) 3 Ad. & E. 200.

(17) 9 Ad. & E. 576.

(18) Law Rep. 4 C.P. D. 383, 459.

(19) 47 Law J. Rep. Exch. 662; Law Rep. 3 Ex. Div. 261.

(14) *Coram Bramwell, L.J.; Baggallay, L.J.; Thesiger, L.J.*

Myers v. Defries (App.), Exch.

on others, even as there was none in the Court of Chancery, in the case of a plaintiff failing as to part of his bill—*The Attorney-General v. Carrington* (20), *Saner v. Bilton* (8). The cases relied on by the plaintiff were cases of references under special orders, each of which must be considered with reference to the peculiar circumstances of the case. *Blake v. Apleyard* (4), *Hallinan v. Price* (21), are direct authorities in favour of the defendants.

The costs, which are to follow the event, taking that word distributively, are the general costs; that was the rule before the Judicature Act, and there is nothing in that Act, or in the Rules of Court, to change the well-understood practice.

Such has been the view hitherto taken by the Courts whenever the question has arisen, even though there may not have been a formal decision on the question—*Berdan v. Greenwood* (22), *Cole, Marchent & Co. v. Firth* (23), *Davidson v. Gray* (24).

Murphy, in reply.—*Chatfield v. Sedgwick* (18) settled that the event means the balance, the defendants here have not gained the balance. There can only be one judgment and one event in this case. Issues were the creatures of statute, they were not preserved, and therefore they must be held to be abolished. To support the contention of the defendants it would be necessary to alter Order LV. rule 1 (3), and to change the word event into the plural number.

BRAMWELL, L.J.—I am of opinion that this judgment must be affirmed. Rule 1 of Order LV. (3) cannot be said to be a very happy rule, and so much discussion has taken place upon it that it might not be inconvenient if it were repealed and then re-drawn. We have to-day to consider how this rule is to be applied to a case which was very probably not in the contemplation of those who framed it. I think

that the old law as to costs is abolished, and that the old rule as to issues is also abolished; but the law as it was prior to the Judicature Act may well be referred to for the purpose of construing the new rules of Court. It has been urged on behalf of the appellants that rule 1 of Order LV. (3) only applies in cases where the event proves to be wholly in favour of either the plaintiff or the defendant, and it is said that if the result of a trial be that the plaintiff succeeds as to one part, and the defendant succeeds as to another part of the subject-matter of the cause, then the rule does not apply, as it cannot be said that there is any event within the meaning of the rule. The appellant says that the result of the trial must be considered to be entirely one-sided, as otherwise there cannot be an event, and that in the present case the event is in his favour, and that he has succeeded in the result, for that he recovered one farthing damages on one of the causes of the action, while the defendants have not recovered anything, so that the plaintiff claims to be the person who has obtained relief, while the defendants have not obtained anything, and therefore he says the event is wholly in his favour.

Now I do not think that this contention can succeed. I do not think that it would be reasonable, nor do I think that the unreasonableness which would result from putting such a construction upon the words, "costs shall follow the event," can be said to be got rid of by the discretion given at the end of the rule to a Judge of the Court. It would not be good legislation first to make an unreasonable rule, and then to insert a proviso under which the unreasonableness of the rule might be done away with. It is said that the event in this rule means the judgment which is given on and after the finding of the jury." I am of opinion, however, that this is not sufficient; there may be several events in an action, and the rule must be read as though it were "the costs shall follow the events." The word event in this rule is a *nomen collectivum*, and may be said to be equivalent to result. Suppose that the word "result" had been placed in the rule instead of the word "event," could

(20) 6 Beav. 454.

(21) 41 Law Times, N.S. 627.

(22) 47 Law J. Rep. Exch. 628; Law Rep. 3 Ex. Div. 251.

(23) 40 Law Times, N.S. 851.

(24) 40 Law Times, N.S. 192.

Myers v. Defries (App.), EXCH.

it then be said that there could only be one result? Surely not; event and result may both comprise several things. I think that the rule means that in cases where several causes of action are combined and tried together there may be several events, and that then the costs must follow those events. A doubt did suggest itself to my mind as to which party ought in such a case to get the general costs of the cause. Each party contends that the event is in his favour; but I think that these costs will, if a reasonable rule be applied, be found not to present any difficulty. The costs of the writ, for instance, are necessarily incurred by the plaintiff if there is an event in his favour. Where an event is in the plaintiff's favour, and where he gets costs, he will get the general costs of the cause; where, however, he recovers nominal damages and gets no costs, he will not have to pay any general costs to the other party.

This seems to me to be reasonable, and to carry out the intention of the rule. The appeal must therefore be dismissed, and the judgment of the Exchequer Division must stand.

BAGGALLAY, L.J.—I am of the same opinion. The plaintiff sued the defendants in respect of three distinct causes of action. He recovered a verdict upon one cause of action, and the jury awarded him one farthing as damages. A verdict passed for the defendants upon the two other causes of action. A verdict and judgment were entered for the plaintiff for a farthing damages, and verdict and judgment were entered for the defendants upon the other issues. No order was made as to costs. The Exchequer Division afterwards ordered that the plaintiff should have no costs of the action, and that order was affirmed by this Court. The Master refused to tax the costs of the issue found for the plaintiff, and taxed the costs of the defendants of the issues found for them.

The plaintiff moved to review the taxation, but his motion was refused, and he now appeals to this Court.

The question is, what is the event of the trial within the meaning of rule 1

of Order LV. (3)? I am of opinion that the event is the outcome or the result of the trial, and that, although there may be one verdict and one judgment, still there may be more than one event. A plaintiff may now unite in the same action several causes of action, and when he does so, the several items which compose his claim are often tried together; but it is provided by rule 1 of Order XVII., that the Court or a Judge may order separate trials of any of the causes of action so united if he thinks they cannot be conveniently tried together. If an order to this effect should be made, in such a case it is clear that there would be several events, and that if such an order had been made in this case, there would have been events which would have resulted in favour of the defendants. At one part of the argument I was pressed with the difficulty as to what costs could be due to the defendants; but that question is not now before us, the only question we have to consider is, whether the defendants are entitled to have any costs.

I agree also with the judgment of the Court below in holding that rule 62 of the Rules of Hilary Term is abrogated by the provisions of the Judicature Act; but it seems to me reasonable to refer to the old practice, and to bear in mind what the law as to costs was when the Judicature Act was passed, in order to construe the Order which is now under consideration. I do not think that there is any ambiguity in the Order, but if there were, I think it would be cleared up by a consideration of the practice which existed before the Judicature Act.

THESIGER, L.J.—I am of the same opinion. The facts of the case are undisputed and have been already stated. I think that it is important to consider what was the practice in relation to the costs of a plaintiff and a defendant prior to the passing of the Judicature Act. A plaintiff could, before that Act was passed, join in one action several causes of action subject to certain defined limitations, and a defendant could plead several pleas subject also to certain limitations, conditions, and qualifications, and when the verdict was given and judgment signed the

Myers v. Defries (App.), Exch.

plaintiff was, if he succeeded on one of his causes of action, entitled to the general costs of the action, subject, of course, to certain exceptions provided for by certain statutes, such as the Statute of James, Lord Denman's Act and the County Court Act. The defendant also, in such a case, had taxed to him the costs of the particular issues in respect of which the plaintiff failed to recover a verdict and judgment.

The Judicature Act has enlarged the powers of a plaintiff, and has enabled him to join in one action several causes of action, subject to but little limitation. Issues, using that word in the sense in which it was used prior to the Judicature Act, have been abolished; but there are issues still, and the object of all pleading is now to get clear, definite and precise issues. Issues are mentioned in rule 18 of Order XIX., in rules 19 and 23 of Order XXXI. and in rule 6, 7 and 8 of Order XXXVI. This last-mentioned order introduces a new practice as to issues, for under the old system issues might be directed and tried in interpleader, by order of a Court of Equity, or by order of the Court of Probate, but otherwise it was necessary to try an action as a whole, and there was no power to order a trial of different issues of fact in different ways.

I think it may be said that *a priori* the Legislature would not alter a reasonable rule, and it appears to me that, although the Legislature has provided that costs shall be in the discretion of the Judge, it has also given him a hint as to the way in which he should, as a rule, exercise that discretion. The rule says, "provided that where any action or issue is tried by a jury the costs shall follow the event." Thus far the rule contemplates a case in which no order is made by the Judge, and two alternatives then present themselves, either the plaintiff must have the whole costs of the action if he succeed upon any one item of his claim, or the costs must abide the event, using the word event as it was used prior to the passing of the Judicature Act, in which case the plaintiff who succeeds gets the general costs of the cause; but the defendant, if there are specific issues on

which he succeeds, gets the costs of those issues.

I think that the latter alternative is the true one, and that it carries out the intention of the rule more satisfactorily than does the former alternative; it affords a reasonable construction, and it prevents such a case as the present from being *casus omissus*. The event must either be a complex matter to be arrived at by the ultimate result of all the matters in dispute, or the word must be read distributively, and there seems no reason why it should not be so read.

I hold that the general costs of the action follow the whole event of the action, and then that the taxation proceeds, having regard to each event and to the relation it bears to the issues. This practice seems to me, as I have said, to be reasonable. It is in accordance with the practice of the Masters, and with the opinion of the Exchequer Division in this case. The question has been discussed in *Davidson v. Gray* (24), in *Blake v. Appleyard* (4), in *Saner v. Bilton* (8), in *Cole, Marchent & Co. v. Firth* (23) and in *Berdan v. Greenwood* (22), and although it arose incidentally in those cases, still the expression of opinion in all of them was to the same effect as that which we are now expressing in this case.

Judgment affirmed.

Solicitors—G. S. & H. Brandon, for plaintiff;
John Hands, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]
1879. } HALL (appellant) v. HOPWOOD
Dec. 3. } (respondent).

Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, r. 1—Insufficient Ventilation in Mine—Expense of Alteration—Information—Liability of Manager.

[For the report of the above case, see 49 Law J. Rep. M.C. 17.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE SOUTH EASTERN RAILWAY
 Dec. 19. } COMPANY v. THE RAILWAY COM-
 1880. } MISSIONERS AND THE MAYOR AND
 Jan. 13. } CORPORATION OF HASTINGS.

Railway Commissioners, Jurisdiction of
 —36 & 37 Vict. c. 48—*Order to execute*
Structural Works—17 & 18 Vict. c. 31—*Prohibition.*

The 2nd section of the *Railway and Canal Traffic Act* (17 & 18 Vict. c. 31), enacts that every railway company and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, &c.; and section 3 enacts, that it shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of that Act, to apply to the Court of Common Pleas to hear and determine the matter of such complaint, and for that purpose to prosecute any enquiry the Court may deem necessary by engineers, barristers or other persons, after which the Court may issue a writ of injunction.

By section 6 of the *Regulation of Railways Act*, 1873 (36 & 37 Vict. c. 48), the Railway Commissioners had transferred to them all the jurisdiction conferred by section 3 of 17 & 18 Vict. c. 31, on the several Courts and Judges empowered to hear and determine complaints under that Act, with power to make orders of a like nature with the writs and orders authorised to be issued and made by the said Courts and Judges.

The Railway Commissioners, having been applied to by the Corporation of Hastings, who complained of the want of sufficient accommodation for passengers, goods and cattle at the Hastings Station of the South Eastern Railway Company, made an order upon the railway company requiring them to enlarge the platforms, to build new waiting rooms, to add a refreshment room, and a covered place under which carriages can set down; to make additional sidings for unloading goods, and to supply cattle pens:—

Held, on demurrer to a declaration in prohibition, by COCKBURN, C.J., and MA-

VOL. 49.—Q.B., C.P., & EXCH.

NISTY, J. (*dissentiente* LUSH, J.), that the Railway Commissioners have no jurisdiction to order structural works and additions to be executed by a railway company beyond those works contemplated when the capital of the company was fixed and sanctioned by Act of Parliament; and that a company cannot be forced, under the above-mentioned Acts, to find fresh capital for structural additions not within the scope of the original enterprise, simply because such constructions might be for the convenience of the public.

This was a demurrer to a declaration in prohibition raising the question of the jurisdiction of the Railway Commissioners to entertain an application by the Corporation of Hastings against the South Eastern Railway Company, and to make an order upon that company to execute certain structural works at the Hastings station involving the expenditure of a considerable amount of capital, and being additions to and extensions of the station originally made, alleged to be necessary and desirable for the accommodation of the increased traffic both in passengers and goods. The application and the judgment of the Commissioners appear very fully set out in the considered judgments below.

The Solicitor-General (Sir H. S. Giffard) (A. L. Smith with him) (on Dec. 19), for the Railway Commissioners, in support of their demurrer to the declaration in prohibition.

Murphy (F. M. White and Mansel Jones with him), for the Corporation of Hastings, the other defendants.

Little (Willis and Brenner with him), for the South Eastern Railway Company, the plaintiffs.

Our. adv. vult.

The following judgments were (on Jan. 13) delivered—

MANISTY, J.—This is a demurrer to a declaration in prohibition by which the plaintiffs, the South Eastern Railway Company, pray for a writ of prohibition directed to the Railway Commissioners to prohibit them from further proceeding in any way touching an application made

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

to them by the defendants, the Mayor, Aldermen and Burgesses of Hastings, pursuant to the "Railway and Canal Traffic Act, 1854," and the "Regulation of Railways Act, 1873."

That application was in substance for an order requiring the Railway Company—

1. To enlarge the Hastings station, and to provide better booking office, waiting room, refreshment room and general accommodation therein.

2. To lengthen and deepen the existing platforms of the said station, and to provide additional platforms.

3. To provide better warehouse accommodation for goods at the said station.

4. To provide better pens at the same station, and additional sidings for cattle trucks.

5. To enlarge the platform of the St. Leonard's station, and to provide that station with a new approach by a direct route.

The full text of the application is set out in the declaration.

The Railway Commissioners have delivered a judgment, which is also set out at length in the declaration. It consists in part of orders, and in part of recommendations.

Among the proposed orders one is to the effect that, considering the exposed position of the station and that Hastings is a place of resort for invalids, the commissioners say they think there is not shelter as things are, and therefore they shall order a substantial addition to be made to the area of the covered platform, and the yard also to be so arranged as that carriages may set down and take up under cover.

Another proposed order is to the effect that the company is to provide at Hastings two general and two first-class waiting rooms, each at least twice as large as the largest of the present rooms, and to reserve also part of their buildings for refreshment purposes.

It is unnecessary to advert at greater length to the terms of the order proposed to be made by the commissioners, because it was agreed on the hearing of the demurrer that the Court should only express its opinion as to the power of the commis-

sioners to compel the company to construct structural works such as those proposed.

The obligations of the company, and the powers of the commissioners, which of course cannot exceed the obligations of the company, depend, so far as this case is concerned, upon the true construction of the 2nd section of the Act of 1854.

That section is, in my opinion, divisible into two parts, and two only. The first relating to the traffic proper of any given railway. The second relating to what I will venture to call foreign traffic, that is to say, traffic carried by and received from one railway to be forwarded by or on another.

By the first part of the section it is enacted that every railway company, canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By the second part of the section it is enacted that every railway company and canal company, and railway and canal company, having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station or wharf of the one near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

desirous of using such railways or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

In each part of the section the railway company is required to afford all reasonable facilities for the purposes mentioned in it, and that without undue or unreasonable preference or advantage, or prejudice or disadvantage, but the first part of the section alone contains the words "according to its powers."

Now it seems to me that these are qualifying words of great significance, and in order to construe them it ought to be borne in mind that the statute deals with an existing railway, which, by the interpretation clause, includes every station of or belonging to such railway, used for the purposes of public traffic, and that the expression "railway company," includes any person being the owner or lessee of, or any contractor working any railway constructed or carried on under the powers of any Act of Parliament.

It should also be borne in mind that before an Act of Parliament can be obtained for making a railway, plans must be deposited shewing the works proposed to be constructed, and very strict proof is required in support of the estimated cost of construction, which forms the basis of the authorised capital of the company.

We start therefore with this, that a railway company constituted by Act of Parliament, has only limited powers and a limited capital, which capital is fixed with reference to the cost of the land authorised to be purchased, and the works authorised to be constructed.

It should also be borne in mind that before any railway can be opened for public use, it has to be passed by a Government Inspector, whose duty is to see that the line and all the stations are completed and properly constructed in accordance with the deposited plans.

Such being some of the circumstances to be borne in mind in construing the Act of 1854, which, be it observed, is an Act for the better regulation of the traffic on railways and canals, let us consider what

is the meaning of the enactment that every railway company shall, "according to its powers," afford all reasonable facilities for receiving and forwarding the traffic, as defined by the interpretation clause in each of the two Acts.

Does it mean, as contended for by the plaintiffs, that the company shall so use and manage its railway with its stations and works, and so conduct its business as to afford, according to its powers, all reasonable facilities for receiving and forwarding the traffic?

Or does it mean, as contended for by the defendants, that if traffic increases beyond what was originally contemplated and provided for, every railway company is compellable from time to time according to its powers (meaning thereby, as is contended, according to its legal capacity) to acquire more land, and construct new and enlarge old works, so as to afford reasonable facilities for receiving and forwarding the increased and increasing traffic.

I am of opinion that the plaintiffs' construction of the Act is the correct one, and that to adopt the defendants' construction would be to impose upon railway and canal companies a burden such as the Legislature never contemplated, and such as I should think few companies would undertake.

It is said that unless the defendants' construction of the Act be adopted, the public are at the mercy of railway and canal companies; in short, that the Act of 1854 is a dead letter.

As regards the public being at the mercy of railway companies, it seems to me that the danger is more apparent than real, even if there be any reality in it, which I doubt. It is the interest of every company to make provision from time to time for increased traffic so soon as the outlay would be remunerative, and that they do so is abundantly proved by the numerous Acts of Parliament which are from time to time obtained for the purpose.

It was well said by Jervis, C.J., in delivering the judgment of the Exchequer Chamber in the case of *The York and North Midland Railway Company v. The Queen* (1) with reference to compelling

(1) 1 E. & B. at p. 865; 22 Law J. Rep. Q.B. 225.

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

railway companies to exercise their powers, that if the work would be remunerative it would probably be proceeded with, and that it is not for the public interest that work should be undertaken if, when made, it would not be remunerative; adding that "by leaving the exercise of the powers to the option of the company the Legislature adopts the safest check upon abuse—self-interest," and as to the statute being a dead letter, I think this is a misconception—because I suppose it will not be disputed that the commissioners have the power to compel railway companies and their lessees and working contractors to maintain their railway, including stations, in an efficient state of repair, and to conduct their business so as to afford, according to their powers or means, the facilities mentioned in the statute without giving any undue or unreasonable preference or advantage to any person or company.

These are large powers, and I venture to think that if the Legislature had intended to give to the Court of Common Pleas or to a single Judge (for it must be borne in mind that a single Judge was authorised to exercise all the powers given to the Court) the unlimited powers now claimed by the Commissioners as their successors, very different language would have been used to that which is to be found in the 2nd and 3rd sections of the Act of 1854.

It is by no means an uncommon case for a railway company to be made by one company and leased to another. In such a case it seems to me the first part of the 2nd section of the Act of 1854 could only admit of the construction contended for by the plaintiffs. A lessee surely could not be called upon to expend his earnings in enlarging the stations, &c., and yet that would be the only source out of which he could do it.

Again, the insertion of the words, "according to their respective powers," in the first part of the 2nd section and the omission of them in the second part, is very significant. I am inclined to think the Legislature meant in the second part of the section, to make it compulsory on all owners and lessees and working contractors of railways, which form part of a

continuous line of railway, to afford reasonable facilities for receiving and forwarding what I will venture to call the foreign traffic, even though they might have to apply their earnings in order to accomplish that purpose. But surely it never could have been intended that every railway and canal company in the kingdom should be compellable, either by increasing its capital, if it had the power to do so, or by expending its earnings, to enlarge and extend its railway so as to meet the requirements for the time being of the public.

What the commissioners are really claiming to do in the present case is, not to compel the South Eastern Railway Company to give facilities according to its powers, but to compel them to increase their powers for giving facilities. That this is so appears from their judgment and the orders they propose to make. They say at page 2 of their judgment, "Two things that are urgently required are additional ground for the purpose of giving a more extended area to the station and the widening of the bridge by which the trains from the south coast and the trains from Tunbridge Wells enter the station." They then go on to state that the company sold their surplus lands in 1856, and that they subsequently obtained an Act of Parliament to enable them to enlarge their station, but their compulsory powers expired by lapse of time without being used; and that they have twice since, namely, in 1870 and again in 1875, applied to Parliament for compulsory powers, but owing to the bills being opposed they withdrew them. The commissioners then proceed thus: "We do not feel called upon to say whether the company had or had not sufficient reason for not going on with their applications to Parliament in 1870 and 1875, but we can have no doubt that with the traffic of the two companies in and out of Hastings so large as it is, and every year becoming larger, it is necessary that the South Eastern Company should find means to extend the limits of their station."

And after adverting to an arrangement which the railway company have made for widening the bridge, the commis-

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

sioners proceed to make orders for enlarging the stations and constructing new works, all of which are set out in their judgment, and to some of which I have already specially adverted.

If the commissioners have the power to make such orders as these I do not see why they should not order a railway with a single line of rails to be converted into one with two lines of rails with suitable stations and other conveniences, if they thought the traffic required it, and the company had the legal capacity to do it. Surely this would be at variance with the principle upon which the Legislature has hitherto acted in sanctioning the construction of railways.

As a rule, Acts for the construction of railways are permissive, not obligatory: see *The York and North Midland Railway Company v. The Queen* (1). No doubt there are exceptions, but they are of rare occurrence.

The 122nd section of the Commissioners Clauses Consolidation Act, 1845, is in accordance with the general principle. It empowers the directors if they think fit to set aside out of the profits such sum as they may think proper to meet contingencies or for enlarging, repairing or improving the works connected with the undertaking and divide the balance only among the shareholders.

The borrowing powers are also permissive, see s. 38.

It is said that as regards matters within their jurisdiction the commissioners are the sole judges of what is reasonable. That is conceded. But it is also said that they have power in point of law to compel any railway or canal company having statutory powers to execute any works which they deem reasonably necessary for accommodating the existing traffic, provided the company has the legal capacity to do what they order.

It seems to me that this is in effect saying that the commissioners can compel railway and canal companies to exercise all their permissive powers not only as regards capital (be it share or borrowed) but also as regards their earnings.

It would require very strong and unambiguous language to convince me that the Legislature ever meant to vest such

a power in a single Judge of the Court of Common Pleas or in any Court or tribunal whatever; and I find no such language either in the Act of 1854 or that of 1873.

The commissioners in their judgment rely upon the *Caterham Case* (2) as an authority for the view they take of their powers. They say the Judges of the Common Pleas in that case acted upon the principle that the Legislature did intend by the word "facilities" to give the public a remedy for a want of reasonable accommodation in the way of works.

The only ground upon which the Judges even granted a rule *nisi* in that case was the allegation of the complainants that whereas there were covered stations at all other places on the line there was not the same accommodation at the Caterham Junction, and so the company subjected passengers travelling on the Caterham line to undue inconvenience and disadvantage. The case, therefore, is no authority whatever for the proposition that the Act gives the commissioners power to order the construction of new and the enlargement of old works to meet increased traffic wholly irrespective of the question of undue preference or undue disadvantage. Moreover the granting of a rule *nisi* which never came on for argument can scarcely be cited as an authority for any proposition.

There is really no authority bearing upon the question now before the Court, and that is a fact of some significance, seeing that the Act has been in operation for a quarter of a century.

Before I conclude I must notice an argument which has been a good deal pressed on the part of the defendants. It is said that in the 3rd section of the Act of 1854 power is given to the Court of Common Pleas or a Judge to direct enquiries to be made by engineers, barristers or other persons to enable such Court or Judge to form a just judgment on the matter of any complaint of a violation of the Act, and it is contended that this affords ground for inferring that the 2nd section was intended to give the power claimed by the commissioners, because it

(2) 1 Com. B. Rep. N.S. 410; 26 Law J. Rep. C.P. 161.

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

is said no engineering question could arise out of an enquiry limited to facilities for receiving and forwarding traffic.

To this I would make a twofold answer—first, I do not think such a power as that which is sought to be exercised should be in any degree a matter of inference. It ought to be found if at all in plain unambiguous language.

Secondly, I think engineering questions of considerable nicety might well arise out of an enquiry limited to facilities for receiving and forwarding foreign traffic. The assistance of an engineer might also well be required if a complaint were made that a particular part of a line was not maintained in good working order, or that access to a station was obstructed, &c., &c. But probably the clause was inserted *pro majori cautela* without reference to any particular purpose.

For all these reasons I am of opinion that the commissioners have not the jurisdiction which they claim. Whether they have the power to order some of the comparatively small things which are involved in the application of the Corporation of Hastings may admit of doubt, but it was arranged that the Court should only express its opinion upon the general question.

LUSH, J. (3).—This is a demurrer to a prohibition issued at the instance of the South Eastern Railway Company to restrain the Railway Commissioners from proceeding to make certain orders which they have announced their intention to make under the Act of 1873 (36 & 37 Vict. c. 48), the Act by which the commissioners are appointed to carry into effect the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), as amended and enlarged by that Act.

It is not necessary at present to state in detail what the proposed orders are; it is sufficient to say that they require the company to extend and improve their station accommodation at Hastings and St. Leonard's, and to make certain additional works adjudged to be necessary to accommodate the increased traffic at those stations, as regards passengers, animals and goods.

(3) Read by Manisty, J.

The railway company object that it is not within the jurisdiction of the commissioners to order any structural works or alterations whatever. The commissioners have demurred to the declaration, and the question is thus directly raised, what is the extent of the jurisdiction conferred by the Act of 1854, as amended by the Act which establishes the Railway Commission.

Neither of the Acts gives any appeal to this or any other Court, except in the form of a special case upon some question of law, and this the commissioners may state or not, as they think fit; and the Act of 1873 declares that "save as aforesaid, every decision and order of the commissioners shall be final."

The jurisdiction we are called on to exercise is, therefore, the common law jurisdiction of restraining by prohibition every inferior tribunal from exceeding its powers. If the matter of the complaint to the commissioners is one which it is competent to them to entertain, we cannot prevent their proceeding on it, so far as it asks what they have power to grant, and making such orders as the circumstances may in their judgment require. We have no jurisdiction in any case to review their decision upon a question of fact, nor upon a question of law which is not raised in the form of a special case.

The first part of the Act of 1854, which we are called on to construe, is by no means explicit. The particular phrase which creates the difficulty is large enough to admit of a wider or a narrower meaning, and a preliminary question arises, namely, what is the rule of construction to be applied to it? Is the Act a remedial or a penal Act? and if remedial, on whose behalf? To my mind the answer is obvious, that it is a remedial Act, and that it was passed in the interest of the public and not in the interest of the companies. The 7th section, it is true, gives a benefit to companies by limiting their liability for the loss of, or injury to, animals, to specified amounts, unless an insurance rate is paid for their carriage; but, on the other hand, *this* section also protects the sender of traffic, whether animals or goods, from being subjected to unreasonable condi-

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

tions in carrying contracts; and all the rest of the Act contemplates only the convenience of the public.

If it is a remedial Act, it is to receive as liberal a construction "to advance the remedy" as its language taken as a whole will fairly admit of. For while we are to collect what the Legislature intended from what it has said, we must look, not at one phrase or one section only, but at the whole of the Act, and must read it by the light which the state of the law at the time and the relation in which the travelling and sending public then stood to the carrying companies, throw upon it.

In 1854, the year of the passing of the Act, railway companies had not only all become carriers, but they had acquired a virtual monopoly of the carrying business of the country, for all kinds of traffic—passengers, animals and goods. The only authority which had been invested with any controlling power was the Board of Trade, and their functions were limited to measures which concerned the public safety.

No line or portion of a line could be opened for traffic without a month's previous notice to the board, and if the inspector of the board reported that the opening would be attended with danger to the public using the railway, by reason either of the incompleteness of the permanent way, or the insufficiency of the establishment for working it, the board were empowered to postpone the opening from time to time until it should appear to them that the opening might take place without danger to the public.

Again, differences between the company and adjoining owners who wished to have a communication between their siding and the railway, as regarded the point of junction, the decision of which was originally vested in justices, had been transferred to the Board of Trade—3 & 4 Vict. c. 97. s. 19.

The board had also authority to decide disputes between two or more companies whose railways had a common terminus, or a portion of the same line in common, or which formed separate portions of one continuous line of railway communication, and to prescribe what arrangements

should be made and observed for conducting their joint traffic with safety to the public—5 & 6 Vict. c. 55. s. 11.

Moreover, the board had power to authorise the revival or extension of the compulsory powers for taking land if the public safety required additional land to be taken for certain specified purposes (s. 15); power to order the erection of screens between the railway and a public road to prevent horses being frightened by passing trains (8 Vict. c. 20. s. 63), and various other powers of a subordinate nature.

These powers still belong exclusively to the Board of Trade.

But neither the Board of Trade nor any other body had authority to direct anything to be done, or to interfere in any matter which concerned merely the convenience or accommodation of the public using the railway. Nor was there any legislative provision for securing equitable conditions in the carrying contracts of railway companies; and although they were enjoined by statute to charge equal tolls to all persons, and after the same rate per ton per mile or otherwise, in the same circumstances; and although, as carriers, they were bound to treat all their customers alike in like circumstances, no means were provided for summarily enforcing this duty, but the parties aggrieved were left to pursue their remedy by the ordinary course of law.

The Act in question was passed to supply these defects. It is applicable to both railway and canal companies, and is intitled "An Act for the better Regulation of the Traffic on Railways and Canals," and the preamble states that it is expedient to make better provision for regulating "such traffic." The former Acts which gave jurisdiction to the Board of Trade were "for the better regulation of railways." I agree with the counsel for the company that the words both of the title and preamble *prima facie* refer to traffic management (properly so called), and that unless we find in the enactment language which requires a wider interpretation they must be so construed.

The Act commences with an interpretation clause which explains and amplifies the words of the enactment. "Traffic"

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

is to include not only passengers and their luggage and goods, animals and other things conveyed upon the railway or canal, but also carriages, waggons, trucks, boats and vehicles of every description adapted for running or passing on the railway or canal.

"Railway" is to include every station used for purposes of public traffic, and "canal" every wharf and landing-place, and "railway company, canal company," &c., is to include "any person being the owner or lessee of, or any contractor working any railway or canal, constructed or carried on under the powers of any Act of Parliament."

These definitions are repeated in the Commissioners Act of 1873.

The 2nd section of the Act of 1854—the one upon which the question arises—enacts that

"Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles; and

"No such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever; nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and

"Every railway company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus, station or wharf of the one near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any

such preference or advantage or prejudice or disadvantage as aforesaid; and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf."

These are the precise words of the section. I have, for the sake of clearness divided it into the three paragraphs of which it is composed, because each of them, in my opinion, treats of a separate subject.

The counsel for the company objected to this division of the section, contending that it legislates for two subjects only, namely, undue preference and undue obstruction of through traffic.

To establish this argument he proposed to strike out the word "and" which connects the first paragraph with the second, and to substitute the words "so as," thus blending the two paragraphs into one.

If the first paragraph had been so worded as to be unintelligible, unless it were linked to the second, or as to produce consequences so absurd that it could not be supposed the Legislature intended them, it might have been allowable so to change the words. But it is perfectly intelligible and complete as it stands, and its construction, whether the wider or the narrower sense be put on the word "facilities," involves no absurdity. We are not therefore at liberty to alter its language. This would be not to expound, but to legislate.

This reading of the section is borne out by the way in which it is recited in the 11th section of the Commissioners Act, 1873.

That section runs thus: "Whereas by section 2 of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving, and forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles;

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

and that no such company shall make or give any undue or unreasonable preference," &c. Here the paragraphs are even more distinctly marked, and quoted as independent paragraphs.

The main argument, however, was, that the Act contemplates only traffic arrangements properly so called, and that what was meant by "affording all reasonable facilities," is, as respects passengers and their luggage, providing sufficient porters, sufficient carriages, luggage vans, and such like conveniences, and making the best arrangements in their power for the train service; and as respects their stations, making the best use of them, and of their appendages, in the condition in which they are, for the accommodation of the traffic; but that under no circumstances are the commissioners empowered to order any structural alteration of any kind; and they call in aid the title and preamble of the Act, and the repetition of the phrase "all reasonable facilities," which occurs in the third paragraph, and which in that connection cannot have reference to structural alterations.

On the other hand, the Commissioners do not propose to order the company to apply to Parliament for further powers, or in any way to acquire ability to give additional accommodation, or to do anything which is not within their present ability to do, but what they claim is, authority to compel the company to make use of the property and means which they possess, including the adaptation of their station premises, platform, and other traffic works, to the exigencies of the traffic, so as to afford to the public all the accommodation which the public reasonably require, and which they have the power to give, whether by building or otherwise.

They do not claim to dictate any particular style of architecture or quality of materials, but only to say in what respect and to what extent their premises require enlargement, alteration, or addition, to suit the traffic.

This is the question at issue, and I am of opinion that there are provisions of the Act which require the larger meaning to be put on the word "facilities" in this section, and consequently that the view

which the Commissioners take of the meaning of the Act is the right one.

The words "according to their respective powers" which occur in the first paragraph, and nowhere else in the Act, appear to me of great significance. Every railway Act necessarily confers large and varied powers on the company—powers to take by compulsion any lands within the limits of deviation, to divert roads and streams, to bridge over or under them, to construct such warehouses, offices, stations, and other buildings, as they think proper, and do all other acts necessary for making and working the railway. But these general powers are not unfrequently fettered by special clauses, the result of local opposition, so that all companies have not in all respects equally wide powers. For example, one company may be prohibited from erecting a station beyond certain limits in one direction, or from extending their buildings beyond a given point, or raising them beyond a given height in a certain locality; another may be prohibited from erecting anything to obstruct a right of way at a given spot, or may be compelled to erect and maintain a bridge for the use of a private occupier, which may in time present an obstacle to some extension of their buildings which it might be convenient to make. Various matters of this kind prohibited or made obligatory by their Act may incapacitate a company from affording at all their stations all the facilities which the traffic might in after years require. What may be within the legal capacity of one company may be beyond the legal capacity of another. Besides, the line may be worked by a lessee or a contractor, who may not have the right to make any alteration in the works. The Act is intended to control those who actually work the lines, and are the carriers for the public. If the word "facilities" in the first paragraph covered nothing more than traffic arrangements, these qualifying words, "according to their respective powers," would be not only out of place, but would be absurd, for no carrier, whether company or individual, is under any legal restriction as to the amount of accommodation which he affords to his customers in the way of traffic

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

arrangement. Therefore, the third paragraph of this section, which enjoins the company to afford "all due and reasonable facilities" for receiving and forwarding through traffic without unreasonable delay and without undue preference, contains no such words. The requirement here is absolute.

The 18th section of the Commissioners' Act also requires every company to "afford all reasonable facilities for the receipt and delivery of mails at any of their stations without requiring them to be booked or interposing any other delay." The qualifying words are here also omitted and for the same reason.

Thus the insertion of such a phrase in the first paragraph implies that the "facilities" intended by the Legislature comprehended something which all companies, or persons who work the line, might not have legal capacity to afford. They thus furnish a key to the construction which makes it clear to my mind that the Legislature meant the word "facilities" in this part of the Act to be taken in its widest sense, and to include facilities of every kind which is within the legal capacity of the company to give.

If we adapt the first paragraph to the case before us, by importing into it the appropriate words supplied by the interpretation clause (as we must do in order to read it aright), the paragraph as applied to passengers, would stand thus: "Every railway company shall, according to its powers, afford all reasonable facilities for receiving passengers at the station, for forwarding them on the railway, and for delivering them." Here is a duty imposed for the benefit of passengers, the measure of which is the reasonable requirements of the passenger on the one hand, and the legal capacity of the company on the other. Within these limits the company are to afford all facilities for the several stages of the journey.

"Facilities" for receiving at the station include convenient access to the station and convenient accommodation there while waiting for the train.

"Facilities" for forwarding, include conveniences for taking tickets and for

getting from the station to and into the carriages.

Suppose the ordinary traffic at a given place to have so far outgrown the capacity of the station that it no longer contains standing room for more than one-half of the passengers, and that the regular trains overlap the platform at both ends, so that half of the passengers have to remain outside the station or on the permanent way till the train arrives and moves the carriages from the level of the line. And suppose there is ample space belonging to the company for extending the station and platform to the length of the ordinary trains, and they are free to use it for that purpose, can it be said that they afford all reasonable facilities in their power for receiving and forwarding their passengers, while they refuse to give the additional accommodation?

Or, suppose the way to the station through the company's land has become dangerous for want of repairs, or by reason of obstructions placed there; or suppose the entire platform to be without a roof, and no other place is provided for passengers to wait, than the one exposed to the weather, where they may get wet through before getting into the carriages, would this be affording "all reasonable facilities" for receiving passengers at the station?

If not, it would, I think, be within the jurisdiction of the commissioners to order the company in the one case to enlarge their station and platform, and in the other to repair and clean the way to and from the station, and to cover the platform.

The only authority upon this subject that was quoted, and that I am aware of is *The Caterham Case* (2), referred to by the commissioners in their judgment, and which came before the Court of Common Pleas in 1857. It was a complaint by the Caterham Railway Company against the Brighton and the South Eastern Companies of undue prejudice to the passengers of the Caterham line, in several particulars, one of which was, that a covered place was provided for them at Caterham junction while waiting for the train. The Court dismissed the complaint as to all except the latter ground, and

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

that they granted a rule to shew why the companies should not provide a covered station at that point as had done at other stations on their line.

Each of the Judges expressed an opinion that the case was within the rule. The companies, however, did not shew cause, but submitted to the rule, and therefore the opinions extended have only the weight of first impressions. But neither of the Judges stated any doubt upon the point (4).

I must here refer to the 17th section of the Commissioners' Act, as it appears to afford an additional argument in favour of the wider construction of the "facilities" in the first paragraph, also to give additional weight to the reasons expressed by the Court in the *Caterham Case* (2).

I must premise that the Court of Common Pleas in *Bennett v. The Manchester, Sheffield and Lincolnshire Railway Co.* (5), had taken a more limited view of their powers under the Act of 1854. The company had become proprietors of Crimsby old dock and of a new dock communicating with their railway, and were required by Act of Parliament to maintain the old dock and the approach to it to a given depth. The dock and its approach had become silted up, the depth of water insufficient for boats to get to the wharves adjoining, and it was imputed to the company that the object was to divert the traffic from the old dock to the new one. An application was made under the Act of 1854, for a mandatory injunction to the company to clean the dock and the approaches, and the Court held, that as the plaintiff alleged a breach of a public duty which was already susceptible of enforcement by mandamus or indictment, the case was not within the Act of 1854. A similar doctrine would, of course, have been applicable to a canal company which suffered the canal to become unnavigable for want of dredging or sufficient supply.

The 17th section of the Act of 1873, states that, "every railway company

1 Com. B. Rep. N.S. 410; 26 Law J. Rep. 31.
2 Com. B. Rep. N.S. 707.

owning or having the management of any canal or part of a canal, shall at all times keep and maintain such canal or part, and all the reservoirs, works and conveniences thereto belonging, thoroughly repaired and dredged, and in good working condition, and shall preserve the supplies of water to the same so that the whole of such canal or port may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary hindrance, interruption or delay." The 6th section gives the commissioners power to receive complaints of anything done or of any omission made in violation of the Act of 1854, or of that Act, and thereupon to exercise all the jurisdiction conferred by the 3rd section of the Act of 1854.

In this respect the Act of 1873 corrects the judgment of the Court of Common Pleas in the case just cited and enables them not only to order traffic arrangements but to order the company working a canal to keep the canal in efficient working order for the traffic. In other respects also it explains and amends by enlarging the powers given by the Act of 1854 (see sect. 11), but contains nothing which bears upon the view taken by the Court in *The Caterham Case* (2). That case had been reported for nearly sixteen years; it must have been known to the company moving this prohibition, for the rule was against them, and was no doubt known to all the railway authorities, and if the Legislature had disapproved of it it is reasonable to suppose they would have corrected that as they corrected the decision in the canal case. The 3rd section of the Act of 1854 contains a provision which also has an important bearing upon the question before us. It authorises the Court of Common Pleas, "in order to form a just judgment on the matter of the complaint, to direct and prosecute in such mode and by such engineers, barristers or other persons, as they might think proper, all enquiries as might be deemed necessary," and to authorise them to receive evidence on oath.

The 6th section of the Commissioners' Act of 1873 expressly transfers to them

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

all the powers vested in the Court of Common Pleas.

The counsel for the company was asked in the course of the argument what employment could be found for engineers if his construction of his Act was the right one. His reply was, that they might have to decide whether an adjoining owner should or should not have a junction between his siding and the railway. This, however, many of the railway Acts before 1845 and the Railway Clauses Act of that year gave as a right if it could be done with safety (sect. 76), and any dispute about the point of junction, or whether a junction could safely be made, had, as I before observed, been left to the Board of Trade. He further suggested that the commissioners might be called on to decide how the traffic should be conducted between two companies whose lines had a common terminus or point of junction. The same answer applies to this. It is true that the Board of Trade had and still have to regard only the public safety, but with that view they fix the point of junction and direct how the traffic shall be worked. I cannot conceive of any engineering question being evolved out of an enquiry into mere traffic arrangements, but I can conceive of such question arising where the dispute is whether a station should be extended in a given direction or additional works made. I do not feel pressed with the argument that the company might have expended their capital, and might by such orders be called upon to exhaust the fund which should go to the shareholders. The income is the fund which the Companies Clauses Act, 1845, section 122, points out as the fund for enlarging as well as for repairing their works.

I am, therefore, of opinion, first, that the commissioners had jurisdiction to entertain the complaint, and secondly, that they have jurisdiction to make all the orders which they have intimated their intention to make, except the order to provide a refreshment room, by which I understand a room in which the company are to provide refreshments. That, I think, is *ultra vires*.

As regards the prayer for a more

direct route to the St. Leonard's station, I do not understand that the commissioners propose to make an order, or to do more than recommend the company to endeavour to make arrangements with the road authorities for opening their roads.

COCKBURN, C.J.—This was a demurrer to a declaration in prohibition, made by the direction of this Court, on an application of the South Eastern Railway Company for a writ of prohibition to the Railway Commissioners and the Town Council of Hastings, prohibiting them from proceeding further in the matter of an application by the Town Council to the Railway Commissioners, under the Railway Traffic Act of 1854 and the Railways Regulation Act of 1873, for an order on the plaintiffs, the railway company, to execute certain works at their stations at Hastings and St. Leonard's, in order to afford proper facilities for receiving, forwarding and delivering the traffic at those stations. The facts on which the application was founded were these:—

The South Eastern Railway Company are the proprietors of a line of railway from London to Hastings and St. Leonard's, and have stations for passengers and goods at both these places. The London, Brighton and South Coast Railway have also a branch from their main line to Hastings; and by an arrangement with the South Eastern Company, sanctioned by Parliament, the London, Brighton and South Coast Company run their trains to the stations of the South Eastern Company, and use these stations for the purpose of their traffic. These stations having been built many years since, and the traffic having largely increased, the stations have become altogether inadequate to its requirements. Under these circumstances the Town Council, as representing the inhabitants, applied to the Railway Commissioners for an order on the plaintiffs in prohibition to execute the following works:—1. As regards the Hastings station, to enlarge the station and provide better booking office, waiting room, refreshment room, and general accommodation therein.

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

lengthen and deepen the existing
forms, and to provide additional ones.
to provide better warehouse accom-
modation for goods. 4. To provide cattle
and additional sidings for cattle
trains. 5. As regards the St. Leonard's
station, to enlarge the platform, and to
take a new approach to the station by
direct route.

It appears from the declaration that
the plaintiffs put in an answer to the
declaration of the Town Council, in which
they denied, as matter of law, the jurisdic-
tion of the Commissioners to hear and
determine the application, or to make
an order, or grant the relief therein
demanded for, or any part thereof. The
Commissioners, nevertheless, entered on
the inquiry, and after hearing witnesses
from both sides, pronounced judgment,
advising, however, from making any
interim order for a period of two
months, with a view to afford time for
arrangement for co-operation between
the corporation and the railway com-
pany, with liberty to either party to
apply to them in the interval. The judg-
ment is set out in the declaration, and it
appears from it that the Commissioners
were prepared to make an order on the
railway company to execute, in substance,
the works specified in the application of
the Town Council.

In order the better to appreciate the
question to be determined it may be ex-
pedient to follow the judgment in some
detail. The Commissioners deal first
with the enlargement of the Hastings
station. "Two things," they say, "that
urgently required are additional
land for the purpose of giving a more
extended area to the station, and the
widening of the bridge by which the
trains from the south coast and the
trains from Tunbridge Wells enter the
station, and which at present is only
wide enough for two lines of rails."
On entering on the merits of the ques-
tion they say, "We cannot doubt that
the traffic of the two companies in
the out of Hastings, so large as it is,
every year becoming larger, it is
necessary that the South Eastern Com-
pany should find means to extend the
limits of their station."

The meaning of this language is am-
biguous. It may mean that the Com-
missioners are prepared to make an order
on the company to apply to Parliament
for additional powers, or may amount to
no more than a recommendation to them
to do so.

The judgment next deals with the
widening of the bridge; but an arrange-
ment having been come to pending the
inquiry, between the company and the
trustees of an adjoining estate, from
whom it was necessary to obtain land,
and with whom there had been pre-
viously a disagreement as to terms, and
the bridge being now, in conformity with
the agreement thus come to, about to be
widened, the commissioners, though they
do not expressly say so, appear not to
contemplate making an order in respect
of widening the bridge, which, but for
their arrangement, it appears they would
have been prepared to do.

The commissioners next deal with the
platform accommodation. After shewing
that the two existing platforms are in-
sufficient for the traffic, they mention
that a plan has been submitted to them
on the part of the company for an en-
largement of the platform area to the
extent of 2,000 yards, and for the addi-
tion of a third platform. They wind up
by saying, "Our order will require the
company to extend the platform accom-
modation in the degree which has been
admitted to be necessary, and which the
plan of the company's engineer shews
can be provided without difficulty, now
that the bridge is about to be made wide
enough at least to carry four lines of
rails."

The commissioners next deal with "the
complaint that passengers are not suffi-
ciently protected from the weather," and
with the suggestion of the corporation
that "there should be a roof over all the
platforms, and also over that part of the
station yard where carriages draw up."
With respect to this they say, "We think
that, considering the exposed position of
the station, and that Hastings is a place
of resort for invalids, there is not shelter
as things are; and we shall order a sub-
stantial addition to be made to the area
of covered platform, and the yard to be

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

so arranged as that carriages may set down and take up under cover."

The complaint as to "the absence of proper waiting rooms" is next considered. After pointing out the deficiency in this respect, the commissioners say, "The company admit in fact that the accommodation in question is not sufficient, by proposing, in the plan to which we have referred, to increase its superficial area by 2,300 feet. How that additional area would be arranged by them internally was not disclosed in the evidence; but we shall feel it necessary to require the company to provide two general and two first-class waiting rooms, each at least twice as large as the largest of the present rooms, and to reserve also part of their buildings for refreshment purposes."

Lastly, the commissioners determine that in the booking office there shall be more than one window for the delivery of tickets. Having thus disposed of the complaints relating to the passenger traffic, the commissioners deal with the complaints as to the goods traffic, which are confined to the small size of the goods shed, and the short supply of sidings with roads alongside for carts to get to the trucks to unload traffic waiting for delivery. The commissioners are of opinion that additional sidings are required. They pronounce the size of the shed to be too small; but as it could only be increased by space taken from the goods yard, from which none could be spared, they refrain from making any order for its increase, but add that, "as a goods yard cannot dispense with accommodation of the sort on a proper scale, it becomes almost imperative upon the company to seek for powers to make that yard large enough to include it." Here, again, this last observation leaves us in uncertainty whether the commissioners propose to include in their order, when made, an injunction to the company to apply to Parliament for power to acquire additional land for the purpose of enlarging their yard.

It next appears that there are weekly consignments of live stock brought to Hastings, but there are no cattle pens at the station, and though a raised platform

intended for a cattle dock was erected, has been used for the coal traffic. The commissioners require cattle pens to be supplied, and the structure to be restored for its original use.

The complaints as to the St. Leonard station are of a similar character. The two platforms are pronounced to be insufficient in point of size, as also in point of covered accommodation. The lines are crossed by a bridge, and the bridge is not covered over. The waiting-rooms, two in number, but one of which is also used as a ticket office, are too small.

All these defects are to be remedied. Besides the present small rooms, there are to be "not less than two good-sized waiting-rooms on each side of the line."

Here, again, there being but one window for the issue of tickets to the three classes of passengers, the commissioners are prepared to order that there shall be three.

The last head of complaint connected with this station seems more especially to exhibit the extent to which the authority of the commissioners is proposed to be carried. "The other principal complaint regarding the station," say the commissioners, "is that the company have not laid out a yard outside the down or arrival platform large enough for flies and carriages to turn round in, and that they refuse to connect their station road on that side with some new streets abutting upon it; and it is said that a populous district north and north-east of the station would be much approximated to it if the company would only remove their fence and allow ingress and egress by these streets. But the company allege that their road is some feet below the level of the streets, and that the break between the two makes it impossible to give a through passage with a gradient that a carriage could work without at least beginning the incline in their cab yard, and thus, as they say, still further diminish the adaptability of that yard for station purposes. They also object to their station road being made into a public thoroughfare. It is not, they say, sufficiently wide for a public street, and any general use of it would interfere with the station traffic.

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

ter considering the merits of the
ion the commissioners say: "The
we take of this part of the case is
the railway company ought to give
consent to the proposed openings
their approach road, as also to such
ning of that road if required, as the
s of their property will admit, pro-
that the public road authorities
in consideration thereof to do the
ion work and the work of widening
oad, subject to the approval of the
any's chief engineer, and to defray
e expenses of such works (any dis-
ment that may arise *being referred to*
r decision), and provided, also, that
agree that the company shall have
ight at any time of requiring them
ke over the approach road and to
and maintain it as a public road."
thus appears that the Railway Com-
oners have entertained an applica-
for an order to the railway company
ecute structural works of an ex-
ve character, and contemplate issu-
such an order; and the question
d on this record is whether such an
is within their authority, as con-
d by the two Acts to which I have
red. This depends on the construc-
to be put on section 2 of the first
the 17 & 18 Vict. c. 31. That sec-
is as follows:—

Every railway company, canal com-
pany, and railway and canal company,
according to their respective powers,
shall afford all reasonable facilities for the re-
ceiving and forwarding and delivering of
goods upon and from the several rail-
ways and canals belonging to or worked
by such companies respectively, and for
the return of carriages, trucks, boats and
other vehicles, and no such company shall
refuse or give any undue or unreasonable
preference or advantage to or in favour
of any particular person or company, or
of any particular description of traffic in
respect whatsoever, nor shall any
company subject any particular
person or company, or any particular
description of traffic, to any undue or
unreasonable prejudice or disadvantage
in respect whatsoever; and every
railway company, and canal company,
and railway and canal company having

or working railways or canals which form
part of a continuous line of railway or
canal, or railway and canal communica-
tion, or which have the terminus, station,
or wharf of the one near the terminus,
station, or wharf of the other, shall afford
all due and reasonable facilities for re-
ceiving and forwarding all the traffic
arriving by one of such railways or canals
by the other, without any unreasonable
delay, and without any such preference
or advantage, or prejudice or disadvan-
tage as aforesaid, and so that no obstruc-
tion may be offered to the public de-
sires of using such railway or canal, or
railways and canals, as a continuous line
of communication, and so that all reason-
able accommodation may, by means of
the railways and canals of the several
companies, be at all times afforded to the
public in that behalf."

By the third section jurisdiction is
given in case of "any complaint or any-
thing done or omitted in violation or
contravention of the Act," in England
to the Court of Common Pleas, in Ireland
to any of the superior Courts, in Scot-
land to the Court of Session, to hear and
determine the matter of such complaint,
and for that purpose to prosecute any
enquiry the Court may deem necessary
by engineers, barristers, or other per-
sons; after which the Court may "issue
a writ of injunction or interdict restrain-
ing the company from further violation
or contravention of the Act, and en-
joining obedience to the same;" after
which, obedience may be enforced by
attachment or by the infliction of a fine
of 200*l.* a day.

By the Railways Regulation Act of
1873, 36 & 37 Vict. c. 48, the jurisdiction
of the Courts of law is transferred to the
Railway Commissioners, but the autho-
rity is carried no further, and must be
sought in the construction to be put on
the earlier statute.

Two views of the most opposite and
conflicting character were pressed upon
us on the argument. On the part of the
plaintiff in prohibition, it was contended
that the sole purpose and effect of the
Railway Traffic Act of 1854 was to ensure
equal accommodation being afforded to
all persons, or classes of persons, in the

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

conveyance and delivery of goods, and to prevent any undue preference being given to one, to the prejudice or disadvantage of another; or that, at most, its purpose was to ensure effective management in the details of the traffic, and the best arrangements for the speedy and safe carriage and delivery of passengers and goods; while, on the part of the defendants, it was contended that it was competent to the Commissioners, with a view to afford facilities to the traffic, not only to regulate the working of the railway in all its details, as in directing the number of trains, the class of carriages, or the like, but also, where structural accommodation was needed for the traffic, to order a railway company to enlarge, alter or erect structural buildings, such as stations, platforms, bridges, warehouses, sheds; or to alter the internal arrangements of a station with reference to the number, size or position of its waiting or refreshment rooms; to make or enlarge yards, to make or alter roads or approaches to stations, or even to lay down additional lines of rails; in short, to do anything which should appear to the Commissioners reasonable, with a view to the requirements of the traffic, with one limitation only, namely, that the thing ordered to be done should be within the powers and the means, including herein the pecuniary means, of the company. For it was admitted on the argument as beyond dispute—though from the judgment of the Commissioners it may be doubted whether such is their view—that the Commissioners could not compel a railway company to apply to Parliament for fresh powers to enable them to carry out an order made by them. But with this single limitation a plenary and absolute authority was asserted on the part of the Commissioners, whenever the question of facility to the traffic was concerned, and the thing required to be done was in their judgment reasonable, to direct and control railway companies in the government and management of their property, and the conduct of their affairs, from the minutest details of the management and the working of the traffic to the structural organisation of the railway and its accessories, however great the work or costly

the expenditure. Indeed the Solicitor General, in arguing for the defendant, even went so far as to maintain that if the company, laying down a railway with a single line of rails, had taken power to raise money and lay down a second line and the traffic was sufficient to call for it, the Commissioners would have authority to order the company, against their will, to lay down such second line of rails. Nay, if the argument is to be carried logically into all its ulterior consequences, I can see no reason why, if it is to prevail, it will not be competent to the Commissioners, in the interest of the traffic, to reduce the tolls on a railway to their minimum, and thus to take the most important part of their business out of the hands of a company.

The question raised on the record, and with which alone we have to do is, whether the Railway Commissioners have authority to entertain an application for such an order for structural erections and alterations as is asked for by the Corporation of Hastings, and, as appears from the judgment thus provisionally pronounced, the Commissioners are prepared to make.

It is greatly to be regretted that, in a matter of so much importance, the legislature should have made use of phraseology so uncertain and indefinite as the language of the second section of the Act of 1854, in the use of the term, "facilities for receiving, forwarding and delivering traffic," which, while its more obvious meaning would appear to have reference to the arrangements to be made for the convenient working of the traffic, and the management of the details necessary thereto, may, by a strained construction, be taken to comprehend the construction of the railway itself, and of everything connected with it; though I agree with the learned counsel for the plaintiffs that the word is an inapt word for such a purpose, and one which the legislature is not likely to have employed to confer a power so vast and unlimited. But besides the argument which arises from the inaptness of the phraseology of the section, with a view to the creation of so important a power there are, as it seems to me, several grounds for thinking that Parliament

the Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

have intended by the enactment in question, to confer such an authority and jurisdiction as that which the Railway Commissioners now claim to exercise.

In the first place, such legislation would have been wholly inconsistent with the principle previously adopted by Parliament in entrusting to companies powers to construct works of a public character, such as canals, harbours, docks, railways and wharves, in which, owing to interference with the private rights of property, statutory powers are necessary, and, owing to the contingencies which would accrue to the company from carrying out such undertakings, Parliament has deemed it right to entrust such powers, but in granting them it imposes specific duties and obligations on the company for the advantage of the public. In all these cases the principle has been for the legislature expressly to declare the duties and obligations which it thinks proper to impose on the company, whether for the protection of those whose rights are interfered with, or for the interest of the public, as the consideration for the powers it confers, and in the special Act constituting the company, or in some general Act applicable to the subject matter of similar undertakings, and which is incorporated in the former. Beyond doing this, and entrusting the company and herein providing for its government, the course has been to leave the company to manage its affairs, as any other company carrying on its business as matter of private law would do, subject only to the general laws, by which its duties and obligations, either to the public or to individuals, may always be enforced by appropriate remedies, whether by damages, action or suit in equity; the legislature wisely trusting in great measure to the operation of the motive which affords the best security for the public being the interest served in a matter of commercial enterprise, namely, the interest of those concerned in attracting custom by efficient management, with a view to their own profit and advantage.

In other Acts of a similar character, and in constituting the South Eastern Railway Company duly provides for the government of the company, in the

periodical and special meetings of the shareholders, and in the appointment of its directors as the governing body; "full power and authority" being given them by the Act, "to do all acts whatsoever for carrying into effect the purposes of the Act, and for the management, regulation and direction of the affairs of the company, or relative thereto, except such as are herein required and directed to be done at some general or special meeting of the said company"—thus leaving in the hands of the company and its directors full power and authority to manage, regulate and direct its affairs—a term which would, I apprehend, beyond all question include the erection or alteration of structural buildings. I observe, too, that among other things which the company are empowered to do for the purposes of the Act, is that of "erecting and constructing such houses, wharfs, warehouses, toll-houses, landing places, engines, and other buildings, machinery, apparatus and other works and conveniences as the said company *shall think proper*,"—plainly leaving it to the company itself to determine what buildings, among other things, would be necessary for the purposes of its traffic. The Railways Clauses Act of 1845, in section 16, contains the same provision in the very same terms. It seems difficult to suppose that the legislature can have intended to take away or abridge this right by subjecting it to the discretionary control of the Commissioners, no longer leaving it to the company to do as they *may think proper* in this respect, but making it compulsory on them to act as the Commissioners "*may think proper*."

A difficulty equally great, if not greater, in the way of the authority thus asserted, presents itself if the matter is looked at from the point of view of the financial interests and position of the company. In order to obtain its Act, a railway company has to lay before Parliament not only a plan of the line, with a general outline of the works which it proposes to execute, but also the amount of capital it proposes to raise and expend on the undertaking; and it has to satisfy Parliament that the capital it proposes to raise will be sufficient to enable it to make the line and

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

execute the necessary works, as contemplated in the proposed enterprise. The Act then empowers the company to construct the railway, with such buildings, &c., "as the company may think proper"—such being, as I have just pointed out, the express language of the special Acts, and also of the general Act of 1845.

The proposed capital having been raised and expended on the line and its accessories, the company has fulfilled its engagements to Parliament. Its remaining obligation is to maintain the line and its accessories in proper repair and to work the traffic with due regard to the interest of the public and its own. It cannot, justly or reasonably, be called upon, except with a view to its own interest, to enlarge the sphere of the original undertaking, or against its own will and the sense of its own interest to invest its earnings in the acquisition of fresh land or the execution of new works involving extensive outlay.

And here a further financial difficulty presents itself. The works having been constructed, and the line opened for traffic, the company are entitled to take tolls for the carriage of passengers and goods; and the company, or its directors, as the case may be, are authorised from time to time to declare a dividend out of the net profits of the undertaking. By the South Eastern Company's Act the dividend may go as far as the "net amount of clear profit at the time being in the hands of the company"—section 108. It is thus left to the company to exercise its discretion as to keeping back any part of the net profits for future additions or alterations. In the later Act, the Companies Clauses Act of 1845, the settling the amount of dividend is left to the directors, who are expressly invested with a discretion as to reserving any portion of the profits for enlarging or improving the works; section 122 providing that "Before apportioning the profits to be divided among the shareholders, the directors may, if they think fit, set aside thereout such sum as they may think proper, to meet contingencies, or for enlarging, repairing or improving the works connected with the undertaking, or any part thereof, and may divide the

balance only among the shareholders. Here again the question presents itself whether it can have been intended to subject the plenary discretion thus given to superior control, and so far to take away. For it is obvious that the right of a company to decide by itself or its directors, whether any portion of its profits shall be applied not merely to the necessary maintenance and repair of the line and works, which of course must always be defrayed before net profits can be declared, but also to the formation of a fund for affording additional facilities to the traffic of the line by new works, and the right of the shareholders, subject to this discretion, to have the clear profit divided among them according to their share in the capital, becomes seriously compromised by the creation of a power which may order the construction of such works, however costly, whenever those who wield it may be led to think that the requirements of the traffic call for such an outlay. For, the capital of the company having been expended in the existing works, the only fund from which the cost of new works can be defrayed will be the net profit which would otherwise be distributable as dividend, and which, if new stations, such as we sometimes see, are ordered to be built, may absorb anything like a dividend for a considerable time.

Nor are these observations applicable to the South Eastern Railway Company alone. At the time that the Act of 1845 was passed, many of the leading lines of railway in the kingdom had already been opened. Other companies had obtained their Acts, and had raised their capitals, and their lines were in the course of construction. Canal Acts had been passed year after year, for a century. All the Acts contained similar powers of self-government, and secured the right of the shareholder to his share of the net profit absolutely, or if subject to the reservation of a portion of such profits with a view to the further enlargement and improvement of the concern, subject to it only so far as the company or its governing body should determine. It seems to me nearly impossible to suppose that Parliament, having conceded these powers and rights

the Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

basis of these great undertakings, intend, by a sudden blow, to place in a worse position than that of the companies.

When once made its bargain with a public company, in a matter of commercial enterprise, in the Act by which the company is constituted and its powers conferred, the Legislature could not, such a power has been expressly added to it, with any consistency or afterwards impose fresh liabilities on the company, or deprive it of any of its powers and vested rights the grant of which had been the inducement to undertake the enterprise. Where in the original constitution of such a company, the uncontrolled management of its affairs, especially in respect of its property and pecuniary interests, has been conceded, it seems impossible to suppose that Parliament would, by an *ex facto* law, deprive the company of its power of self-government, and subject throughout its entire existence, to a controlling power not dreamt of in its original constitution.

It is to be observed that the general principle relating to these companies, which under the extensive legislation of the Act are all prospective in their operation, and so thoroughly does it appear to have been understood, at the time of the passing of the original Act of the South Eastern Railway Company, that such statutory powers, once given, could not be taken away or abridged without an express provision to that effect, that, in order to reserve to Parliament the right to subject the company to any general Act which might be passed, as appears then to have been contemplated, within twelve months, section 219 it is expressly provided that nothing in the Act shall be taken to prevent the railroad to be formed under the provision of any general Act for the regulation of railroads which might be passed, within a year from the passing of the Act, if Parliament should be sitting, or, if it should not, then at the end of the next session.

It may perhaps be said that this reason, sound, would equally apply, though less in a less degree, to the interference, whatever it may be—and there is

undoubtedly some—introduced by the Act of 1854. But a material difference exists between the two cases. In the acquisition of the powers granted to a company by Parliament, with a view to the public service, there is always the implied condition that, to the extent of the means at the company's disposal, the public service shall be promoted with due diligence, and every one shall be entitled to be served on equal terms. To provide for the due discharge of this implied obligation, when it became apparent that railway companies were not always willing to fulfil it, might not—especially if confined to insuring equality and preventing undue preference—amount to an unjust interference with the right of managing their own affairs previously conceded to them. Lord Campbell, in the House of Lords, on the discussion on the bill, expressly declared that the 2nd section imposed no greater duty or liability on railway companies than they were already under by law. It is obviously a very different thing when, the traffic having outgrown the accommodation contemplated in the original scheme, and provided for by the capital which it was authorised to raise, a company is called upon to invest capital, possibly to a large amount, in new stations, or other structural works. For it is here obvious that, the capital of the company having been long since expended on the line and works, as contemplated in the original scheme, the amount to be expended on new works, not so contemplated or provided for, must be found out of income; in other words, out of what would otherwise be payable as dividend to the shareholders, secured to them as their undoubted right by the Act of Parliament constituting the company, and the want of which as a means of income may be to some of the shareholders a very serious inconvenience—an injustice which will be the more sensibly felt if, in the view of the company and its directors, the works ordered to be made are uncalled for.

It is thus beyond question that interference with the self-government and financial management of railway companies is an interference with vested rights, and, while there can be no doubt

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

that Parliament, in the plenitude of its legislative power, can deal with such rights, yet, looking to the tenderness with which vested rights are ever infringed on, any legislative enactment interfering with such rights must receive the strictest construction and be carried no further than the language of the enactment necessarily requires.

The language of the Act here becomes of material importance, and, as it seems to me, affords a cogent argument against the authority claimed. For if the Legislature had intended to undo what it had done, and to take from railway and canal companies the management of their affairs, as previously conceded to them, and as enjoyed by other trading companies, to the extent of compelling them to invest fresh capital, contrary to their own judgment and will, in new works, this would have been explicitly declared in unambiguous language, and not in language far more applicable to the conduct of the ordinary business of a goods department. Moreover, provision would have been made for the financial arrangements which an order of this kind, involving possibly a very considerable outlay, might necessitate. Something, too, I should expect would have been done to reconcile the enactment of the 122nd section of the Companies Act of 1845, which leaves the reservation of a fund for such purposes entirely in the discretion of the directors, and that of the 3rd section of the Act of 1854, which directs the order to be made, and in case of disobedience makes the penalty fall, not on the directors, but on the company.

But it is not only that the language of the 2nd section is far more adapted to facilities afforded by the management of traffic than to those arising from the structural accommodation of the premises in which the traffic is carried on; the whole tenor of the enactment seems to me to point in the same direction. The provision as to affording "reasonable facilities for the receiving and forwarding, and delivering of traffic," is associated in the same sentence with that of affording facilities for "the return of carriages, trucks, boats and other vehicles," and with the prohibition against "giving un-

due or unreasonable preference," which course applies not to the traffic of passengers but that of goods, as it is in respect of the latter that undue preference occurs. Then follows, in the same section, a provision which appears to me of infinite importance as shewing the sense in which the term "facility" is employed in the enactment, namely, that "Every railway company, or canal company, or railway and canal company, having or working railways which form part of a continuous line of railway, or canal, or railway and canal communication, or which have the terminus, station or wharf near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding the traffic, arriving by one of such railways or canals, by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid; and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication; and so that all reasonable accommodation may be made by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf." Now this may mean no more than that the company, to whose railway or canal forming, with that of another company, a continuous communication, traffic brought, shall receive and forward without obstruction or unreasonable delay, and, it may be, shall make its premises available for the purpose; but it cannot as it seems to me, in the absence of express provision, be taken to mean that such company shall be compulsorily, under the necessity of making, at its own expense, structural erections or alterations to afford facilities to the traffic of another and independent line, to which it owes no duty or obligation except such as the statute thus creates. Yet the meaning of the term "facilities" must be the same in both branches of the section.

It does not appear to me to be of much avail in favour of the opposite view to say that the erection of structural buildings is within the term "facilities" as occurring in the Act of 1854. No one can deny

with Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

stations, platforms, warehouses, yards, afford facilities to traffic, though it may perhaps be doubted whether covered platforms, or luxurious waiting-rooms, or arrangements for the convenience of invalids, though much to the convenience of the passengers, can be said to afford facility to the traffic, though that is to be taken to include passengers. The question is, not whether these things come within the meaning of the term in its widest and most general sense, whether they come within its means as used in the statute—in other words, whether they come within the spirit and meaning of the enactment. Nor does it cease the argument to say that the law was intended to be remedial, and therefore should receive a liberal construction. Remedial it was, no doubt; but of what? The Act does not, as judicial statutes generally do, recite the mischief against which its enactments are intended. But it is not immaterial to observe that it professes to be simply “an Act for the regulation of the traffic on railways and canals;” and that its only object is that “it is expedient to make provision for regulating such traffic”—a title and preamble certainly more in keeping with provisions for regulating the management of a goods department and the details of the traffic, than the erection of stations, wharves or structural accessories of a railway terminal. In the absence of any express declaration of its purpose, what the Act intended to remedy must, therefore, be sought in its provisions; and these we find to relate to unreasonable delay or obstruction in the working of the traffic, undue preference, and to the want of harmonious cooperation between different companies with respect to continuous communication. There is nothing in the second section which directly or indirectly points to structural accommodation. Nor, indeed, had any inconvenience in this respect, or complaint of obstruction at the time the Act was passed. The railway system was comparatively in its infancy. The traffic had not developed as it has since done, and so had not outgrown the accommodation which had been deemed adequate to its

requirements in the formation of the companies, and in fixing the amount of capital necessary to the undertaking. If any doubt could be entertained on this point it would be at once removed by referring to the history of this legislation. The Act was a government measure. Its main purpose, as explained on its introduction by Mr. Cardwell, was to prevent the obstruction which had been opposed by some of the railway companies to a continuous through communication over different lines of railway, by throwing obstacles in the way of receiving and forwarding the traffic from other lines, at that time a subject of much complaint, and which had been the subject of investigation by a committee of the House. A secondary purpose was that of preventing the inequality of the accommodation afforded, and the undue advantage frequently given to particular individuals or classes, to the injury and oppression of others. Of inconvenience to the public occasioned by the want of structural accommodation, as a ground of the measure, not a trace is to be found in its progress through parliament, nor was anything of the sort aimed at by it.

It is said, indeed, that interference in the matter of structural erections or alterations must have been contemplated, as otherwise the power given to the Court to employ engineers to make inquiry of and report would have been useless, as the assistance of engineers could not be needed for the solution of any question relating merely to traffic arrangements. In this, if it is limited to arrangements at a station, I agree; but the assistance of engineers might be of possible utility in the event of a question of reasonable accommodation in respect of the number of trains running on a line of railway, especially if complicated with the use of the line by another company, or in the event of a dispute between two companies as to arrangements for the uninterrupted conveyance of the through traffic. Indeed it was on this latter ground that this provision was explained and justified by the Lord Chancellor in the House of Lords; and Mr. Cardwell, on introducing the bill, said that this provision

South Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

had been imported into it by analogy to the Chancery Procedure Bill of 1852, which contained a similar provision. That the assistance of engineers would be required for the purpose now suggested does not seem to have occurred to any one. Nor is this surprising. As matter of history, it may be safely asserted that the idea of compelling companies to erect or enlarge buildings did not enter into the measure as contemplated, nor was present to the mind of the Legislature in passing the Act.

I must further observe that the constitution of the authority which is to exercise jurisdiction over railway companies under the Act of 1854, affords a strong argument against so extensive and formidable power as that now asserted. I cannot believe that it can have been intended that a Court of law, and still less a single Judge, unable, and indeed without authority itself to enter upon local inquiry, and able to institute such inquiry only through engineers or barristers, and acting only on the report of such engineers or barristers, should be able to exercise such a power. Still less can I bring myself to think that the Legislature can have intended to place such a power of unfettered discretion, involving interests so large, in the hands of three gentlemen without any appeal from its exercise, however serious the effect of their decision as affecting the interests of a company.

It should be observed that we are not called upon to say what, short of structural additions, would be included in "facilities" to traffic, within the meaning of the Act. I certainly am not prepared to give effect to the contention of the plaintiffs, and to limit the authority conferred by the Act to the insuring equality to the exclusion of undue preference. On the contrary, I should be disposed to hold that whatever can reasonably be expected from a company, with the means at its disposal, in the way of management for the public convenience and advantage, in receiving, forwarding and delivering the traffic—probably even to the extent of determining the number of trains to be run, or the times of departure or the like would be within the authority. But this

it is not necessary to decide. My judgment must be considered as limited to the question of structural additions beyond those contemplated in fixing, with parliamentary sanction, the capital of the company. I cannot think that a company can be forced against its will to find fresh capital for structural additions not within the scope of the original enterprise, simply because such constructions might be for the convenience of the public.

Numerous as have been the applications to the Court of Common Pleas under the Act, on complaints of undue preference (a fair proof that it was to this evil that its enactments were in great measure directed), there is but one authority applicable to the case before us, namely, that of *In re The Caterham Railway Company* (2), in which on an application for a rule *nisi*, three of the Judges expressed an opinion that the want of sufficient station accommodation at a particular place at which trains stopped, might be a ground for the interference of the Court; but the fourth Judge, Mr. Justice Cresswell, concurred in granting the rule on the ground of undue disadvantage. But the case is by no means conclusive; for the rule was never drawn up, and consequently no argument on it ever took place; and the Judges were evidently misled by the term "reasonable accommodation," which does not occur in the part of the section with which alone the Judges in the *Caterham Case* (2) had, and we in the present have to deal, and which only requires that "reasonable facilities" shall be afforded "in receiving, forwarding and delivering the traffic," the term "reasonable accommodation" which is the one on which the Judges in the *Caterham Case* (2) dwell, being applicable only to that which is to result from the continuous traffic, provided for in the later and independent part of the section.

Feeling myself therefore unfettered by what was said in the *Caterham Case* (2), the only conclusion at which I can arrive looking to the circumstances under which the Act of 1854 was passed, to the interference in the vested rights which the construction of the Act contended for

th Eastern Rail. Co. v. Railway Commissioners, &c., Q.B.

arily involves, and to the language of the second section which, it seems to be far short of conferring so vast a power, is that the Act of 1854 does not empower the railway commissioners, in administering it, stand in the shoes of the Court of Common Pleas, the jurisdiction which they are entitled to exercise, and consequently our judgment on this point must be for the plaintiffs in opposition.

Rule absolute.

ors—W. R. Stevens, for the South-Eastern Railway Company; J. H. Lydall, agent for the Meadows, Town Clerk, Hastings, for the Corporation of Hastings; Hare & Fell, agents for the Solicitors to the Treasury, for the Railway Commissioners.

THE QUEEN'S BENCH DIVISION.]

80. } REED v. HARVEY.
n 3, 6. }

Bankruptcy—Disclaimer by Trustee of Leasehold Interest—Leave of Court—32 & 33 Vict. c. 71 (Bankruptcy Act, 1869), ss. 24—General Rules, 1871, r. 28—Notice sent by Registered

section 23 of the Bankruptcy Act, (32 & 33 Vict. c. 71), the trustee is required by writing under his hand to disclaim any onerous property of the bankrupt, and section 24 limits the time for the trustee to twenty-eight days after "application in writing made to any person interested in such property requiring him to decide whether he disclaims or not." Rule 28 of the General Rules of 1871 says that, "where property of a bankrupt acquired by a lease under the Act shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose":—

held, that the rule merely regulated the procedure of the Court, and that a disclaimer duly made in time was effectual,

though no leave had been asked for or obtained.

Where a registered letter containing a notice, requiring the trustee to disclaim, had been posted, but the trustee denied having ever received it,—

Held, that some evidence of the delivery of the letter to the trustee or at his office must be given to affect the trustee with notice, under section 24 of the Bankruptcy Act, 1869.

Action for the recovery of one quarter's rent of leasehold premises, due on the 1st of November, 1879.

The defendant in the action was the trustee in bankruptcy of the tenant, one Mortimer.

On the 2nd of October the defendant was duly appointed trustee. On the 7th of October the solicitor to the plaintiff, the landlord, sent to the defendant a notice under section 24 of the Bankruptcy Act, 1869, requiring him to decide whether he would disclaim or not. This notice was sent in a registered letter. No answer was received to the notice, and on the 12th of November the plaintiff's solicitors applied to the defendant for 25l., one quarter's rent. A correspondence then ensued between the plaintiff's solicitors and the defendant, in which the plaintiff's solicitors said that, as they had given defendant notice, and he had not disclaimed within twenty-eight days from the receipt of the notice, he was liable for the rent. The defendant in reply declared that he had never received the notice, and he then disclaimed in due form. Thereupon this action was brought in the County Court.

At the trial it was proved on behalf of the plaintiff that the notice had been enclosed in a registered letter and duly posted, but no proof was given of delivery. The defendant denied having ever received the letter, but in cross-examination admitted that, at about the time the notice was sent to him, a clerk of his had stolen a number of his letters and absconded. The learned Judge held that proof of the posting of the letter was sufficient, and that the defendant must be taken to have received notice, and a verdict was taken for the plaintiff.

Reed v. Harvey, Q.B.

A rule having been obtained for a new trial on the ground of misdirection,

A. Wills (*Forbes* with him), for the plaintiff, now shewed cause.—If the clerk of the defendant received the registered letter containing the notice, that would be sufficient service of the notice on the defendant, even though the clerk stole the letter and the defendant personally never received it. Proof of the posting of the registered letter is sufficient to prove delivery. By rule 14 of the Bankruptcy Rules, 1870, it is provided that "all notices and other proceedings may be sent by prepaid post letter." The post was therefore a proper way of sending the notice, and the decision in *The Household Fire and Carriage Accident Insurance Company v. Grant* (1) shows that proof of posting is all that is necessary.

[*LUSH, J.*—If it were clear that the letter had been lost in the post, I am inclined to think, as at present advised, that no notice to the defendant would be proved.]

Apart from the question of notice or no notice, the defendant here has made no disclaimer at all in law. The so-called disclaimer made after the correspondence with the plaintiff's solicitors is not an operative disclaimer; for by rule 28 of the Bankruptcy Rules, 1871, "Where any property of a bankrupt acquired by a trustee under the 'Bankruptcy Act, 1869,' shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose." Here the property was a leasehold interest, and no leave of the Court was obtained. The disclaimer is, therefore, void. It has been so held by the Court of Appeal, in a case where *Thesiger, L.J.*, gave a judgment involving this point, but the case is not reported.

Leese, for the defendant, in support of the rule.—The leave of the Court is not necessary to enable a trustee to disclaim. The power is expressly conferred on him by section 23. The disclaimer is, therefore, good, and dates back to the order

of adjudication. Moreover, the defendant here never took possession of the premises as trustee, and he is, therefore, not personally liable. He cited *In re Sneezum*; *ex parte Davis* (2); *In re Solomon*; *ex parte Dressler* (3); and *Ex parte Brook* (4).

A. Wills, in reply.

Cour. adv. vult.

The judgment of the Court (5) was (on the 6th of March) delivered by

LUSH, J.—We deferred giving our judgment in this case in order to ascertain from *Thesiger, L.J.*, what had occurred in the Court of Appeal as to the validity of a disclaimer of a leasehold interest made by a trustee, without the leave of the Court. He says that what he is thought to have said must be a mistake, for that the point has never, to his knowledge, been decided. We have, therefore, to decide the point. We cannot entertain a doubt, looking at the language of section 23 of the Bankruptcy Act, but that the disclaimer is entirely in the discretion of the trustee and of the trustee alone. A disclaimer can under the Act be given only by the trustee, and when given by him it is operative. The rule 28 relied upon by the plaintiff merely regulates the procedure of the Court. If it did more, and qualified the enactments of the section it would, in our opinion, be *ultra vires*. We think, therefore, that in this case there was an effectual disclaimer subsequent to the correspondence between the parties, and that, as is expressly provided by the words of the Act, its operation is retrospective, so that the lease must be deemed to have been surrendered on the date of the order of adjudication. This is the plain direction of the Act.

Then the only question left is, whether the trustee here had been called upon to make his disclaimer before, and he made default in so doing within the twenty-eight days limited by section 23.

(2) 45 Law J. Rep. Bankr. 137; Law Rep. Ch. D. 463.

(3) 48 Law J. Rep. Bankr. 20; Law Rep. Ch. D. 253.

(4) 48 Law J. Rep. Bankr. 22; Law Rep. Ch. D. 100.

(5) *Lush, J.*, and *Manisty, J.*

(1) 48 Law J. Rep. C.P. 577; Law Rep. 4 Ex. D. 216.

to not think that enough has been
d to shew that the defendant had
e from the plaintiff, having regard
positive denial of all knowledge of
letter. It is not enough under these
stances for the lessor to say, "I
a requisition to the trustee to dis-
and I registered the letter," with-
yme evidence being adduced that the
e received such letter. There was
ng here to shew that the letter
ed the defendant's office; if there
I think that delivery of the regis-
letter to the clerk of the defendant
, if proved, be equivalent to de-
to the defendant; he would then
received notice to disclaim, and
l have failed to do so within the
imited by the Act. If, on the con-
the delivery of the letter at the
or to the clerk be not proved, then
bsequent disclaimer is in time, the
nder took effect, and the defendant
liable for the rent. The case must
ck for a new trial, that it may be
whether the registered letter
l the trustee's office.

The parish of S. was within the parliamentary borough of New Shoreham, but an isolated portion of the parish of S., called Broadbridge Heath, was locally situated within the parish of Horsham, which parish is coterminous with the parliamentary borough of Horsham. The Local Government Board under the powers of the above Act amalgamated Broadbridge Heath with the parish of Horsham:—

Held, that persons qualified to vote in respect of property situate within Broadbridge Heath were not entitled to vote for the borough of Horsham, but retained their right to vote for the borough of New Shoreham.

Appeal from the decision of the Revising Barrister for the borough of Horsham by a case stated pursuant to 41 & 42 Vict. c. 26. s. 37 (1). The Revising Barrister having refused in the first instance to state a case, the appellants on the 9th of October moved and obtained a rule *nisi* at chambers calling on him to shew cause why a case should not be stated for the opinion of the Superior Court. This rule was subsequently made absolute by the Divisional Court of Common Pleas, and accordingly the Revising Barrister stated the following

At the revision of the lists for the borough of Horsham objections were

(1) 41 & 42 Vict. c. 26, s. 37.—“If any person feels aggrieved by a revising barrister neglecting or refusing to state any case, he may, within one month after such neglect or refusal, apply to the High Court of Justice upon affidavit of the facts for a rule calling on the revising barrister, and also on the person, if any, in whose favour the decision from which the applicant desires to appeal was given, to shew cause why a rule should not be made directing the appeal to be entertained and the case to be stated, and thereupon the High Court, or any Judge thereof in chambers, may make such rule to shew cause, and make the same absolute, or discharge it with or without payment of costs as seems just, and the revising barrister on being served with any such rule absolute shall state the case accordingly, and the case shall be stated and the appeal entertained and heard notwithstanding any limitations of time or place contained in the Parliamentary Registration Act, 1843.”

2 Q

Rule absolute for a new trial.

rs--Bell, Brodrick & Gray, agents for
house & Peach, Hull, for plaintiff; George
yer, for defendant.

THE COMMON PLEAS DIVISION.]

al from Revising Barrister's Court.)

26. { FOSTER AND OTHERS (*appellants*)
v. MEDWIN AND ANOTHER (*respondents*).

*liament—Borough Vote—Divided
es and Poor Law Amendment Act,
39 & 40 Vict. c. 61), s. 4—Alteration
arish Boundary—Parliamentary
ary of Borough.*

alteration of parish boundaries under the Divided Parishes and Poor Law Amendment Act, 1876, does not affect the elementary divisions of counties and of boroughs for election purposes, so

OL. 49.—Q.B., C.P. & EXCH.

Foster v. Medwin (App.), C.P.

duly made to the names of the appellants being retained on the list of persons entitled to vote at the election of a member to serve in Parliament for the borough of Horsham. The following is a copy of the notice served on each of the appellants by the respondent: "I hereby give you notice that I object to your name being retained on the list of persons entitled to vote at the election of a member to serve in Parliament for the Parliamentary borough of Horsham in respect of property occupied within the parish of Horsham on the following ground, namely, that your alleged qualification is not within the parliamentary borough of Horsham."

By the 5th section of the 2 and 3 Will. 4. c. 45, being the Reform Act of 1832, it is enacted as follows:—

"That the borough of New Shoreham shall for the purposes of this Act include the whole of the rape of Bramber in the county of Sussex, save and except such parts of the said rape as shall be included in the borough of Horsham by an Act to be passed for that purpose in the present Parliament."

By the 7th section of the same Act it is enacted as follows:—

"That every city and borough in England which now returns a member or members to serve in Parliament and every place sharing in the election therewith (with certain exceptions therein mentioned) shall for the purposes of this Act include the place or places respectively which shall be comprehended within the boundaries of every such city, borough or place as such boundaries shall be settled and described by an Act to be passed for that purpose in this present Parliament, which Act when passed shall be deemed and taken to be part of this Act as fully and effectually as if the same were incorporated herewith."

By the 35th section of the 2 and 3 Will. 4. c. 64 (being the Act referred to in the 5th and 7th sections of the 2 and 3 Will. 4. c. 45), after reciting the above provisions and declaring that the several cities, boroughs and places where the boundaries were to be settled and described as in the said recited

Act is mentioned are the several cities, boroughs and places which are specified in the schedule to this Act annexed marked O, it is enacted as follows:—

"Be it further enacted and declared that the several cities, boroughs and places specified in the said schedule to this Act annexed marked O shall, as to the election of members or a member to serve in Parliament, respectively include the places and be comprised within the boundaries which in such schedule are respectively specified and described in conjunction with the names of such cities, boroughs and places respectively."

Schedule O was and is as follows:—

Horsham, the Parish of Horsham.

In the year 1876 an Act to provide for the better arrangement of divided parishes and other local areas, and to make sundry amendments in the law relating to the relief of the poor in England, being 39 & 40 Vict. c. 61, was passed.

By the 1st section of the said Act it is enacted as follows:—

"Where any parish shall be divided so as to have its parts or any of them isolated in some other parish or parishes, or otherwise detached, the Local Government Board may, as and when they shall see fit after local enquiry, to be held upon notice duly given to the Clerk of the Peace of the county or counties in which the part of the parish are situated and in the parishes to be affected in the manner prescribed, or usually adopted therein for the publication of parochial notices, make an order to take effect at the expiration of some period not less than three months from the day when a copy of such order shall have been sent to the overseer either for constituting separate parishes out of the divided parish or for amalgamating some of the parts thereof with the parish or parishes in which the same may be locally included or to which the same may be annexed as shall appear to such board to be most convenient, and providing where requisite for a change of the county of the parish or part of a parish."

By the 3rd section of the said Act it is enacted as follows:—

"From and after the 25th day of March next ensuing, the day when such

ster v. Medwin (App.), C.P.

if not objected to, shall take effect, in the case of a provisional order ensuing the date of the Act of Parliament confirming the same, the several of every parish to which such order apply shall be and continue to be constituted in the manner directed by the order, and the officers of the several parishes affected thereby shall be employed and shall be required to act as if the parishes had been constituted in the manner directed prior to the issue of the order."

the 4th section of the said Act it acted as follows:—

Nothing herein contained shall apply to the ecclesiastical divisions of parishes or to the constitution of school districts without the sanction of the Education Department, or shall alter the boundaries of any municipal borough, and for the purposes of the election of Members of Parliament and of burgesses in municipal boroughs, of the jury lists, of the action of the justices, and of the police and constables, the parishes shall continue to be constituted unaltered until new lists are made and new constables are appointed." The appellants claimed to have their names retained on the list in respect of property situated in what was, prior to the making of the order of the Local Government Board hereinafter mentioned, an isolated and detached part of the parish of Sullington, known as Broadbridge Heath.

On the date of the said order of the Local Government Board the said Broadbridge Heath was within the parliamentary borough of New Shoreham as defined in the 4th section of the 2nd and 3rd Will. 4, 1835, and was not within the parliamentary borough of Horsham.

A copy of an order of the Local Government Board was produced, and the order was duly made pursuant to the 9 & 40 Vict. c. 61, and was not objected to, and was not a provisional order. The meaning of the 3rd section of the said statute, and was in all respects valid at all material times a valid and subsisting order (2).

The said order is as follows:—
Arrangement of detached portion of parish of Horsham and Thakeham Unions,

New lists of voters had been duly made, and new constables had been duly

Horsham
and
Sullington } parishes.

To the Guardians of the Poor of Horsham Union, in the county of Sussex.

To the Guardians of the Poor of the Thakeham Union, in the said county.

To the Churchwardens and Overseers of the Poor of the parish of Horsham, in the said Horsham Union.

To the Churchwardens and Overseers of the Poor of the Parish of Sullington, in the said Thakeham Union.

And to all others whom it may concern.

Whereas (here sections 1, 2 and 3 of "The Divided Parishes and Poor Law Amendment Act 1876," are recited).

And whereas by an order dated the 16th day of April, 1835, the Poor Law Commissioners declared that the several parishes and places named in the margin thereof, comprising the Thakeham Union and including the parish of Sullington, in the said county of Sussex, should be united for the administration of the laws for the relief of the poor.

And whereas by an order dated the 27th day of August, 1835, the Poor Law Commissioners declared that the several parishes and places named in the margin thereof, composing the Horsham Union, including the parish of Horsham, in the county of Sussex, should be united for the administration of the laws for the relief of the poor.

And whereas the said parishes of Sullington and Horsham are respectively parishes within the meaning of the above recited Act.

And whereas the said parish of Sullington is divided, so that certain parts thereof known as "Broadbridge Heath" and "Broadbridge," which are isolated and detached from the remainder, are locally included within or annexed to the said parish of Horsham, and a proposal having been made that such isolated and detached parts should be separated from the parish to which they belong, and that each such part should be amalgamated with the parish in which it may be locally included or with some parish to which it may be annexed; the Local Government Board caused local enquiry to be held after notice duly given as required by the above-recited Act, and report has been duly made thereon.

Now therefore we the Local Government Board, in pursuance of the powers given by the statutes in that behalf, hereby order as follows:—

Article 1. All those two isolated and detached parts of the said parish of Sullington known as "Broadbridge Heath" and "Broadbridge," which are locally included within or annexed to the said parish of Horsham, shall cease to be parts of the said parish of Sullington, and shall be amalgamated with the said parish of Horsham.

Article 2. This order shall take effect on the 1st day of November, 1878.

Foster v. Medwin (App.), C.P.

appointed for the parish of Horsham subsequently to the 25th of March, 1879.

It was contended by the respondent that the property in respect of which the appellants claimed to have their names retained on the list was within the parliamentary borough of New Shoreham, and not within the parliamentary borough of Horsham, and that therefore the appellants were not entitled to have their names retained on the list.

It was contended by the appellants that the property in respect of which they claimed to have their names retained on the list had ceased to be within the parliamentary borough of New Shoreham, and was now within the parliamentary borough of Horsham, and that therefore the appellants were entitled to have their names retained on the list.

The Revising Barrister decided that the property in respect of which the appellants claimed to have their names retained on the list was within the parliamentary borough of New Shoreham, and was not within the parliamentary borough of Horsham, and that therefore the appellants were not entitled to have their names retained on the list of persons entitled to vote for a member for the borough of Horsham.

The appellants have required the returning officer of the borough of Horsham to be made a respondent.

A. L. Smith, for the appellants.—The property in respect of which the appellants claim to vote having ceased to be within the parliamentary borough of New Shoreham, and being now within the parliamentary borough of Horsham, the appellants are entitled to have their names retained on the list for the borough of Horsham. By section 3 of the 39 & 40 Vict. c. 61, the altered parishes are to be constituted in the manner directed by the order of the Local Government Board, but by section 4 the parishes are to be deemed unaltered in respect of certain matters until new lists are made and new

Given under the seal of office of the Local Government Board this 26th day of July, in the year 1878.

G. Selater Booth, President.

(L.S.) Thomas Salt, Secretary.

constables appointed; when that is done the parishes are altered.

[*LORD COLERIDGE, C.J.*—This section means no more than that the lists of voters for Broadbridge Heath should be put up on the parish church of Horsham.]

It points to this, that the appellants would thenceforward vote for the borough of Horsham.

[*LORD COLERIDGE, C.J.*—There might arise a case in which by such transfer of voters persons would be disfranchised, for example, by throwing part of a borough into the county.]

In the converse the franchise would be extended, for persons would be enfranchised. In the present case no such effect would follow, as the voters are equally qualified for each borough. By the Representation of the People Act, 1867, rating is to be the qualification of franchise in boroughs, and these voters will be rated in the parish of Horsham.

Goldie, for the respondent.—The parliamentary boroughs of New Shoreham and Horsham are defined by the Reform Act, 2 & 3 Will. 4. c. 45, and the incorporated Act, 2 & 3 Will. 4. c. 64, settling the divisions of counties, and limits of cities and boroughs, and without some express enactment those boundaries could not be altered. In the schedule to the latter Act many parts of outlying parishes are shewn to be portions of parliamentary boroughs, e.g. Midhurst; in such case the voters resident in these outlying parishes would vote for the borough of Midhurst, though locally situated outside the borough, and within another parliamentary division, and there would be a similar condition of things in the present instance. The 39 & 40 Vict. c. 61, is a Poor Law Amendment Act, and only intended to deal with poor law and local areas. The new lists mentioned in section 4 are probably the lists of those voters who are thus transferred for parochial purposes into the parish of Horsham, and such lists will have to be made by the overseers of Horsham. The contention of the appellants would give to the Local Government Board the power to enfranchise and disfranchise by alteration of the boundaries of parishes.

J. F. Clerk, for the returning officer.—

Poster v. Medwin (App.), C.P.

re probably was originally a full stop
the word unaltered, and the remaining
ds have been added in committee.

expression "burgesses" always
ns the electors, not the elected.
ew lists" are intended to mean new
lists, which are to be made out by
overseers of the parish to which the
ded parish is transferred.

LORD COLERIDGE, C.J.—They cannot
overseers of the parish until the new
are made.]

those words need not be construed
ctly. The parish would be considered
red at the moment the new lists were
le.

L. Smith, in reply.

LORD COLERIDGE, C.J.—This is an ap-
from the decision of the Revising
rister for the boroughs of New Shore-
a and Horsham, brought by persons
heretofore have been residents in the
ough of New Shoreham, but who now
med to vote for the borough of Hor-
n. The Revising Barrister has dis-
vowed their claim. I am of opinion that
decision was correct, and that these
ons are still within the borough of
y Shoreham and not within that of
sham, and that they have no right to
e for the latter borough.

he decision turns upon a few sections
he Divided Parishes and Poor Law
endment Act, 1876 (39 & 40 Vict. c.

I am compelled to say that after full
ntion I cannot place a satisfactory in-
retation on section 4, but I approach
consideration of the case upon this
ciple, namely, that, looking at the
e of the Act, it seems our duty to
rpret it so as not to affect the parla-
itary franchise unless we are driven
o so. The preamble as well as the
le Act is directed to the amendment
he poor law; the last section enacts
the Act is "to be cited and described
all purposes as the Divided Parishes
Poor Law Amendment Act, 1876,"
hat from the beginning to the end the
ration of the Act is confined to poor
purposes.

he first section gives the Local Go-
ment Board power to divide parishes
to make provision for these divided

parishes, giving notice to the parishes
which are to be affected, and to the clerks
of the peace of counties which are to be
affected, and for the purposes of the Act
to change the boundaries of counties.
There are certain parochial purposes for
which the county rates are now made
liable, consequently the change of county
may be very convenient for parochial and
poor law administration, and as the
boundaries of counties for such purposes
may be altered, there is a sufficient ex-
planation why notice of such intended
alteration is to be given to the clerk of
the peace. No such notice is to be sent
either to town clerks in boroughs where
there is a municipality, or to the return-
ing officer, or to the person interested in
parliamentary boroughs without municip-
alities, such as the boroughs of New
Shoreham and Horsham.

Then comes the 4th section, and I
must say I share with my brother Lindley
and with the learned counsel who have
addressed us, the difficulty of giving a
clear interpretation to it. It recites,
"Nothing herein contained," that is, no
change in the parishes, "shall apply to
the ecclesiastical divisions of parishes,
the constitution of school districts, or shall
alter the boundaries of any municipal
borough." With these matters we are
not now concerned, and for the purposes
of the present case they may be put aside.
Then follow the words on which reliance
is placed by the appellants, "And for the
purposes of the election of members of
Parliament and of burgesses in municipal
boroughs, of the jury lists, of the action of
the justices, and of the police and con-
stables, the parishes shall continue to be
deemed unaltered until new lists are made
and new constables are appointed." I sup-
pose it is intended that when new lists are
made and new constables appointed that
the parishes for certain purposes shall be
altered. What are these purposes? The
election of members of Parliament is in
some respects a parochial matter, inasmuch
as the overseers make out the parochial
lists. So with regard to burgesses in
municipal boroughs, which I am inclined
to agree means electors, and consequently
with regard to election of members of
Parliament and burgesses in municipal

Foster v. Medwin (App.), C.P.

boroughs, these parishes are for certain purposes to be altered.

Holding the governing principle that the parliamentary franchise is not to be affected if possible, how can I interpret this section without interfering with it? A suggestion made in the course of the argument appears to me to be a solution. The new portion of the parish of Sullington, is for some purposes to be attached to the parish of Horsham, but not so as to affect the election of members of Parliament, beyond that the lists of names of those voters who remain in the amalgamated portion of the parish of Sullington will have to be put on a separate list and stuck on the doors of the church in the parish of Horsham, but they will still vote as they have done for the borough of New Shoreham. Similar instances are to be found in the 2 Will. 4. c. 64, which is a part of the Reform Act to settle the divisions of counties and the limits of cities and boroughs. A variety of portions of parishes, partly in the county and partly in the borough of Midhurst, there form part of that borough. In those parishes the overseers have to put up two lists on the doors of their parish churches. They have to put up the lists of county voters, and the list of Midhurst voters, so far as the borough of Midhurst extends into their parish, and this is what the overseers of Horsham will have to do in the present case. That seems to me to give an adequate interpretation to this section. It is plain that to construe it otherwise would give to the department of the Executive Government, in cases where a borough is attached to a considerable district—which is the case in several parts of England—the power to disfranchise, by throwing voters into the county where they would lack the necessary qualification; that would be a startling conclusion, and such that one would not willingly come to unless obliged. In the present case no one would be disfranchised, the voters would merely change their district. It is also true that a change of votes might in some cases have the converse effect of enfranchising; as far as the argument rests it is a fair answer to say so, but the fact that the power of enfranchising and disfranchising depends on a department of the Executive Government remains an

argument for both sides, and a conclusion to which one would be reluctant to come.

For these reasons, without pretending to say I have construed this section so as to give a satisfactory effect to the whole of it, I am of opinion that the decision of the Revising Barrister was right, and must be affirmed with costs. The returning officer is made a respondent against his will and ought to have his costs.

LINDLEY, J.—I am of the same opinion. Like my Lord I do not profess to understand the 4th section, but, as often happens, one may see what a thing does not mean, without seeing what it does mean. The Act appears to be directed to a different matter altogether. Neither in the preamble nor in the whole Act is there a word which justifies the contention that the object is to influence the franchise, nor is there any reason for supposing that any alteration of it was contemplated except by such intention as is to be gathered from the obscure words of section 4, on which the appellants' contention is founded. Up to a certain point the section is free from ambiguity and consistent with the Act, but a difficulty arises at the words "until new lists are made and new constables are appointed." What are the consequences which are to follow when that is done? Some consequences obviously, and it is contended we ought to answer that the boundary of this borough is to be altered for election purposes. The answer is, whatever consequences are to follow, this is not to follow. The counsel for the respondent suggests the words refer merely to the making of new lists, the counsel for the returning officer suggests they refer to the jury lists, and of the two suggestions the latter seems to me to be preferable, though I am not prepared to say which of the two is right; but at all events I am not prepared to say that the boundary of Horsham, which was settled by the Reform Act, is now altered for election purposes.

Decision affirmed with costs; no costs against the returning officer.

Solicitors—Robinson, Preston & Stow, agents for Bostock & Rawlison, Horsham, for appellants; and for returning officer; Carritt & Son, agents for Bedford, Horsham, for respondent.

THE QUEEN'S BENCH DIVISION.]

8. } GLYNN, MILLS, CURBIE AND CO. v.
 0. } THE EAST AND WEST INDIA DOCK
 23. } COMPANY.

ip and Shipping—Consignment of
 s—Pledge by Consignee during Voyage
 ts of Bill of Lading—Title of Holder
 nocent Parties—Warehouseman.

The plaintiffs advanced a sum of money
 O. & Co." upon the security of certain
 shipped for London, of which "C. &
 were the consignees and owners. A
 of lading representing the goods was
 used and delivered to the plaintiffs by
 Co. as collateral security for the goods.
 bills, so indorsed and delivered, had
 signed by the master of the ship in a
 of three, each of which was marked
 st," "Second," "Third," making the
 deliverable to "C. & Co., or their as-
 s." Freight was made payable in
 London, and the bills of lading contained
 usual clause, "the one of which bills
 accomplished, the rest to stand void."
 as the "First" of the set which "was
 referred to the plaintiffs by O. & Co.,"
 it was the only one which they ever
 rrsed. On the same day that the ship
 ed in London, "C. & Co." made entry
 the goods on board which were consigned
 em, and these goods were landed and
 ed in the custody of the defendants in
 warehouses. The following day the
 er lodged with the defendants a notice,
 ting them to detain the cargo until the
 ht should be paid. Two days later,
 & Co." produced to the defendants the
 cond" part of the set of three of the
 of lading of the goods in question, and
 defendants then entered "O. & Co." in
 books as the proprietors of the goods.
 esequently the stop for freight was re-
 ed, and the defendants delivered the
 s to third parties under delivery orders
 ed by "C. & Co.," and lodged by them
 the defendants. These orders and deli-
 es were made entirely without the know-
 e of the plaintiffs. In an action by the
 ntiffs against the defendants to recover
 value of the goods represented by the bill
 iding, of which the plaintiffs were the
 fide indorsees and holders for value:
 eld, by FIELD, J., on further consider-

ation, that the plaintiffs were entitled to
 judgment on the ground that, whatever the
 rights and obligations of the master of the
 ship might have been, so long as the goods
 were still in her hold, the only authority
 conferred upon the defendants by the mas-
 ter was to detain until payment of freight,
 and then to deliver to the holder of the bill
 of lading, and that, accordingly, upon the
 release of freight, the defendants became
 either agents for the holder of the bill of
 lading (in which case they were only autho-
 rised to deliver to the plaintiffs) or ware-
 housemen, who, as such, had been guilty of
 a conversion in delivering the goods upon
 the order of O. & Co. to third parties, to sell
 or use for their own benefit.

This was a case tried without a jury
 before Field, J., on the 8th of December,
 1879, at the Guildhall; and in which judg-
 ment was reserved.

Herschell and J. O. Matthew, for the
 plaintiffs.

Watkin Williams and Pollard, for the
 defendants.

Our. adv. vult.

FIELD, J.—This action was tried at the
 last Guildhall sittings before me, sitting
 without a jury, and after argument, I re-
 served my judgment. The question raised
 in it is, whether the plaintiffs are entitled
 to recover as against the defendants the
 value of some West India produce repre-
 sented by bills of lading, of which they
 are the *bona fide* indorsees and holders
 for value, under the following circum-
 stances.

On the 15th of May, 1878, the plaintiffs
 advanced the sum of 13,000*l.* to Messrs.
 Cottam, Morton & Co. upon the security
 of a large quantity of produce, of which
 Cottam, Morton & Co. were the consignees
 and owners, and the bills of lading repre-
 senting which they indorsed and delivered
 to the plaintiffs by way of collateral secu-
 rity for the advance. A part of this produce
 consisted of sugar which had been shipped
 at Jamaica, and was then at sea on board
 the *Mary Jones*, and as the facts and
 reference to this sugar are substantially
 identical with those relating to the rest
 of the produce, it was agreed upon the

Glynn, Mills & Co. v. East and West India Dock Co., Q.B.

argument that the facts and principles applicable to the produce *ex Mary Jones*, should represent the whole. The bills of lading thus indorsed and delivered, had been, as usual, signed by the master in a set of three, and each of the set was conspicuously marked "First," "Second" and "Third." They were dated the 15th of April, and represented the goods as to be delivered to "Cottam & Co. or their assigns;" freight being made payable in London, and they contained the usual clause by which it was witnessed that the master had affirmed to three bills of lading, "the one of which bills being accomplished, the rest to stand void." It was the "First" of the set which Cottam & Co. transferred to the plaintiffs, and it was the only one which they ever indorsed. Contemporaneously with the advance, Cottam & Co. also assigned a memorandum of deposit of the goods, by which the advance was made repayable on the 15th of July; liberty was given to the plaintiffs to realise the goods in the event of default or "other case of need," and the memorandum contained provisions for the insurance of the goods by Cottam & Co. against fire, and for the application of any money recovered under the policy in part liquidation of the advance.

The *Mary Jones*, which was a general ship, arrived in London, her port of discharge, on the 28th of May, and on that day Cottam & Co. made entry of such of the goods on board as were consigned to them, being the goods in question, and those goods as well as the rest of the cargo were landed and placed in the custody of the defendants in their warehouses. On the same day the master lodged with the defendants a copy of the manifest of the whole of his cargo, at the foot of which he signed an authority to the defendants to deliver the goods to the "holders of the bills of lading." On the following day, the 29th of May, the master lodged with the defendants notice, under section 68 of the Merchant Shipping Act Amendment Act, 1862, directing the defendants to detain the cargo until the freight should be paid. On the 31st of May, the consignees of the goods in question, Cottam & Co., produced to or lodged with the defendants the "Second"

part of the set of three of the bills of lading of the goods in question, and the defendants then entered Cottam & Co. under appropriate columns in their book as the "Enterers," "Importers" and "Proprietors" of the goods. Nothing further appears to have been done as to the goods until the 7th of June, on which day the stop for freight was removed, and the goods remained in the defendants' custody until the 3rd of July, on which day they delivered them to Messrs. J. C. Williams for their own benefit, under delivery orders signed by Cottam & Co. on the 2nd of July, and lodged by them with the defendants on the following day. In the case of some of the other produce forming part of the plaintiffs' security, the defendants made out warrants in favour of Cottam & Co. upon orders lodged by them, and deliveries were made as per the indorsements on the warrants to third parties. These orders for warrants and for delivery were lodged by Cottam & Co., and the deliveries under them were made entirely without the knowledge of the plaintiffs, and Cottam & Co. having filed their petition for liquidation on the 15th of August, with a large balance due by them to the plaintiffs, the latter proceeded to resort to their security. On application, however, to the defendants, the plaintiffs discovered the dealing which had taken place with their goods as above detailed, and having made subsequent demand of delivery, with which, of course, the defendants could not and did not comply, the present action was brought.

The question involved is the one so often unfortunately raised in Courts of justice as to which of two innocent parties is to suffer by the dishonest dealings of a third, and the only course open to a Court, in such a case, is to ascertain upon which of the parties the loss is caused by the operation of the rules of law applicable to the case, and decide accordingly. In this action the question is one of considerable mercantile importance, and I have taken time to consider the authorities applicable to it, but the legal result of the facts has always seemed and now seems to me reasonably plain.

By the pledge by Cottam & Co., who

nn, Mills & Co. v. East and West India Dock Co., Q.B.

unquestionably the owners of the goods, and the delivery to them of the bills of lading, the plaintiffs as of right became entitled to all the goods & Co.'s rights. This is established (if authority be necessary) by the case of *Barber v. Meyerstein* (1) cited in argument. It is true, however, that the plaintiffs' right of immediate possession was subject to one limitation, namely, payment of the freight on the arrival of the goods, but on payment of the freight on the 8th of June, or at all events on the subsequent demand and refusal, the plaintiffs' right of immediate possession as well as their property was clearly vested in them. It is certain that the plaintiffs have never in any way intentionally parted with their rights, and the only mode in which the defendants can justify their taking of the goods upon the order of Cottam & Co. must be either by some act of fraud on the part of the plaintiffs, either of omission or commission, whereby they have deceived the defendants and induced them reasonably to believe that Cottam & Co. were the owners of and entitled to the goods as their own property, or by some title paramount to that of the plaintiffs, by the coming into effect of which their title was divested. It was urged by the learned counsel for the defendants upon the argument, that the plaintiffs had not been guilty of any laches or negligence so as to estop them from setting up their title, and, after a careful consideration of the evidence, I am unable to find that there was any act of fraud done or pursued by them, or by any person acting for them, or by any way held out to the defendants as authorised or induced the defendants to believe that they were authorised, to deal with the property in the goods. The omission to insert in the bill of lading, or in the notice of the indorsement to them, the words "First," were urged by defendants' counsel as thus operating, but similar arguments were also unsuccessfully relied upon in the case of *Barber v. Meyerstein*

(2), and I can give such contention no better answer than it there received in the judgment of Lord Hatherley. It was upon argument further admitted, upon the authority of *Barber v. Meyerstein* (2), that as against the persons who took the goods under the warrant of delivery orders, the plaintiffs' rights of property were sufficient to entitle them to recover the value of the goods; but it was said that this was not so as against the defendants, in whose case the question was not one of property, but of contract, and it was urged that the delivery of the goods to Cottam & Co.'s order, which was the act complained of, was justified by the terms of the bills of lading (subject to which the plaintiffs admittedly took the goods), the defendants being, as was said, in the same position as the master of the *Mary Jones*, the goods being, as was said, in the same position as if they were still in his hold.

This contention was based upon the fact that the freight remaining, as it did, unpaid on the 29th of May, the master had availed himself of the provisions of the Merchant Shipping Act of 1862, by lodging with the defendants the notice to detain the goods, and that was said to have constituted the defendants the agents of the master for delivery. The alleged right of the master to deliver to Cottam & Co. rested upon the contention that, as he had, for (as it was said) the convenience of the merchant, made three copies of the bill of lading, whereby the goods were deliverable to Cottam & Co. by name or "assigns," the presentation by Cottam & Co. of any one copy, although unindorsed, without notice of any previous indorsement of any other part of the bill would render it compulsory upon the master to deliver, or, at all events, have justified him in delivering the goods to the consignees, notwithstanding that they had previously assigned the bill to the plaintiffs. It was urged that there would be a great hardship in making the master liable to the previous indorsee in such a case, as it would compel him to decide upon conflicting claims without the means of de-

(2) 39 Law J. Rep. C.P. 187; Law Rep. 4 H.L. 317.

6 Law J. Rep. C.P. 48; Law Rep. 2 C.P.

Glynn, Mills & Co. v. East and West India Dock Co., Q.B.

ciding which of them was best founded, and it was said by the presentation of one copy by the consignee, the bill of lading became by the very terms of it "accomplished," and so the plaintiffs' copy stood "void." No direct authority in support of the proposition, as between the master of a ship and a consignee named in a bill of lading, who, having a right to indorse, had previously transferred his property in the goods and indorsed the bill of lading for value to a third party, was cited. Mr. Herschell, indeed, at the close of his argument, referred to certain authorities on which, as he anticipated, Mr. Watkin Williams would rely for the defendants; but although the latter to some extent urged propositions in the direction of which those authorities tend, he did not cite them in support of his argument. I have, however, thought it my duty to examine them, and this seems to be the result.

The earliest case is that of *Fearon v. Bowers* (3), which was cited by Lord Loughborough with approval, in his celebrated judgment in *Lickbarrow v. Mason* (4). In that case there was a stoppage *in transitu* by the vendor, and the prior indorsee, for value from the purchaser, brought an action against the master, who had delivered to the vendor's agents upon production of a copy subsequently indorsed to him by the vendor, and the master was held by the Chief Justice Lee entitled to succeed. In that case a mercantile usage is reported as having been proved that when bills of lading are indorsed to different persons, the master has a right to deliver to whichever he thinks proper, and is discharged by a delivery to either, and is not obliged to consider the merits of the different claims, and it was upon that evidence that Chief Justice Lee directed a verdict for the defendant. This case was also cited with approval by Dr. Lushington in the case of *The Tigress* (5). The latter case was cited in the argument of *Barber v. Meyerstein* (2), and although not noticed in the judgment, Lord Westbury is reported to have

said, that possibly the shipowner might be justified in cases like that before him between two indorsees of the bill of lading. It is, however, to be observed that the views of these two eminent Judges were not necessarily the foundation of their judgment in either case, and in *Meyerstein v. Barber* (1), Mr. Justice Willes seems to have entertained a different opinion, and the doctrine thus enunciated seems to conflict strongly with the general doctrine of the liability of wharfingers, warehousemen and other bailees, who, it is clear, are under the obligations under similar circumstances to decide between rival claimants their peril or to interplead. (See per Willes, J., in *Meyerstein v. Barber* (1) and *Wilson v. Anderton* (6)).

In the present case it is not, however, necessary for me to decide this question for I am of opinion that the defendant did not at the time that they delivered the goods upon Cottam & Co.'s order occupy the position, or have vested in them any such right or obligation of the master if it exist. It seems to me that the order authority conferred upon the defendant by the master was to detain until payment of the freight, and then to deliver to the owner of the bill of lading. Upon the release of freight of the 8th of July the interest and duty of the master ceased and the defendants became either simple agents for the holders of the bills of lading or mere bailees of Cottam & Co. under the entry of the goods made by them. In support of this first view of their character, even if that be not an implication of law resulting from the facts, it is to be observed that on the day before the master lodged the stop-freight he had lodged a copy of his manifest in a printed form supplied by the defendants for use at their docks.

By the terms of this document, originally printed, the masters purport to give an authority to the defendants to deliver the goods to "the consignee or holder of the bill of lading," and it contained directions applicable to a case in which the master himself, in default of the consignees taking delivery of

(3) 1 Smith's Leading Cases, 5th edit. 705 n.

(4) 1 Smith's Leading Cases, 5th edit. 601.

(5) 32 Law J. Rep. Prob. M. & A. 97.

(6) 1 B. & Ad. 450.

Ann, Mills & Co. v. East and West India Dock Co., Q.B.

deposits the goods with the dock any under the provisions of the Merchant Shipping Act Amendment Act; in this case the consignees, Cottam & Co., took delivery and entered the bill of lading, the master, before signing the copy bill of lading, struck out all the latter part, also struck out the word "consignees," leaving, therefore, the authority to deliver to the "holder of the bill of lading," in other words to the consignees, who alone filled that character, of whom, therefore, after the payment of freight, the defendants would become consignees. If, on the other hand, the defendants are to be regarded, as it appears to me they are, as the warehousemen or ordinary bailees of Cottam and Co. then they have no better title as bailees than the plaintiffs than their bailors, cannot justify the delivery to the consignees of the latter; see *Batut v. Hartley*. It is said to be a hardship on the defendants that they should be liable for the goods upon the production of the bill of lading part of the bill of lading without knowledge of a previous indorsement. It may be observed that they had the goods in their own hands, as the part produced was conspicuously marked "consignees," and they had only to require production of the "First" part of the bill, as is well known, is usually sent to the consignee, and in case of the non-production of it to take an indemnity for the delivery.

It is said that is the course pursued by the defendants in their East India trade, which the original bills of lading only accepted, and in case of loss the defendants require satisfactory proof of title to the goods, thus shewing that in that at least, precautions are taken which are taken by the defendants in the present case which would have protected them against the loss.

If the law were held to be different from the result at which I have arrived, the consignee who had sold or dealt with the goods, to arrive, would only have to avail himself of his almost necessary earlier knowledge of the arrival of the goods to protect himself by production of his bill of lading.

lading any production by the indorsee of the original previously indorsed, and thus most seriously affect the transaction of any such dealings, which are effected solely in reliance upon the shipping document.

The only remaining question is whether the defendants have been guilty of what is technically called a conversion, so as to entitle the plaintiffs to recover from the value of the goods. The various cases cited in *Hollins v. Fowler* (8) were referred to by the defendants, for the purpose of contending that in the present case they had done no more than that which is ordinarily done by packers, carriers, wharfingers, warehousemen and other bailees, who when they have merely carried the goods or dealt with them in the way of their trade, or re-delivered them to their bailors, consistently with the purposes for which they were bailed, have not been held liable for the value of the goods. But the facts in the present case are in no way analogous to those, for here the defendant had absolutely delivered the produce upon the orders of Cottam and Co. to third parties, purchasers or others, intending to sell or use them for their own benefit. The defendants, therefore, have recognised a title, and assumed and executed a dominion over the goods utterly inconsistent with the plaintiffs' rights as proprietors, which are to take them wherever and when they please, and by this act of the defendants the plaintiffs have been permanently deprived of their property. That such acts entitle the plaintiffs to recover in this action the value of the property seems to me clear, and I therefore give a verdict and judgment for the plaintiffs for the amount which the parties have undertaken to fix.

Judgment for the plaintiffs.

Solicitors—Murray, Hutchins & Stirling, for plaintiffs; Freshfields & Williams, for defendants.

[IN THE COURT OF APPEAL.]

1879.
 Nov. 16, 17. } LEWIS v. LEONARD AND SON.*
 1880.
 March 10. }

Liquidation by Arrangement—Resolutions giving Power to grant Discharge—Acceptance by dissenting Creditor of Benefits under Liquidation Scheme—Effect of Certificate of Discharge—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 28, 49, 125, sub-secs. 7, 9, 10—Rule 302.

A creditor who dissents from, but who accepts the composition paid under resolutions adopted for the liquidation by arrangement of a debtor's affairs, cannot, the debtor having duly received his discharge and certificate, on default being afterwards made in the payment of a part of the composition, impugn the validity of the resolutions and sue on the original debt.

The certificate of discharge given by the Registrar to a debtor whose affairs are liquidated by arrangement, is conclusive evidence of the validity of the liquidation proceedings.

Claim by the plaintiff as indorsee against the defendants as acceptors of two bills of exchange for 100*l.* and for 50*l.* respectively, of which part had been paid, leaving 102*l.* 11*s.* due.

Defence. That the defendants were merchants carrying on business under the name of Samuel Leonard & Son; that they presented a petition for liquidation; that at the first general meeting of creditors it was resolved that the affairs of the defendants should be liquidated by arrangement; and that the debtors' discharge might be granted on a certificate of the committee of inspection and of the trustee; that at the second meeting the following resolutions were duly passed:—

I. That the following scheme of settlement of the affairs of the said debtors be and the same is hereby sanctioned and adopted, namely—

(1) The trustee, with the approval of the committee of inspection (which has already been given), to sell the whole of

the interest of the creditors and trustee in the joint estate of the said debtors, and in the separate estate of the said James Henry Leonard to the said Samuel Leonard alone, in consideration of his paying in cash the whole of the legal and other charges of and incident to the petition and these proceedings, and also a sum sufficient to produce a dividend of 8*s.* in the pound on the debts due to the creditors of the said debtors. Such purchase-money to be payable by the separate promissory notes of the said Samuel Leonard in favour of the creditors, by four equal instalments at two, four, six and eight calendar months from the approval by the Court of the terms of the scheme, the due payment of such promissory notes to be secured by the bond or covenant to the trustee of the said Samuel Leonard for the full amounts of such purchase-money, and of eight surties to be approved of by the committee of inspection to the amount of five hundred pounds each.

The said Samuel Leonard to pay to the trustee the following amounts in full in cash on or before the assignment of the estate to the said Samuel Leonard, namely—

(a.) The amount of the debts due to the separate creditors of the said James Henry Leonard.

(b.) The amount of the debts due to such of the creditors of the joint estate as are entitled to be paid in full.

(c.) All moneys expended by the receiver and manager and trustee of the estate for the purchase of goods, payment of wages and other payments for the protection of the estate.

3. The trustee to retain possession of the estate until the aforesaid terms are carried out, and the Court has approved of the terms of the scheme, and then to give the debtors their discharge.

II. That the trustee be and he is hereby authorised to do and execute all such acts, deeds and things that he may think necessary for carrying out and giving full effect to the aforesaid scheme.

III. That on the carrying out and completion of the scheme the trustee be released, and the estate closed without any further meeting.

* *Coram* Coleridge, C.J.; Bramwell, L.J.; and Brett, L.J.

is v. Leonard (App.), C.P.

at the above resolutions were duly considered and approved; that the trustee reported that the defendants were ordered to receive their discharges; that he received them, and that the Registrar duly certified the same; that the resolutions containing these resolutions were carried out; that the debt sued for was provable in the liquidation proceedings; that the plaintiff sued for the same; that he was bound by the terms of the scheme; and that he had received payments from the defendant, Samuel Leonard, on account of the composition agreed to be paid. That the composition agreed to be paid, having been paid, the original debt was discharged.

At the trial before Grove, J., without objection, it appeared that the petition for liquidation was duly presented on the 17th of November, 1877, and the first meeting of creditors duly held on the 28th of November; that the plaintiff attended the meeting and proved his debt, and that a resolution for liquidation by arrangement was adopted, from which the plaintiff dissented.

A second meeting was held on the 18th of January, 1878. The notice summoning the meeting was inserted in the *Gazette* of the 11th of January, and announced that a general meeting of the creditors of Samuel Leonard and J. H. Leonard will be held on Friday, the 18th of January, for the purpose of sanctioning the following resolution of the affairs of the said creditors: "Notice then set out the scheme, which was contained in the statement of defence, and in clause II., giving the trustee authority to do all such things as he might think necessary for carrying out the scheme, and containing in addition the following clause—"and also for the purpose of passing any other resolution and for any other scheme under the provisions of the Act."

The trustee and committee of inspection reported on the 28th of February, that the debtors were entitled to their discharges, and the Court granted them discharges on the 1st of March.

On the 11th of March a bond carrying out the scheme was entered into, to the effect that S. Leonard, J. H. Leonard, eight

sureties, the trustee and the committee of inspection were parties.

The first three instalments of the composition due under this arrangement were duly paid by Samuel Leonard; but on the 12th of October, shortly before the last instalment became due, he sent a circular to his creditors asking for six weeks' grace.

The plaintiff issued the writ in the present action, and the defendants were allowed to defend on payment into Court of the amount claimed.

Grove, J., gave judgment for the defendants.

The plaintiff appealed.

De Gez and Dugdale, for the plaintiff.
—The plaintiff is at all events entitled to judgment for the amount of the last instalment, as default in payment has been made; but it is further submitted that there is no defence to the action, as there has been no valid discharge of the debtors.

This discharge purports to be a discharge under sub-section 9 of section 125 of the Bankruptcy Act (1). Sub-section

(1) By 32 & 33 Vict. c. 71. s. 28—

"The trustee may, with the sanction of a special resolution of the creditors assembled at any meeting of which notice has been given specifying the object of such meeting, accept any composition offered by the bankrupt, or assent to any general scheme of settlement of the affairs of the bankrupt, upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled, subject nevertheless to the approval of the Court, to be testified by the Judge of the Court, signing the instrument containing the terms of such composition or scheme, or embodying such terms in an order of the Court.

"The provisions of any composition or general scheme made in pursuance of this Act may be enforced by the Court on a motion made in a summary manner by any person interested, and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of the Court. The approval of the Court shall be conclusive as to the validity of any such composition or scheme, and it shall be binding on all the creditors so far as relates to any debts due to them and proveable under the bankruptcy."

Section 49.—"An order of discharge shall be sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge

Lewis v. Leonard (App.), C.P.

7, however, makes the bankruptcy provisions of the Act apply to proceedings in liquidation, so that the provisions of section 28 (1) are applicable to this case. Now section 28 does not contain provisions for, nor was it intended to apply to, the discharge of a debtor, for if it did so apply, there would not be any need for the provisions of sections 48 and 49 (1), which deal with the discharge of a debtor.

Even in bankruptcy this discharge would have been invalid, for it only requires a payment of 8s. in the pound, whereas by section 48 the debtor must pay not less than 10s. in the pound; and if it is invalid in bankruptcy it is also invalid in liquidation. The learned Judge considered that this scheme was prepared under rule 302 (2), but the notice given

in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give it and the special matter in evidence."

By section 125, sub-section 7, it is provided that—"The trustee under a liquidation shall have the same powers and perform the same duties as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in a bankruptcy; and with the modification hereinafter mentioned all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation and the word 'bankruptcy' included liquidation by arrangement; and in construing such provisions the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy or the service of such petition or an order of adjudication in bankruptcy."

Sub-section 9.—"The provisions of this Act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation by arrangement; but the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution, at such time and in such manner, and upon such terms and conditions as the creditors think fit."

Sub-section 10.—"The trustee shall report to the Registrar the discharge of the debtor, and a certificate of such discharge given by the Registrar shall have the same effect as an order of discharge given to a bankrupt under this Act."

(2) Rule 302.—"Where liquidation by arrange-

in the *Gazette* was not a notice for a meeting such as is contemplated by that rule, but a notice of a meeting for the purpose of considering a scheme for a settlement under section 28 (1), and not a notice of a meeting for considering the discharge of the debtors. The resolution which purports to give the discharge is bad, for it does not satisfy the requirements of sub-section 9 of section 125 (1). It is opposed to the principles laid down in *Ex parte Hope* (3); it delegated to the trustee that which the creditors cannot delegate, and it did not fix the time for the discharge.

Moreover the terms and conditions of the deed have not been carried out, the promissory notes have not been paid; it is true that their payment is guaranteed by sureties; but the plaintiff is no party to the deed and cannot sue upon it.

Mellor (with him *Graham*), for the defendants.—The respondents contend that the action is barred, inasmuch as the debtors have been properly discharged.

The resolution for their discharge satisfies the requirements of the latter part of rule 302 (2). *In re Hope*; *Ex parte Hope* (3) can be distinguished, for there the creditors passed a resolution empowering the trustee to give an absolute unconditional discharge; in the present case the discharge was only to be given on the performance of certain conditions. The notice was that a meeting would be held to consider a general complete beneficial scheme for the settlement of the affairs of the debtors.

The creditors were therefore able to consider any scheme whatever, the dis-

ment and not in bankruptcy has been resolved on by the creditors may, at the same meeting at which such resolution is passed, resolve whether the debtor's discharge shall be granted either forthwith or at a date to be specified in the resolution or subject to any and what conditions. In default of any resolution being then come to as to the debtor's discharge a general meeting shall be summoned for the purpose of considering the grant thereof, either when the trustee shall so require, or when the committee of inspection (if any) or when the debtor, with the concurrence of one-fourth in value of his creditors, who have proved, shall require the trustee to summons the same."

(3) 47 Law J. Rep. Bankr. 78; Law Rep. Ch. D. 398.

s v. Leonard (App.), C.P.

was part of the scheme, and a creditor who desires to object to the proposed scheme should apply to the Court to prevent the assent of the Court given to the scheme. This is a liquidation by arrangement, and not a case of bankruptcy, and therefore the provision in section 48 (1), by which a composition required to be paid, has no application. The creditors can, subject to the assent of the Court, enter into any arrangement and make any bargain that they choose, and as the debtors have no objection to their discharge that discharge is provided for in section 49 (1) an answer to this action. If there were a composition the debt might be paid by default; but that is not the case in a liquidation, the difference being that in a composition the proceedings are in the hands of the creditors, whereas in a liquidation they are under the supervision of the Court. In the present case the defendant was a dissenting creditor, but he has taken advantage of the provisions of the Act, and has received payment of the four instalments due out of the four instalments due out of it.

Id., in reply.

Cour. adv. vult.

MWELL, L.J. (on March 10) read the following judgment.—I am of opinion that the defendant is entitled to judgment. He has obtained a certificate of discharge. By section 125, sub-section (1), that certificate "shall have the same effect as an order of discharge in a bankruptcy." By section 49 (1) an order of discharge "shall be evidence of the bankruptcy and of the validity of the proceedings thereon." The words are "sufficient evidence;" there is no doubt that this means evidence. The course of anyone coming to the Court of such an order or intended order or of the report of the trustee, or of the report under section 125, sub-section (1), to apply to be heard against the discharge of it, or if made, to get it set aside. It cannot remain in existence and be contested as proposed in this case. There is another ground on which the defendant is entitled to judgment. The plaintiff indeed opposed the resolution but has received and retained a

dividend. While he retains the benefit of the resolutions give him, and which he has accepted, he cannot be heard to deny the validity of those resolutions. The object of sections 125 and 126 is to bind a dissentient minority by the votes of a specified majority. The legislation is, *quoad* the majority, needless. Before this Act and others similar to it, creditors assenting to an arrangement or composition with a debtor were bound; see *Good v. Cheesman* (4) and especially per Williams, J., in *Boyd v. Hind* (5). It was upon this ground that I thought the judgment in *Campbell v. Im Thurn* (6) proceeded. Lord Blackburn, however, in *Breslaue v. Brown* (7) says, "Such a supposition is absolutely contrary to the fact," namely, that the creditors agree to a composition amongst themselves. He does not think that a creditor who comes in and votes for such a composition "dreams that he is entering into a bargain," and adds, what is certainly true, that he who votes against it makes no bargain. Such expressions do not alter my view of the grounds on which *Campbell v. Im Thurn* (6) was decided and, in my opinion, rightfully decided. But it is not necessary to determine the difference of opinion, as Lord Blackburn proceeds to say: "In either case," i.e. whether he has voted for or against the resolutions, "he has waived the conditions and submitted to the Court of Bankruptcy." I do not understand this. If it means he submitted by compulsion, it is incorrect. If it means he submitted by agreement, it looks like a bargain. However, this also is immaterial. They got right somehow it seems in *Campbell v. Im Thurn* (6), and according to the opinion of Lord Blackburn, or according to the one which I thought decided *Campbell v. Im Thurn* (6), the creditor is bound if he votes on and assents to the proceedings, *a fortiori* must he be if he takes a benefit under them as here. It is said he could not help him-

(4) 2 B. & Ad. 328.

(5) 1 Hurl. & N. 938; 25 Law J. Rep. Ex. 246.

(6) 45 Law J. Rep. C.P. 482; Law Rep. 1 C.P. D. 267.

(7) 47 Law J. Rep. C.P. 729, at p. 747; Law Rep. 3 App. Cas. 672.

Lewis v. Leonard (App.), C.P.

self; that is not so, he could, he might have refused the dividend, and taken the proceedings he is now taking. I repeat it is impossible he can retain the money he has received, and yet deny the validity of the proceedings under which he has received it. To do so would be contrary to all analogy and to principle. It is unnecessary to discuss the other matters controverted before us.

Lord Coleridge and Brett, L.J., concur in this judgment, and I may add that although it is expressed in the first person they adopt both the reasoning and the conclusion.

Appeal dismissed.

Solicitors—Robinson, Preston & Stow, agents for Rowlands & Bagnall, Birmingham, for plaintiff; Byrne & Lucas, agents for Homfray & Holberton, Brierley Hill, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. } MIDDLETON AND OTHERS (*petitioners*) v. SIMPSON (*respondent*).
Feb. 25. }

Municipal Elections — Qualification of Candidates — Burgess Roll — Municipal Corporations Act (5 & 6 Will. 4. 76. c. 6), s. 28; 38 & 39 Vict. c. 40. s. 1.

Up to the time of the passing of 38 & 39 Vict. c. 40, a candidate for the office of town councillor or alderman was qualified for election if entitled to be on the burgess list of the borough, even though his name, as a fact, was not on the list.

By section 1 of that Act a candidate "shall be enrolled on the burgess roll of the borough:"—

Held, that section 1 merely added to the existing law a requirement that the name of the candidate must be on the burgess roll.

Therefore, on the trial of a petition to enquire into the election of a town councillor, the burgess roll is not conclusive evidence of qualification.

SPECIAL CASE, stated for the further consideration of the Superior Court, on a question of law reserved on the trial of a

municipal election petition, in pursuance of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), section 15, sub-sect. 7 (1).

A petition was on the 25th day of November, 1879, presented to the Common Pleas Division of the High Court of Justice by the petitioners against the return of the respondent as town councillor for the West Derby Ward in the borough of Liverpool. The petition was tried at Liverpool, on the 17th, 19th and 20th days of January, 1880, before Mr. Samuel Prentice, Q.C., as Commissioner, and the result is stated by him in the subjoined Special Case as follows:—

On the trial of the petition it was proved that the respondent was enrolled on the burgess list and roll for the said borough and ward, which came into operation on the 1st day of November, 1879, in respect of a dwelling-house in the said ward, as a burgess for the said borough and ward thereof.

The petitioners proposed to prove: the said trial (amongst other things) that the respondent was not qualified to be on the said burgess list or roll, because he had never occupied the said dwelling-house.

It was contended before the Court, on behalf of the respondent, that the said burgess list and roll were conclusive that he was entitled to be on the burgess list of the said borough within the meaning of the said Act of Parliament in that behalf. The Court held that the said list and roll were not so conclusive, and found and determined on the said trial as a fact that the respondent had never occupied the said house as required by the Act of Parliament in that behalf, and was therefore not duly qualified to be on the said list or roll or to be a burgess councillor of the said borough.

(1) By 35 & 36 Vict. c. 60. s. 15, sub-sect. it is enacted that, "If it appear to the Court, on the trial of a petition, that any question of law as to the admissibility of evidence, or otherwise, requires further consideration by the Superior Court, the Court may postpone the granting of a certificate until such question has been determined by the Superior Court, and for this purpose may reserve any such question in like manner in which questions may be reserved on a Judge on a trial at Nisi Prius."

Middleton v. Simpson, C.P.

Under the 15th section of the Corrupt Practices (Municipal Elections) Act, at the request of the respondent, the Court reserved for the opinion and determination of the Common Pleas Division of the High Court of Justice the question of law whether the said burgess roll and roll were conclusive as contended by the respondent, and postponed giving a certificate under the said Act until such question had been determined.

The Common Pleas Division determined and answers the above question in the affirmative, a certificate will be given that the respondent was duly elected.

The above question is determined in the negative, a certificate will be given that the respondent was not duly elected, and that the election was void. The costs of the petitioners and respondent are to follow the

case (*Edward Pollock* with him), the respondent.—The respondent's qualification was on the burgess roll, which is a sufficient qualification except *qua* per disqualification, and the question was what was his position before he got on the roll ceases to be admissible on a burgess roll.

The qualification of candidates for the office of town councillor was declared by the Municipal Corporations Act (5 & 6 Vict. c. 76), s. 28 (2). This continued the qualification until 32 & 33 Vict. c. 40, ss. 1, 3, whereby it was enacted that persons who have the requisite qualification within the borough, and have resided and resided within seven miles of the borough, shall be placed on one roll and persons who have resided within seven miles and fulfilled all other requirements, shall be placed on another roll. Then by 38 & 39 Vict. c. 40, section 1, sub-sect. 2 (3), it was enacted

that 5 & 6 Will. 4. c. 76. s. 28, enacts "That no person shall be eligible for election as a councillor of any dissenting congregation, shall be entitled to be elected or to be a councillor of any such congregation, or an alderman of any such borough, who shall not be entitled to be on the burgess list of such borough."

38 & 39 Vict. c. 40, s. 1, sub-sect. 2, enacts

VOL. 49.—Q.B., C.P. & EXCH.

that the candidate must be on the burgess roll.

Under the 5 & 6 Will. 4. c. 76. s. 28, it was held that if the party can shew that he is "entitled to be on the burgess list" of the borough, though as a fact his name is omitted from the list, he would be qualified to be a councillor or an alderman of the borough—*The Queen v. Harvey* (4), *The Queen v. Dixon* (5), *Whalley v. Bramwell* (6), where it is laid down that the qualification is the title to be on the list, and not the burgess roll. In *Ex parte Hindmarch* (7) the party was on the roll, and it was sought to displace him, but the Court held that it was too late. *Ex parte Birkbeck* (8) seems to shew a difference between being on the roll and being qualified to be on the roll. But then 38 & 39 Vict. c. 40. s. 1, alters and substantially repeals section 28 of 5 & 6 Will. 4. c. 76, as interpreted by these cases, and in effect declares that the roll shall be conclusive evidence of qualification.

The meaning of the words "and shall be otherwise qualified," in sub-section 2, is that he is not suffering from personal disqualification. The register is conclusive for purposes of voting (section 5), but the whole object of the register is voting, and there is no reservation as to candidature in that section.

[GROVE, J.—It seems as though section 1 of 38 & 39 Vict. c. 40, should be read cumulatively with section 28 of 5 & 6 Will. 4. c. 76, so that the candidate must not only be on the roll, but be qualified to be on the roll.]

An enquiry of this sort is now to be relegated to the Revision Court, where

acts that at nominations of all municipal elections of councillors, &c., "Every person nominated shall be enrolled on the burgess roll of the borough, or a person whose name is inserted in the separate list at the end of the burgess roll, as provided by 32 & 33 Vict. c. 55. s. 3, and shall be otherwise qualified to be elected."

(4) 3 Q.B. Rep. 475; 11 Law J. Rep. Q.B. 282.

(5) 15 Q.B. Rep. 33; 19 Law J. Rep. Q.B. 363.

(6) 15 Q.B. Rep. 775; 20 Law J. Rep. Q.B. 53.

(7) 37 Law J. Rep. Q.B. 58; Law Rep. 3 Q.B. 12.

(8) Law Rep. 9 Q.B. 256.

Middleton v. Simpson, C.P.

the question whether he is entitled to be on may well be decided.

Ohannell (W. R. Kennedy with him), for the petitioners.—The respondent must be entitled to be on the list, as well as in fact on it, in order to be qualified for election. 5 & 6 Will. 4. c. 76. s. 53, imposes penalties on persons acting as mayor, alderman or councillor, who are not duly qualified. Then by 6 & 7 Will. 4. c. 104, s. 7, persons so acting are exempt from penalties if on the roll, although they are not qualified to be on the roll, which confirms the view that "entitled to be on" means more than merely "on." *Ex parte Birkbeck* (8) is a direct decision to the same effect. By 7 Will. 4 and 1 Vict. c. 78. s. 23, every application for a *quo warranto* as to a corporate office must be made "before the end of twelve calendar months after the election, or the time when the person shall have become disqualified," and it was held that the time ran from the disqualification to be on the list, and not from the time when he ceased to be on the list. The motion had been made within twelve months of the revision, but not within twelve months of the disqualification; and Blackburn, J., says, "The qualification of an alderman under sections 25 and 28 of 5 & 6 Will. 4. c. 76, is not the being on the burgess roll, but the being entitled to be on the burgess list," shewing there to be a marked distinction between being on and being entitled to be on.

[He was here stopped by the Court.]

Gully, in reply.—This decision of *Ex parte Birkbeck* (8) was before the later statute, which has altered the state of things which then existed.

LOED COLERIDGE, C.J.—The barrister to whom the trial of this election petition has been assigned has found as a fact that the respondent was not duly qualified to be on the burgess roll; the respondent's name was on the burgess roll, and the argument on his side is that this makes an end of the matter, that to be a town councillor it is necessary his name should appear on the roll, but enquiry as to his right to be on, is prevented by the fact of his being there.

Various Acts of Parliament have been

cited, but for the purposes of my decision the only Acts necessary to be considered are the Municipal Corporations Act, 5 & 6 Will. 4. c. 76, and the 38 & 39 Vict. c. 40. The first Act by section 28 enacts in effect that in order to be qualified for the office of councillor or alderman, the candidate must be entitled to be on the roll; a section of a later Act (6 & 7 Will. 4. c. 104. s. 7) *in pari materia* enacts that a person who is on the list is relieved from penalties if he acts, though he may not be qualified to be on, shewing that in the contemplation of the Legislature being "on the list" was not conclusive of the right to be there.

Such was the law up to the time of the passing of the 38 & 39 Vict. c. 40; sect. 1, sub-sect. 2 of that Act it is enacted that the candidate shall be "enrolled on the burgess roll of the borough."

It is argued on behalf of the respondent that, although the first Act is not in terms repealed, yet it is in substance, and that the question whether he is entitled to be on the list, which was raised by the earlier Act, is now impliedly disposed of by the words of the later Act, which make it sufficient to be "on" the list. answer to that argument it is enough to say that there is no necessary contradiction between the two Acts, and observed by my brother Grove in the course of the argument, they may read cumulatively.

This view appears to me to be strengthened by other reasons. The qualification of a burgess has been dealt with by the intermediate Act, 32 & 33 Vict. c. 55, which in terms repeals section 9 of 5 & 6 Will. 4. c. 76. The qualification of burgess is gone and a new qualification is substituted, but there is no such corresponding legislation in respect of section 28 of 5 & 6 Will. 4. c. 76, and that section dealing with qualification of aldermen and councillors is untouched by Parliament with the earlier Act before it, and dealing with certain sections *in pari materia* leaves untouched section 28. This raises a strong argument against the contention of the respondent, for had it been intended, while enacting 38 & 39 Vict. c. 40—an Act which in the schedule repeals the provisions of earlier Acts—

Idleton v. Simpson, C.P.

the provisions of section 28 of Will. 4. c. 76, nothing would have been easier than to have said so, but nothing of the kind is done.

The construction we place on these provisions derives great force from the language used with regard to section 5 of 38 & 39 Vict. c. 40 with the rights of voters, and enacts when on the list persons shall be entitled to vote, and when not on shall not be entitled to vote, shewing that when it was intended to make the roll conclusive and an enactment to that effect was made.

Further, this construction derives considerable force from *ex parte Birkbeck* where the question in the case and the *ratio decidendi* of the case is, the distinction between being on the list and being entitled to be on the list. Lord Blackburn and the other Judges hold distinctly that under the old law—which was repealed—it was the existence of the right to be on the list and not the fact of being on the list which gave persons the right to be elected.

It appears to me to be clear that this is a construction of the statute, and I am therefore of opinion that as the respondent is not qualified to be on the roll he is not entitled to be a candidate for the office of town councillor; the question before us submitted to us must be answered in the negative, and the decision of the barrister affirmed.

JOVE, J.—On looking at the Acts of Parliament affecting the question submitted to us, it appears to me they bear consistent interpretation. The provisions in these Acts with regard to voters and candidates are distinct. Section 28 of the Municipal Corporations Act (38 & 39 Vict. c. 76) applies to candidates, and enacts that they must be entitled to be on the list. The following provision applies to voters, and shews that a voter is on the list if it is sufficient. In dealing these sections with *Whalley v. Bramwell* (6) and *Ex parte Birkbeck* (8), it is clear that it was then sufficient qualification for a candidate to be entitled to be on the list and for a voter to be on the list. Section 38 & 39 Vict. c. 40 one section (section 5) relates to qualification of voters,

and another section (section 1) to qualification of candidates, so that the distinction between qualification of voters and of candidates is preserved.

The respondent cannot shrink from the contention that section 1 sub-section 2 repeals section 28 of the Municipal Corporations Act, 5 & 6 Will. 4. c. 76, because he has to contend that the fact of his name being on the roll is conclusive of his right to be a candidate, but it appears to me that the words of that section only make an addition to the words of section 28. Every word of section 1, sub-section 2, can be given its full meaning and read with section 28 of the earlier Act. This is further borne out by section 5 of this Act (38 & 39 Vict. c. 40), which declares the conclusiveness of the roll for the qualification of voters; by section 12, which refers to the schedule of repealed Acts, where I find that only so much of section 47 of the Municipal Corporations Act as relates to the fixing of the day of election is to be repealed, and by section 13, by which the Municipal Corporations Act, 5 & 6 Will. 4. c. 76, is to be incorporated with this Act.

There is nothing in this Act directly or impliedly repealing section 28 of the Municipal Corporations Act, and consequently that Act remains in full force. I therefore agree that the question submitted to us should be answered in the negative.

LINDLEY, J.—I am of the same opinion. The question before us turns upon two Acts, the Municipal Corporations Act, 5 & 6 Will. 4. c. 76, and the 38 & 39 Vict. c. 40, which, so far as it can be, is to be read with the former statute.

The Municipal Corporations Act says that the candidate for the office of town councillor must be entitled to be on the list. The first question to be decided, which is the meaning of that sentence, is disposed of by *Whalley v. Bramwell* (6), and it is obvious that these words are used by way of contrast with being on the list as used in section 29. All further difficulty is removed by *Ex parte Birkbeck* (8), where the *ratio decidendi* of the judgment of Lord Blackburn turns on the distinction of being on and being entitled to be on, and we have there a judicial

Middleton v. Simpson, C.P.

interpretation of the 5 & 6 Will. 4. c. 76. s. 28, to the effect that the candidate must be entitled to be on the list.

Passing to the amending Act we find that the candidate must now be on the list, and to that extent the interpretation of the Municipal Corporations Act is altered, but it is clear that the later statute is not inconsistent with the earlier.

It seems to me the suggestion of my brother Grove that they should be construed cumulatively should be adopted. The words "and shall be otherwise qualified to be elected" may apply to a person not within the fifteen miles radius, but I do not consider that affects the question which we are deciding.

The argument of the respondents that a person once on the list cannot be removed by shewing want of qualification, seems to amount to no more than the effect of the Statute of Limitations, which bars certain remedies, but does not alter the title.

For these reasons I am of opinion that this appeal should be dismissed.

Judgment for the petitioners.

Solicitors—E. W. Owles, agent for Barrell & Rodway, Liverpool, for petitioners; Field, Roscoe & Co., agents for Oliver Jones, Billson & Jones, Liverpool, for respondent.

Stevenson & Co. v. M^r Leon 492962 704.

[IN THE COMMON PLEAS DIVISION.]

1880. } BYRNE & CO. v. LEON VAN
March 6. } TIENHOVEN & CO.

Contract—Withdrawal of Offer—Contract when complete—Letters sent by the Post—Breach of Contract—Waiver—Continued Breach.

Though an offer of sale may be withdrawn before it has been accepted, the withdrawal must be communicated to the party to whom the offer has been made before such acceptance.

Where an offer of sale is made and accepted by letters sent through the post, the

withdrawal takes effect only when the letter containing it has been received, and not from the moment it is posted, unless the party to whom the offer is made has given the other authority to notify his withdrawal by letter so posted.

If there is a continued refusal by a party to perform his contract, the neglect of the other party to treat the first refusal as a breach will not prevent his suing for a breach.

This was an action which came on before Lindley, J., without a jury at the last Cardiff assizes.

B. T. Williams and B. Francis Williams for the plaintiffs.

M^r Intyre and Hughes for the defendants.

Our. adv. vult.

LINDLEY, J. (on March 6) delivered the following judgment.

This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of one thousand boxes of tin plates pursuant to an alleged contract which I will refer to presently. The action was tried at Cardiff before myself without a jury, and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be 375l.

The defendants carried on business at Cardiff and the plaintiffs at New York and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on the 1st of October, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on the 11th and 15th of October respectively. The letters and telegrams were as follows:—

October 1, 1879.

From Leon Van Tienhoven & Co. 125 Bute Street, Cardiff.

To Messrs. Joseph Byrne & Co., St. George's Buildings, Beckman Street, New York.

Dear Sirs,—We are duly in receipt of your favour of the 18th ulto. and are glad to hear you admit our prices for tin

Byrne v. Van Tienhoven, C.P.

s to be moderate. We are well
e that most exporters deduct four
cent. in most instances from their
ces, but as we always make a rule to
e nett we cannot take off any extras
the prices we quoted; as you say
Hensol is a favourite brand of yours
will, although you certainly must
y the present manufacturers' prices to
7s. 6d. less four per cent. maintain
firm offer of 1,000 boxes of this brand
20 at 15s. 6d. per box f. o. b. here,
one per cent. for our commission,
s four months' bankers acceptance on
don or Liverpool against shipping
ments, but subject to your cable on
efore the 15th inst. here, and trust
this advantageous offer may be the
mencement of repeated and satis-
fry business between us. We can
e steam freight to your port to-day
s. and ten per cent. per ton. We
k that after due consideration you
not find our terms to be arbitrary, as
a you compare our prices with those
thers you must in justice admit that
give a good equivalent, and are not
gether one-sided in our business.

Yours faithfully,
Leon Van Tienhoven & Co.

ablegram from Messrs. Joseph Byrne
o., New York.

To Messrs. Leon Van Tienhoven & Co.,
dfff.

ent October 11, 1879.

Accept thousand Hensol.

October 15, 1879.

Messrs. Leon Van Tienhoven & Co.,
dfff.

Dear Sirs,—We have to thank you
your valued letter under date 1st inst.
ch we had on Saturday p.m., and
mediately cabled acceptance of the 1,000
es "Hensol" 1^c 14/20 as offered.
against this transaction we have plea-
in handing you herewith the Canadian
k of Commerce letter of credit No. 78
ober 13, on Messrs. A. R. M^r Master
rothers, London, for 1,000l.

This credit rates A1 with bankers. The
k has six million dollars capital. We
recciate your liberality in leaving this
r open so long with such a market as

we are in, and it will not be our fault if
we do not have considerable dealings to
follow this.

We shall prepare a code for you in a
mail or two to expedite matters. The
address is already registered, and for the
present, assuming quality to be equal to
Hensol, we shall understand "price" alone
to mean 1^c 14/20 price with wasters, say
message read 250 wasters 15s. will be
quite clear. Market is very strong and
likely to keep so till January; coke tins,
6½; wasters, 6½; both in light stock;
best coke 1^c 10/20, also very scarce. We
can handle 500 of them, and 500 B.v.
grade also 250/em 10/20 B.v. grade.
Will thank you to ship the 1,000 Hensols
without delay, and without further to-day
remain

Faithfully yours,
Joseph Byrne & Co.

These letters and telegram would, if
they stood alone, plainly constitute a con-
tract binding on both parties. The de-
fendants in their pleadings say that there
was no sufficient writing within the
statute of frauds, and that they contracted
only as agents, but these contentions were
very properly abandoned as untenable,
and do not require further notice.

The defendants however raise two
other defences to the action which remain
to be considered. First, they say that
the offer made by their letter of the 1st of
October was revoked by them before it
had been accepted by the plaintiffs by
their telegram of the 11th or letter of the
15th. The facts as to these are as follows.
On the 8th of October the defendants
wrote and sent by post to the plaintiffs a
letter withdrawing their offer of the 1st.
The following is the material part of
such letter:—

From Leon Van Tienhoven & Co.,
125 Bute Street, Cardiff.

To Messrs. Joseph Byrne & Co., St.
George's Buildings, Beckman Street,
New York.

October 8, 1879.

Dear Sirs,—Confirming our respects
of the 1st inst. we hasten to inform you
that there having been a regular panic in
the tin-plate market during the last few
days, which has caused prices to run up
about twenty-five per cent. we are re-

Byrne v. Van Tienhoven, C.P.

luctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1,000 boxes "Hensols" at 17s. 6d. to be cancelled from this date.

This letter of the 8th of October reached the plaintiffs on the 20th of October. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract, as follows.

October 20, 1879.

Messrs. Leon Van Tienhoven & Co.,
Cardiff.

Gentlemen,—We are to-day in receipt of your letter of the 8th and note contents with astonishment. Indeed, assuming that your firm has honourable standing and business experience, we cannot think that you seriously intended to disregard this engagement, to which you have voluntarily committed yourselves. Under date 1st of October you made our firm offer of 1,000 boxes "Hensol" 1^c 14/20; coke at 15/0 f.o.b. Cardiff, with one per cent. commission added for London bankers, four months' acceptance. We had that letter offer on the 11th, and immediately cabled our acceptance of your offer, and mailed your letter of credit for 1,000l. by the S.S. *Gallia*, 15th of October, sending duplicate by the *Wisconsin* on the 14th, thus practically and in fact a contract for the 1,000 boxes came into existence between you and ourselves. It requires the consent of both parties to a contract to cancel same. If instead of writing to us on the 8th you had cabled "offer withdrawn" you would have protected yourselves and us too. We disposed of the 1,000 boxes on the 17th at a net profit of 1,850 dollars. Price is 85s. above cost, or 7 dollars per box. To-day market is 7½. We write to our friend Philip S. Phillips Esq., of Aberkllery, requesting him to call on you and demand delivery as agreed. Hoping you will comply with same and so avoid further trouble, we remain,

Faithfully yours,

Joseph Byrne & Co.

P.S.—You speak of offer of 1,000 boxes Hensol at 17s. 6d. The only firm offer we received from you under date

1st of October was 1,000 boxes at 15s. 6d. and ten per cent. f.o.b. Cardiff. We cable you to-night "Demand Shipment."

This letter is followed by one from the defendants to the plaintiffs of the 25th of October, refusing to complete. It is as follows:—

To Messrs. Josh. Byrne & Co.

25th Oct. 1879.

Dear Sirs,—We received your cable on the 20th inst. "demand shipment," and this day we are in possession of press copy of your letter of the 15th inst., enclosing duplicate credit from the agent of the Canadian Bank of Commerce upon Messrs. A. R. M'Master & Bros. of 34 Clement's Lane, London, authorising the latter to accept our drafts at 4/m. sight to the extent of 1,000l., for payment of invoice cost of Hensol 1^c Coke tin plates, @ 15/6, and 1 per cent. added, f.o.b. Cardiff, dated 13th inst. Our offer of this parcel having been withdrawn by our letter of the 8th inst., we now return the above credit, and for which we have no further need, but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. M'Master & Bros. are not classified as such. The tin plate market remains firm and prices are likely still to go higher. Lantwit and Hensols even sold yesterday at 26/ for January and February delivery. We shall be glad of your further enquiries and remain,

Yours faithfully,

Leon Van Tienhoven & Co.

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not—*Roulledge v. Grant* (1).

For the decision of the precise case, however, it is necessary to consider two other questions, namely—first, whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent; second, whether

(1) 4 Bing. 653.

urne v. Van Tienhoven, C.P.

ing a letter of withdrawal is a communication to the person to whom the letter is sent?

is curious that neither of these questions appears to have been actually decided in this country. As regards the question, I am aware that Pothier, some other writers of celebrity, are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is this;—there is not, in fact, any consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been held that a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is, for all practical purposes, and in point of law, no revocation at all. This is the view taken in the United States (see *Taylor v. The Merchants Fire Insurance Company* (2), cited in *Benjamin on Sales*, 2nd edition, pp. 56 and 58), and is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock, in his excellent work on principles of contracts, 2nd edit. p. 10, and by Mr. Leake, in his *Digest of the Law of Contracts*, p. 18. This view, moreover, appears to be much more in accordance with the general principles of English law than the view maintained by Pothier.

It is therefore to the next question, namely, whether posting the letter of withdrawal was a sufficient communication to the plaintiffs. The offer was made on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiffs until after they had posted their letter of the 15th accepting the offer. It may be taken as now established that where an offer is made, and accepted by letters sent through the post, the contract is completed the moment the offer is accepted—the offer is posted—see *White's Case* (3), *Dunlop v. Higgins* (4), although it never reaches its destination.—*The Household Fire Company v.*

Grant (5), qualifying if not overruling *The British and American Telegraph Company v. Colson* (6).

When, however, these authorities are looked at, it will be seen that they are based upon the principle, that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself; or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter, and there is no legal principle or decision which compels me to hold contrary to the fact that the letter of the 8th of October is to be treated as a communication to the plaintiffs on that day, or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer both by telegram and by post, and they had themselves re-sold the tin plates at a profit. In my opinion, the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative, and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn.

Before leaving this part of the case, it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' construction were to prevail, no person who had received an offer by post, and had accepted it, would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me, that both legal principles and practical convenience require that a person

³ 9 How. Sup. Court of United States, 390.
⁴ 41 Law J. Rep. Chanc. 621; Law Rep. 3 C. 587.

⁵ 1 House of Lords Cases, 381.

(5) 48 Law J. Rep. C.P. 219; and on appeal, 577; Law Rep. 4 Ex. D. 216.

(6) 40 Law J. Rep. Exch. 97; Law Rep. 6 Ex. 108.

Byrne v. Van Tienhoven, C.P.

who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constituted a contract binding on both parties.

The defendants' next defence is, that as the plaintiffs never sent a bankers' acceptance on London or Liverpool as stipulated in the contract, they cannot maintain any action for its breach. The correspondence which preceded the contract satisfies me that the defendants attached importance to this particular mode of payment, and although the plaintiffs sent letters of credit which were practically as good as a bankers' acceptance, yet I cannot say that they did in fact send a bankers' acceptance according to the contract. By the terms of the contract bankers' acceptances on London or Liverpool were to be sent against, *i.e.*, were to be exchanged for shipping documents, and if the defendants had been ready and willing to perform the contract on their part on receiving proper bankers' acceptances, I should have been of opinion that the plaintiffs could not have sustained this action. But it is perfectly manifest from the correspondence that the defendants did not refuse to perform the contract on any such ground as this.

It is true that the defendants in their letter of the 31st of October say "that even if we had not withdrawn our offer we would all the same have returned your credit," and the defendants' solicitors in their letter of the 26th of November say that "if your clients" (*i.e.*, the plaintiffs) "had fulfilled the terms of the contract at the outset, the goods were ready to be shipped," but the defendants' own letters of the 8th, 13th and 25th of October shew conclusively that this was not the case, and that the defendants stood on their notice of withdrawal, and would not have performed the contract even if bankers' acceptances had been sent. Their letter of the 25th of October, in which they return the plaintiffs' first letter of credit is explicit on this point.

The defendants do not return the letter of credit because it is not a bankers' acceptance, but because the offer was withdrawn, and the inference I draw

from that letter is, that if the offer had not been withdrawn the defendants would not have returned the letter of credit although in future transactions they might have been more particular. In the face of this refusal it was useless for plaintiffs to send a bankers' acceptance and although when they found their first letter of credit returned they sent another which was declined, still the defendants never receded from their first position and expressed any readiness to ship the goods on receiving a bankers' acceptance, and it is plain to my mind that they were not prepared to do so. On the other hand I am satisfied that if the defendants had taken this ground the plaintiffs would have sent bankers' acceptances in exchange for shipping documents, and I infer as a fact that the plaintiffs always were ready and willing to perform the contract on their part, although they did not in fact tender proper bankers' acceptances. It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting, and could not treat the defendants as having broken it, and I refer to the passage in *Benjamin on Sales*, p. 454, which is referred to in support of this contention. But when the plaintiffs found that the defendants were inflexible and would not perform the contract at all, they had in my opinion a right to treat it as at an end and to bring an action for its breach. It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. Benjamin (namely *Avery v. Bowden* (7) and others of that class) shew that as the plaintiffs did not when the defendants first refused to perform the contract treat that refusal as a breach, the plaintiffs cannot now treat the contract as broken at the time of such refusal. But I have found no authority to shew that the continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants in the present instance, and it is not necessary to deter-

(7) 5 E. & B. 714; 25 Law J. Rep. Q.B. 49.

ne v. Van Tienhoven, C.P.

exactly when the contract can be
d by the plaintiffs as broken by the
lants. It is sufficient to say that
the plaintiffs were always ready
willing to perform the contract on
part, the defendants wrongfully and
tently refused to perform the con-
on their part, and before action
was a breach by the defendants not
d by the plaintiffs.

the reason before stated I give
rent for the plaintiffs for 375l. and

Judgment for plaintiffs.

ers—Robinson, Preston & Stow, agents for
orne & Ward, Newport, Monmouth, for
tiffs; Ingledew & Ince, agents for Ingle-
Ince & Vachell, Cardiff, for defendants.

Raylin 57 £86 7/4

THE QUEEN'S BENCH DIVISION.]

9. }
25. } THE BRITISH WAGGON COMPANY,
0. } LIMITED, AND OTHERS, v. LEA
13. } AND COMPANY.

ignment of Contract—Liquidation of
any—Power of Liquidator—Nature
tract—Judicature Act, 1873, s. 25,
ct. 6.

defendants entered into an agree-
with the P. Company for the hire of
a railway waggons for a term of seven

The agreement contained a clause
which the P. Company bound themselves
the term to keep the waggons in
and substantial repair and working

Some eighteen months afterwards
Company went into liquidation, and
contract between them and the defen-

was assigned to the plaintiffs, who
er from the P. Company the repairing
is previously used for the repair of

waggons let to the defendants and also
uff of workmen employed in executing
repairs. In an action brought by the

tiffs to recover from the defendants rent
or the hire of the waggons, the defen-
disputed their liability on the grounds,
that the P. Company had, by going
liquidation, incapacitated themselves

performing the contract, and secondly,
Vol. 49.—Q.B., C.P. & Exch.

that there was no privity of contract between
them and the plaintiffs whose services, in
substitution for those to be performed by the
P. Company under the contract, they, the
defendants, were not bound to accept:—Held,
that, whatever might be the position of the
parties on the dissolution of the company,
the liquidator, pending the winding-up, had
power to continue the performance of the
contract.

Held also (*distinguishing* *Robson v. Drummond*, 2 B. & Ald. 303), that, as
personal performance was not of the essence
of the contract, the repair of the waggons
undertaken and done by the plaintiffs under
their contract with the P. Company was a
sufficient performance by the latter of their
engagement to repair under their contract
with the defendants.

This was an action brought by the
plaintiffs to recover from the defendants
rent for the hire of certain railway wag-
gons. The facts of the case are suffi-
ciently stated in the judgment of the
Lord Chief Justice.

A. Wills (*Forbes* with him), for the
plaintiffs.—The arrangement entered into
between the Parkgate Company and the
plaintiffs was a beneficial one so far as
regards the winding-up of the former
company was concerned, and was there-
fore clearly within the powers of the
liquidator (see *Companies Act*, 1862, 25
& 26 Vict. c. 89), ss. 95, 131. There
was no new contract set up between the
Parkgate Company and the defendants,
neither was there anything in the shape
of novation or alteration between the
contracting parties. The authorities that
will doubtless be relied upon on the other
side are inapplicable to a case like the
present, where personal performance is
not of the essence of the contract. They
cited *Brice v. Bannister* (1).

A. L. Smith (*Arthur Charles* and *King-
don* with him), for the defendants.—The
defendants are released from all liability
under this contract on two grounds; first,
by reason of the voluntary liquidation of
the Parkgate Company and the proceed-
ings thereunder; and, secondly, by the

(1) 47 Law J. Rep. C.P. 722; Law Rep. 3
Q.B. D. 569.

British Waggon Co. v. Lea, Q.B.

assignment of the contract and surrender of the repairing stations to the plaintiffs. The liquidator by the assignment of the contract has elected not to go on with it. It may be that a voluntary liquidation will not of itself terminate a contract of this kind, but if the liquidator elects to discontinue the contract, he can no longer say that he is ready and willing to perform his obligation under the contract to the defendants. The Parkgate Company have, by its proceedings, incapacitated themselves to fulfil their obligations to the defendants as regards the keeping of the waggons in repair, and they have no right, without the consent of the defendants, to substitute a third party in their stead. See *Robson v. Drummond* (2), which was approved of in *Humble v. Hunter* (3). "It is," as Patteson, J., remarks in *Robson v. Drummond* (2), "in substance a case where a person having made a contract in his own name, attempts to back out of it, and transfer it to a third person, which he had no right to do." See also *Boulton v. Jones* (4). As regards the right to sue under the Judicature Act, 1873, s. 25, sub-sect. 6, it is contended, that in order that the contract may be assignable there must be a debt due from the defendant to the assignor where nothing is to be done but receive the money.

Wills replied.

Our. adv. vult.

The judgment of the Court was, on the 13th of January, 1880, delivered by COCKBURN, C.J.—This was an action brought by the plaintiffs to recover rent for the hire of certain railway waggons, alleged to be payable by the defendants to the plaintiffs, or one of them, under the following circumstances:—

By an agreement in writing of the 10th of February, 1874, the Parkgate Waggon Company let to the defendants, who are coal merchants, fifty railway waggons for a term of seven years, at a yearly rent of 600*l.* a year, payable by equal quarterly payments. By a second

agreement of the 13th of June, 1874, the company in like manner let to the defendants fifty other waggons, at a yearly rent of 625*l.*, payable quarterly like the former. Each of these agreements contained the following clause: "The owner, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said waggons in good and substantial repair and working order, and on receiving notice from the tenant of any want of repairs, and the number of the waggons requiring to be repaired and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On the 24th of October, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding-up of the company. Liquidators were appointed, and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding-up of the company should be continued under the supervision of the Court.

By an indenture of the 1st of April, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and the assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts with the defendant, together with the benefit of the two contracts and all the interest of the Parkgate Company and the said liquidators therein; the British Company, on the other hand, covenanting with the Parkgate Company "to observe and perform such of the stipulations, conditions, provisions and agreements contained in the said contracts as, according to the terms thereof, were stipulated to be observed and performed by the Parkgate Company." On the execution of this assignment the British Company took over from the Parkgate Company the repairing stations, which had previously been used by the Parkgate Company for the repair of the waggons let to the defendants, and also the staff

(2) 2 B. & Ad. 303.

(3) 12 Q.B. Rep. 310; 17 Law J. Rep. Q.B. 350.

(4) 2 Hurl. & N. 564; 27 Law J. Rep. Exch. 117.

British Waggon Co. v. Lea, Q.B.

men employed by the latter company executing such repairs. It is expressly said that the British Company have been ready and willing to execute, and have, with all due diligence, executed necessary repairs to the said waggons. However, they have done under a special agreement come to between the parties since the present dispute has arisen, without prejudice to their relative rights.

In this state of things the defendants asserted their right to treat the contract at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, by going into voluntary liquidation; and, by assigning the contracts and winding up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution of those to be performed by the Parkgate Company under the contract, they, the defendants, were not bound to accept.

The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the consideration of this Court, the use of the waggons by the defendant being in the meanwhile continued at a rate agreed between the parties, without prejudice either, with reference to their respective rights.

The first ground taken by the defendants is, in our opinion, altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Companies Act.

Pending the winding-up, the company is kept alive by the effect of sections 95 and 96, and, kept alive, the liquidator having power to carry on the business, "so far as may be necessary for the beneficial winding-up of the company," which the continued letting of these waggons, and the receipt of the rent payable in respect of these, would we presume be.

That would be the position of the parties on the dissolution of the company is unnecessary for the present purpose to consider.

The main contention on the part of the

defendants, however, was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the waggons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end. The authority principally relied on in support of this contention was the case of *Robson v. Drummond* (2), approved of by this Court in *Humble v. Hunter* (3). In *Robson v. Drummond* (2), a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held by Lord Tenterden that the defendant could not be sued on the contract on the ground that "the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharpe, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;" and by Littleton, J., and Parker, J., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this *Boulton v. Jones* (4) is

British Waggon Co. v. Lea, Q.B.

a sufficient authority. The case of *Robson v. Drummond* (2) comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in *Robson v. Drummond* (2) rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency or other personal qualification, the inability or unwillingness of the party so employed, to execute the work or perform the service, is a sufficient answer to any demand by a stranger to the original contract for the performance of it by the other party, and entitles the latter to treat the contract at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repairs of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company or by anyone with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in their stipulation was that the waggons should be kept in repair: it was indifferent to them by whom the repairs should be done. Thus, if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in *Robson v.*

Drummond (2) went to the utmost length to which it can be carried, as it is difficult to see how, in repairing a carriage when necessary, or painting it once a year, preference would be given to one coach-maker over another. Much work is contracted for, which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases the maxim *qui facit per alium facit per se* applies.

In the view we take of the case, therefore, the repair of the waggons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligations to keep the waggons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.

That debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in *Brice v. Bannister* (1) be disputed. We are therefore of opinion, that our judgment must be for the plaintiffs for the amount claimed.

Judgment for plaintiffs.

Solicitors—Bell, Brodrick & Gray, agents for Harrop & Harrop, Rotherham, for plaintiffs; Mark Shephard, for defendants.

17. { WILLIAMS (petitioner) v. THE
MAYOR, &c., OF TENBY (re-
spondents).

*Municipal Election Petition—Conditions
Precedent—Notice of Presentation—Cor-
rupt Practices (Municipal Elections) Act,
1872, s. 36 & 37, c. 60, s. 13.*

*Section 13 of the Corrupt Practices
(Municipal Elections) Act, 1872, the fol-
lowing provisions shall have effect with
reference to the presentation of a petition:—
A petition may be presented by four
electors, &c. Second. A petition
shall be presented within twenty-one days
of the day on which the election was
held, &c. Third. At the time of present-
ing a petition, or within three days after
the day on which the election was held,
the petitioner shall give security, &c.
Fourth. Within five days after the presen-
tation of a petition the petitioner shall
serve on the respondent a notice of the pre-
sentation and of the nature of the proposed
petition, and a copy of the petition:—
Provided, that these provisions were condi-
tion precedent to the right to try a petition.*

Proposed motion.

*The petitioner had presented a peti-
tion under section 13 of the Corrupt
Practices (Municipal Elections) Act, 1872,
and omitted to serve on the respondent
notice of the presentation and of the
nature of the proposed security, in
accordance with section 13, sub-sec. 4.
The respondents took out a sum-
mons at chambers calling on the peti-
tioner to shew cause why the petition
should not be taken off the file, on the
grounds—first, that the above section
had not been complied with; second, that
the affidavit of the time and manner of
service of the notice of presentation of
the petition and of the nature of the
proposed security had been filed with the
court in accordance with rule 2 of*

*Order of Council, 1875, s. 13. The following
provisions shall have effect with reference to the
presentation of a petition complaining of an undue*

*influence:—
Within five days after the presentation of
the petition the petitioner shall in the prescribed
manner serve on the respondent a notice of the
presentation and of the nature of the proposed
petition, and a copy of the petition."*

*Additional General Rules, 1875, made
for the effectual execution of the Corrupt
Practices (Municipal Elections) Act, 1872
(2). It was admitted that these condi-
tions had not been complied with, and
the petition was thereupon ordered by
Lopes, J., to be struck off the file. Against
this decision the petitioner now appealed.*

*The Solicitor-General (Sir H. Giffard)
(Biron with him), for the petitioner, con-
tended that the conditions of section 13
were directory and not imperative, and
though it was necessary that the petition
be duly presented in the first instance,
yet that the remaining conditions were
merely machinery for facilitating the
trial of the petition, and that a strict
compliance with those subsequent con-
ditions was not necessary.*

*J. Cunningham, for the respondents,
was not called upon.*

*GROVE, J.—I am of opinion that the
order of my brother Lopes was right.
Section 13 enacts certain provisions with
reference to the presentation of a peti-
tion—first, the petition is to be presented
either by four or more electors, so that
an election presented by three persons
would not be sufficient; second, it shall
be presented within twenty-one days,
evidently a condition precedent, which
it is admitted could not be dispensed
with then; third, within three days the
petitioner shall give security for costs,
which also seems to me to be a condition
precedent, for I cannot distinguish be-
tween a matter of time and a matter of
security: one is as important as the
other; and if the statute is imperative
as to days, it is equally so as to security.
So also with respect to the fourth pro-
vision. The object of these conditions is
to forward the trial of a petition, and
prevent it from being kept hanging over.
It would be unreasonable to hold one*

*(2) Additional General Rules made pursuant to
the Parliamentary Elections Act, 1868:—*

*"2. The petitioner or his agent shall, im-
mediately after notice of the presentation of a peti-
tion, and of the nature of the proposed security
shall have been served, file with the master an
affidavit of the time and manner of service
thereof."*

Williams v. Mayor, &c. of Tenby, C.P.

condition to be directory and the other imperative; and if we were to carve out what is directory and what peremptory we should involve the parties in great difficulties. The conditions appear to me to be peremptory, and as the petitioner has not complied with them, the order of my brother Lopes must be affirmed, and the petition taken off the file.

LOPES, J., concurred.

*Judgment for the respondents,
with costs.*

Solicitors—Norris, Allens & Carter, for petitioner;
Parkers, agents for Gwynne & Stokes, Tenby,
for respondents.

2 Gt. Whed
Polgooth G
5328 ch 45 [IN THE QUEEN'S BENCH DIVISION.]
1879. }
Nov. 26. } THE WHALEY BRIDGE CALICO
1880. } PRINTING COMPANY (LIMITED)
Jan. 12. } v. GREEN.

*Company—Promoter—Agreement for
Sale—Principal and Agent—Profit by
Promoter—Undivided Contract—Commis-
sion.*

The defendant purchased certain calico printing works and premises for 15,000*l.* These were afterwards conveyed to the plaintiff company by the defendant and S. for 20,000*l.*, the defendant having previously purported to sell the premises to S. for that sum by a sham contract intended to be used for the purpose of the negotiations with the company. The defendant made an agreement with S., which existed at the date of the incorporation of the company, by which S. was to have 3,000*l.* out of the purchase-money paid by the plaintiff company. The defendant and S. were at the time of the sale promoters of the company, and the directors, who were in fact nominees of the defendant and S., knew that the defendant had previously purchased the property for 15,000*l.*:—

Held, by BOWEN, J., on further consideration, that the plaintiff company was entitled to enforce against the defendant the secret agreement to pay over 3,000*l.* to Smith so far as it remained still unexecuted,

upon the ground that the contract with must under the circumstances be treated a contract made for the profit of the plaintiff company.

This was an action tried by Bowen at the Manchester Summer Assizes, 1879 and reserved for further consideration.

The facts and arguments sufficiently appear in the judgment.

Charles Russell, Herschell, and Fren
(on Nov. 26), for the plaintiffs.

Ambrose and Gouldthorp, for the defendants.

Our. adv. vult.

The following judgment was (on Jan. 12, 1880) delivered by

BOWEN, J.—This is an action brought by the Whaley Bridge Calico Printing Company (Limited) against Robert El Green, the vendor to the company of certain works and premises. John Smith, defendant joined in the issue, did not appear to defend, and the present question arises wholly between the defendant Green and the company.

In or about May, 1876, the defendant Green purchased certain calico printing works and premises situate at Whaley Bridge, near Buxton, for the sum of 15,000*l.* The defendant John Smith was the manager in Mr. Green's employment at the time, and various negotiations took place between Green and Smith as to the working of the premises for Green himself, and as to their resale to some company. Ultimately, on the 13th of October, 1876, the plaintiff company was incorporated for the purpose of purchasing and working these works, and on the 2nd of February, 1877, the premises were conveyed to the company by Smith and Green for the sum of 20,000*l.*, Green having previously purported to sell the premises to Smith for 20,000*l.* by a contract of the 19th of September, which the jury found was a sham contract, and which (if a sham contract) was obviously intended to be used for the purpose of the negotiations with the company.

The immediate question in the present case turns upon the following findings of the jury:—

Wiley Bridge Calico Printing Co. v. Green, Q.B.

That Green was a promoter of the company from the 29th of August.

That before the 2nd of February the board of directors knew that Green previously purchased the property 3,000*l.* only.

That at the date of the incorporation of the company there was an agreement between Smith and Green that Smith should have 3,000*l.* out of the purchase-money paid by the plaintiff company.

It was agreed that the Court should have power to draw all further inferences from the facts.

The first claim put forward on behalf of the plaintiff company was to have reduced to them the 5,000*l.*, the difference between the 20,000*l.* purchase-money and the price at which Green himself had bought the property.

This claim, in my opinion, cannot be maintained. The company bought with their eyes open as to the price. They knew that Green had in fact given only 15,000*l.* for the works. A fraud was no doubt committed upon them in respect of the contract of the 19th of September, assuming the finding of the jury to be correct; it is clear that Green and Smith induced the company to suppose that there was a genuine contract of sale for 20,000*l.*, which Smith had become the purchaser. In reality, this contract was a sham, and Green, by the agreement entered into in the last finding of the jury, arranged with Smith to pay him 3,000*l.* out of the 20,000*l.* purchase-money. It is true that the property in question appears upon the evidence to be fully worth 20,000*l.*, but this does not prevent the making of the sham contract from being fraudulent. In any action for deceit based on this ground, a jury might perhaps have assessed at 3,000*l.* the damages recoverable by the company against Smith and Green, should the jury have thought that this sham contract induced the company to give 3,000*l.* more than they otherwise need have done.

The plaintiffs, however, have not asked that damages be assessed in this manner. They desire is to enforce against Green the secret agreement to pay over 3,000*l.* to Smith, upon the ground that they are entitled to treat this contract

with Smith as made for the profit of the plaintiff company and not for Smith.

The relief afforded by equity to companies against promoters, who have sought improperly to make concealed profits out of the promotion, is only an instance of the more general principle upon which equity prevents the abuse of undue influence and of fiduciary relations. The term promoter is a term, not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. In every case the relief granted must depend on the establishment of such relations between the promoter and the birth, formation and floating of the company as render it contrary to good faith that the promoter should derive a secret profit from the promotion. A man who carries about an advertising board in one sense promotes a company; but in order to see whether relief is obtainable by the company, what is to be looked to is not a word or name, but the acts and the relations of the parties. In the present instance, Green and Smith agreed to, and did bring out the present company for the purpose of purchasing the chemical works and premises on their own terms. The board of directors consisted of their nominees, and in order to make the purchase run more smoothly a sham contract of purchase was on the 19th of September flashed before the eyes of the directors, as if it were a real contract, by both Smith and Green. The relation in which Smith, by these acts, placed himself towards the company is one in which equity will not allow him to retain any secret advantage for himself. He had a perfect right to agree with Green that he should be remunerated to the extent of 3,000*l.*, provided such agreement was made with the knowledge and assent of the company. But the company have a clear right to treat all profit made by Smith out of such transaction as profit belonging to them, and it was hardly disputed, and in my opinion cannot successfully be denied, that if Green had actually paid the 3,000*l.* to Smith, Smith might be compelled to pay over to the company the clear profit left after deduct-

Whaley Bridge Calico Printing Co. v. Green, Q.B.

ing what he had expended in the promotion. But it is said that the contract cannot be enforced against Green so far as it remains still unexecuted; that there is no instance which can be found in the books in which a company has been allowed to recover for its own benefit on a similar unexecuted contract; and that, as Smith could not enforce against Green a contract based on an illegal consideration, so neither can the company.

This objection seems to me unfounded. There is, in the first place, nothing illegal in the contract that Smith should receive 3,000*l.* out of the sale, provided it was not to be kept secret from the company when the company was induced to negotiate for the purchase. It is said, indeed, that the agreement for the 3,000*l.* was anterior in date to the beginning of the promotion of this particular company. This may have been so; but the agreement, as the jury have found, was continued and applied to the formation of this particular company. As soon as Smith and Green formed the company and nominated its board, it became their duty, in my opinion, to inform the company of this private arrangement between them. Thereupon the company might either, at its option, decline the proposed purchase or accept it, claiming the benefit of Smith's bargain, or might, if they thought it reasonable, sanction the agreement and allow Smith to retain the profit himself. The company cannot be worse off because the existence of this contract was concealed from them. The contract, it is true, has not been as yet fully executed; but nothing remains to be done under it except the payment of money, and the right to this is a profitable right, of which the company are entitled to insist on availing themselves. It does not lie in Green's mouth to say that his own bargain with Smith was a fraudulent one and therefore cannot be enforced: *Allegans turpitudinem suam non est audiendus*. In order to recover against Green, the company do not indeed require to prove that Green was fraudulent. It is enough to shew that this is a profit coming to their agent to the benefit of which they are entitled. It is not, perhaps, every contract which a *cestui que trust*, even under simi-

lar circumstances, could in this manner enforce. In many unexecuted contracts the principal could not substitute himself in the agent's place, as the person for whose benefit the contract was to be performed, without altering substantially the character of the contract. But where nothing has to be done under the contract but payment of money to the agent, I think that the principal, under circumstances such as these, is entitled to stand in the agent's shoes and compel a payment of money directly to himself.

It has been contended, on behalf of the defendants, that neither in the statement of claim nor at the trial was relief sought on this ground; and it was further urged that it was too late for the plaintiff company to insist on suing Green for the 3,000*l.*, inasmuch as before action brought Smith had himself brought an action against Green in his own name, and had received already two sums of 400*l.* each from Green under the agreement—one sum prior to the action, one sum as part of the terms on which he had agreed to abandon it. The defendants' counsel further urged that the settlement of this action between Green and Smith had been effected with the knowledge of the plaintiff company, and that it would be inequitable to allow the plaintiff company now to sue Green. It is true the plaintiff's right to enforce against Green the payment of the 3,000*l.* was not a point made distinctly at the trial before the final speech of the plaintiff's counsel; but it was made then, and made without objection, by the defendant's counsel. And the course taken at the trial by consent of all parties was to leave certain specific questions of fact to the jury, and to reserve all other inferences of fact for the Court. It appears to me that the plaintiffs cannot now be precluded from insisting on shaping their claim as they have done before me, and on the best opinion that I can form on the materials and correspondence before me, the plaintiff company never authorised, or sanctioned, or acquiesced in any settlement between Smith and Green which ought now to preclude them from bringing this action.

The advisers of the company were no

Wiley Bridge Calico Printing Co. v. Green, Q.B.

aware that Smith was suing on an agreement of this kind, but they did not believe by Green that no such agreement existed. I think that they are entitled still to call on Green to pay over the balance, which is the balance payable to the company after deducting the 800*l.* already received by Smith, and to have tendered up to them the bill for 1,000*l.*, the negotiation of which is sought to be prevented.

The plaintiffs therefore must have judgment for 1,200*l.* with costs, and an injunction against the negotiation of the bill coupled with an order that the bill be delivered up to them to cancel.

Judgment for plaintiffs.

Agents—Clarke, Woodcock & Ryland, agents for A. & J. Grundy & Co., Bury, Lancashire, plaintiffs; Dangerfield & Blythe, agents for All & Son, Manchester, for defendants.

THE QUEEN'S BENCH DIVISION.]

7, 28. } *Sept 7/6-*
10. } THE QUEEN v. SHEWARD.

certiorari—Lands Clauses Consolidation Act, Vict. c. 18—Time for setting aside award under—Compensation—Head of claim not objected to.

The railway company having the power to take lands compulsorily, gave a notice to the claimant under the Lands Clauses Act, whereupon the claim for compensation came before the under-sheriff for assessment. On the hearing the claimant claimed compensation, for, among other things, the remainder of his land not being rendered unfit for his business, no objection to this claim or the evidence in support of it was raised by the railway company, and it was left by the under-sheriff to be considered by the jury. On requisition and finding were signed on the 14th of February, and the claimant paid his costs and was paid them on the 1st of April without any objection. Ab-

Vol. 49.—Q.B., C.P. & Exch.

tract of title was furnished and requisitions thereon answered and the draft assignment prepared. As the company did not pay the amount awarded a writ was issued by the claimant, whereupon on the 21st of July, the company obtained a rule for a certiorari to bring up and quash the inquisition on the ground of want of jurisdiction, the claimant not having been entitled to compensation on the above-mentioned head of claim:—Held, that the company were too late, and that the Court would not in their discretion issue a writ of certiorari.

As a rule a certiorari to quash an inquisition taken under the Lands Clauses Act will not be granted after the expiration of a time equal to that allowed for setting aside an award made under the same Act.

This was a rule for a *certiorari* to bring up, for the purpose of its being quashed, an inquisition under the Lands Clauses Act, by which the amount of damages was found, to which Mr. Sheward was entitled by reason of some of his land having been taken for the St. John's Wood Extension Railway, and the injury thereby occasioned to his business as a trainer of horses by the severance.

The claimant was the leaseholder of a large farm which was laid out in steeplechase courses and otherwise adapted and used for the training and breaking of horses. He there carried on the business of a trainer of horses until December, 1875, when he received from the railway company the usual notice to treat for a part of the land. The question of the amount of compensation came in due course under the Lands Clauses Act before the under-sheriff of Middlesex and a jury for assessment. On the hearing Mr. Sheward claimed for his interest in the land taken by the company, also for the loss on the necessary sale of his stock and also for the consequential injury to his business, he stating that he should be obliged to give up his business, which, owing to the proximity of the railway, could not there be carried on any longer. No objection was taken by the company to any of these heads of claim, and evidence having been given, the jury, on the 19th of February, 1879, found a verdict for the claimant for 6,000*l.* After

2 U

The Queen v. Sheward, Q.B.

frequent applications to be paid that amount, Mr. Sheward brought an action against the company to recover it, and the company, by way of defence to such action, set up on the 29th of July, 1879, the invalidity of the inquisition.

On the 21st of July, however, the company had applied for and obtained a rule *nisi* for a *certiorari* to quash the inquisition on the ground that it included compensation for things in respect of which the jury had no jurisdiction to give compensation, against which now on the 27th of February—

Sir Henry James and *Biron* shewed cause.—It is admitted that a head of claim was put forward and gone into which ought not to have been—*Ricket v. The Metropolitan Railway Company* (1), but as no objection was taken at the time, the Court will not now quash the inquisition. If it is said that by reason of the failure of jurisdiction the Court must declare the inquisition to be invalid, it must be remembered that such a principle would equally apply if the evidence had been admitted by the company on purpose in order to upset the finding if unfavourable. It would be contrary to justice to allow a party to stand by without objecting, and then afterwards to bring his objection forward. Here everything was finished, the costs had been taxed and paid, abstract of title had been sent and the assignment prepared. It is like the admission of evidence at *Nisi Prius* without objection—*Robinson v. Davies* (2), *The Queen v. The Commissioners of the South Holland Drainage* (3).

The inquisition here has been acted on, and as jurisdiction could have been given by consent, it must be taken that here it was so given.

Then the writ of *certiorari* is not of right, it is discretionary, and this is just the case where it should not be granted. There must be some period at which an enquiry of this sort should be held to be closed.

(1) 36 Law J. Rep. Q.B. 205; Law Rep. 4 App. 175.

(2) 49 Law J. Rep. Q.B. 218.

(3) 8 Ad. & E. 429; 8 Law J. Rep. Q.B. 64.

Sir H. Giffard (*Solicitor-General*), (*J. G. Holloway* with him), in support of the rule. The facts in this case are simply this that the sheriff's jury have given damages in respect of a matter, for which they had no right to give any—no objection to their doing so was taken at the time, and the whole proceeding was a mistake common to both sides. It is not fair to say that it was all the fault of the railway company. The other side were quite as much to blame. It must be remembered that this is not a question of the admissibility of evidence. The evidence produced was all admissible, inasmuch as there was a question of severance. It is not till we come to the use made of the evidence by the jury that anything went wrong. It is, therefore, a fallacy on the part of the other side to say that we ought to have objected to the evidence being tendered; we could not have done so.

The writ of *certiorari* is doubtless a writ of discretion, but will not the Court think this a case for its exercise? The utmost that can be said is that there was a mistake by both parties. Is it now too late for the Court to do justice? We cannot raise this question in an action—*Mortimer v. The South Wales Railway Company* (4), we are, therefore, driven to ask for a *certiorari*.

[LUSH, J.—What do you say to the case, *The Queen v. The Commissioners of the South Holland Drainage* (3)?]

There there was a wilful intention to deceive. So too in *Robinson v. Davies* (2) and in all the cases the person applying has himself induced that for which he asks a remedy.

No harm has been done to Mr. Sheward by the time that has elapsed, but injustice has here been done to the railway company by this mistake.

[LUSH, J.—Suppose the money had actually been paid over? There must be a moment when you would be too late.]

Most of the delay was necessary, and Mr. Sheward will only be *in statu quo*.

Cour. adv. vult.

(4) 1 E. & B. 375; 28 Law J. Rep. Q.B. 129.

Queen v. Sheward, Q.B.

judgment of the Court (5) was (March 10), delivered by JUSTICE, J.—This was a rule moved on the 21st, and issued on the 23rd of February, 1879, calling upon Mr. Sheward to show cause why a writ of *certiorari* should not issue to remove into this Court of the High Court of Justice the verdict and judgment taken by the under-sheriff of Middlesex, on the 15th, 18th and 19th of February, touching the claim to compensation made by Mr. Sheward, whom I shall hereafter call the claimant, against the Metropolitan and St. John's Wood Railway Company, whom I shall call the company, in respect of his interest in lands, &c., upon the ground that the jury assessed compensation upon the claim upon which they were not authorized by law to do so.

The facts upon which the company have the inquisition removed with reference to its being quashed, are that the claimant had a leasehold interest in certain premises at Mapesbury Farm, Willesden, in which he trained and exercised chase horses and hunters, and the company, by virtue of their special Act incorporating the Lands Clauses Consolidation Act, 1845, had the power expressly to take part of the profits for the purposes of their undertaking, making the usual compensation. In December, 1875, the company gave verbal notice to treat for a part of the claimant's premises, and the question of the amount of compensation to be paid to the company came on to be tried by the under-sheriff of the county of Middlesex and a jury, on the days I have named. In the result the jury gave a verdict for the claimant for 6,000*l.*

The claimant contended that the consequence of the company taking part of the profits and constructing a railway would be that the residue would be unfit for his business, and that he would be compelled to sell off his horses and relinquish his business, and he claimed compensation, not for his interest in the land actually

taken from him, but for all the consequential injury he would thus sustain. A great deal of evidence was given on both sides without objection as to the amount of the loss which the claimant alleged he would sustain, and the jury assessed the compensation at 6,000*l.*, including a large sum for loss in respect of the claimant's business.

The inquisition was signed on the 19th of February, 1879. The claimant proceeded in due course to tax his costs. The taxation was completed on the 1st of April, and on the 17th of April the amount for which the *allocatur* was given, namely, 392*l.* 12*s.* 2*d.* was paid without any objection or protest.

The company having required an abstract of the claimant's title to be furnished, it was furnished in the month of May. A good deal of correspondence passed between the solicitors respecting the title, and requisitions were made by the company's solicitors, all of which were answered by the claimant's solicitors. The company's solicitors then prepared the draft of the assignment to be executed by the claimant, and on the 3rd of July sent it to the claimant's solicitors for approval.

In that draft assignment it was recited that the amount of the purchase money and compensation payable in respect of the premises had been duly ascertained by a jury to be the sum of 6,000*l.* In the course of the correspondence between the solicitors, the claimant's solicitors frequently pressed for payment of the 6,000*l.* In particular the claimant's solicitors on the 28th of April wrote to the company's solicitors saying they were instructed to press for the immediate payment of the 6,000*l.* with interest, in answer to which the company's solicitors on the 30th of April acknowledged the receipt of that letter, and said, "If you will supply us with abstract of title we will proceed with the assignment as quickly as possible." On the 2nd and 3rd of May the claimant finding it impossible to carry on his business of a horse-dealer and trainer on the part of the premises not taken by the company, sold off his plant and stock of horses. On the 12th

Lush, J.; Manisty, J.; and Bowen, J.

The Queen v. Sheward, Q.B.

of May, the claimant's solicitors sent the abstract of title, and again asked for payment of the 6,000*l.*

On the 11th of June, 1879, not having received the 6,000*l.*, the claimant's solicitors issued a writ, specially endorsed, for the recovery of the amount, and sent it to the company's solicitors, who on the 13th of June wrote to the claimant's solicitors as follows:—

"We return writ with acceptance of service endorsed, and regret that you should have thought it necessary to commence proceedings. The abstract of title is now with our counsel, with whom we left it after failing to obtain the production of the deeds the other day, and we will proceed to complete the purchase as soon as possible. There will, therefore, be no occasion for any further steps under the writ."

Further correspondence took place as to the title, and after waiting some time the claimant's solicitors proceeded with the action for recovery of the 6,000*l.*, and on the 29th of July the company delivered their statement of defence, by which they, for the first time, objected to the validity of the inquisition, save that they had, without notice to the claimant, on the 21st of July applied for and obtained the present rule for a *certiorari* to bring up the inquisition for the purpose of quashing it.

The question is, whether under these circumstances, the Court should make the rule absolute.

On behalf of the company it is contended that the sum assessed includes compensation for things in respect of which the jury had no jurisdiction to give compensation, and that consequently it is invalid.

On behalf of the claimant it is contended that assuming such to be the case, the company cannot now apply to have the inquisition quashed, inasmuch as they not only made no objection to the admissibility of the claim on the evidence in support of it before the under-sheriff, or to the summing up of the under-sheriff, but they have acquiesced in the inquisition and acted upon it, and allowed five months to elapse before taking any proceedings with the view of having it

quashed. We are of opinion that the contention of the claimant is well-founded.

It is discretionary in the Court in a case like the present, whether it will grant a *certiorari*—*The Queen v. The Commissioners of South Holland Drainage* (3), and we think as a general rule a *certiorari* to bring up an inquisition taken under the Lands Clauses Consolidation Act 1845, for the purpose of quashing it should not be granted after the expiration of the time allowed for setting aside an award made under the powers of the same Act. That time had elapsed in the present case, in addition to which both parties had in the interim acquiesced in and acted upon the inquisition. The Solicitor-General offered on the part of the company to undertake not to require payment of the costs in the event of the inquisition being quashed, and to submit to any other terms the Court might think it right to impose, but we are of opinion that under all the circumstances the Court ought not to interfere. If the claimant were the party applying for a *certiorari* on the ground that the under-sheriff had excluded some head of damages which was properly the subject of compensation, we think he clearly would have been too late, having received the costs and acquiesced so long in the inquisition, and we do not think the company are in any better position, the only difference being that they paid instead of receiving the costs.

It was assumed upon the argument that the jury had taken into consideration and assessed compensation for matters which were not properly the subject of compensation. We have looked in the short-hand writer's notes of the proceedings before the under-sheriff and of his summing up, and without expressing any opinion upon the point, we think it is open to considerable doubt whether the jury in the present case exceeded their jurisdiction, having regard to the law as laid down by the House of Lords in the case of *The Duke of Buccleuch v. The Metropolitan Board of Works* (6).

In that case the distinction was taken between

(6) 41 Law J. Rep. Exch. 137; Law Rep. H.L. 418.

Lunden v. D. O'Byrne Clerk 5123 Ch 373.
Godard v Carr 53 L.R. 2 57
Wheeler v United Telephone 53 L.R.
Q.B. 468

Queen v. Sheward, Q.B.

In the case of a claimant who simply complains of annoyance and loss caused by the use of a railway sanctioned by the Statute, and that of a person like the present claimant, who being owner of property is compulsorily deprived of part for a purpose which subjects him to annoyance and loss to which he would otherwise have been subject. The House of Lords decided that part of the claimant's land having been taken compulsorily for the purpose of making the Embankment, the arbitrator had no right to take into consideration and award compensation for the loss of privacy and the increase of dust and noise consequent upon the creation of the embankment.

In the present case the claimant informed before the under-sheriff that part of his land having been taken compulsorily for the purpose of making a railway the jury had a right to take into consideration and to award compensation for his consequential loss and injury, including loss sustained by reason of his being able to carry on his business the remainder of his property.

The question whether that contention was well-founded has not been raised before us, and we do not consider it necessary to have it argued because we are nearly of opinion that under the circumstances to which we have adverted, for the other reasons we have given, an application for a *certiorari* is too late, and that the rule ought to be discharged with costs.

Rule discharged with costs.

Counsel—Allen & Son, for claimant; Burchells, for company.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880. } HAWKSLEY v. BRADSHAW AND
March 22. } ANOTHER.*

Practice—Pleading in Action for Libel—Denial and Justification of Libel and Payment into Court—Embarrassing Defence—Rules of Court, Order XXVII. rule 1, Order XXX.

In an action for libel the defendants pleaded denial and justification of the libel without the innuendo, and pleaded alternatively an apology and payment into Court of 40s. as amends:—

Held (reversing the judgment of the Queen's Bench Division), that these defences could be pleaded together, and that they were not embarrassing so as to be liable to be struck out under Order XXVII. rule 1. of the Rules of Court.

Appeal from the Queen's Bench Division. The case is reported *ante*, p. 207.

The plaintiff sued the defendants for an alleged libel which appeared in a paper printed and published by the defendants.

The defendants in their statement of defence denied the libel and the innuendo, pleaded a justification of the libel omitting the innuendo, and alternatively in paragraph 5 pleaded an apology under Lord Campbell's Act (6 & 7 Vict. c. 96. s. 2), and in paragraph 6 paid into Court the sum of 40s. as amends for the injury, if any, sustained by the plaintiff.

The plaintiff applied at chambers to have the payment of money into Court struck out, and the Master made an order to that effect.

The defendants appealed, and Field, J., rescinded the order of the Master. On appeal by the plaintiff the Divisional Court reversed the decision of Field, J., and held the statement of defence to be embarrassing and so liable to be struck out under Order XXVII. rule 1 (1).

The defendants appealed.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

(1) Rules of Court, Order XXVII. rule 1—
“The Court or a Judge may at any stage of the proceedings allow either party to alter his statement of claim or defence or reply, or may order

Hawksley v. Bradshaw (App.), Q.B.

Graham, for the appellants.—The question is whether a defendant may plead payment of money into Court along with other defences in answer to an action for libel. By Order XXX. (2) provision is made for payment into Court, and the defendant can under that order "accept the same in satisfaction of the causes of action in respect of which it is paid in." The principle which was laid down in *Berdan v. Greenwood* (3) applies to the present case, although the decision in that case did not actually include cases of libel, but rather left the question as to such cases open. This plea of payment into Court is in fact double, it is made both under Lord Campbell's Act (4) and under the Judicature Act; a payment into Court under the Judicature Act is none the less a good payment because an apology is pleaded at the same time. Since this statement of defence was delivered, the part of the 2nd section of Lord Campbell's Act as to payment into Court has been repealed (5), and now an apology has become a mere matter of evidence.

The plaintiff is not embarrassed by such pleading, he can go to trial, and if the amount paid in is not sufficient he will get damages *ultra*. The Judge has power over the costs and thus no hardship can be inflicted on the plaintiff.

Cave and Dunn, for the plaintiff.—The 5th paragraph of the statement of defence is in fact a plea under Lord Campbell's Act (4). The word statute is mentioned, and the 6th paragraph could not have been pleaded alone. It was decided

to be struck out or amended any matter in such statements respectively, which may be scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action . . ."

(2) Order XXX. r. 1.—"Where any action is brought to recover a debt or damages, any defendant may at any time after the service and before, or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein."

(3) 47 Law J. Rep. Exch. 628; Law Rep. 3 Exch. D. 251.

(4) 6 & 7 Vict. c. 96. s. 2.

(5) 42 & 43 Vict. c. 59. Schedule, part 2.

in *O'Brien v. Clement* (6) that a special plea of apology and of payment into Court under Lord Campbell's Act (4) cannot be joined with a plea of not guilty to the same cause of action. The part of the section of that Act which allows a defendant to pay money into Court with a plea of apology is repealed by 42 & Vict. c. 59; but the second section of 42 & 9 Vict. c. 75, which makes it compulsory to pay money into Court with an apology is in force, so that the paragraph of the defence containing the apology could not have been pleaded without the payment into Court.

[BRAMWELL, L.J.—The Judicature Act surely makes the judgment of Parke, L.J. in *O'Brien v. Clement* (6) of no effect.]

The defence is also embarrassing. It is pleaded in answer to the whole cause of action upon the record, the libel is justified although the innuendo is not; but this innuendo is mere surplusage now. The plaintiff cannot take the money out of Court, for it is paid into Court in satisfaction of the claim, and must so taken out under Form 6 of Appendix A; the justification would then remain on the record and would be substantially admitted.

Moreover, the judgment of the Divisional Court is an exercise of discretion, and this Court will not overrule a discretion which has been exercised by the Master and the Divisional Court in favour of the plaintiff—*Watson v. Rodwell* (7) *Golding v. The Wharton Salt Works* (8).

BRAMWELL, L.J.—I am of opinion that this appeal must be allowed. I think that the case is concluded by authority, and that the case of *Berdan v. Greenwood* (3) is in point. It is true that it was said at the end of the judgment in that case that there might be some cases in which where "actions were brought to try a right of or in respect of property which is denied, or to establish a character which has been assailed," would be improper to allow payment into

(6) 15 Mees. & W. 435; 15 Law J. Rep. Exch. 285.

(7) 47 Law J. Rep. Chanc. 418; Law Rep. Ch. D. 380.

(8) Law Rep. 1 Q.B. D. 374.

Wicksley v. Bradshaw (App.), Q.B.

t concurrently with other defences, the Court there guarded itself against; supposed to decide that question, no decision was given which is contrary to the opinion I am now expressing, as merely, if I may so say, a natural prudent reservation of judgment on point, and it cannot be construed as an expression of opinion that such a statement of defence as the one which we now considering cannot be pleaded. I agree with the decision in *Berdan v. Wood* (3), and I am, of course, bound by it. I will not, therefore, say anything more on the power which a defendant has of setting up concurrently defences as these; it is clear that he has the power.

Now consider the question which has been raised under Order XXVII. (1). It is of opinion that this defence does not come within that Order. I think the argument for the respondent on this point is founded on a misapprehension.

That order is not equivalent to an admission that if a defence places the plaintiff in a position of difficulty, it is therefore to be struck out. If reference be made to the context it will be seen that it cannot be so. Rule 1 says that statements of defence may be struck out which are scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action."

Now this defence does not prejudice the plaintiff within the meaning of that

It may embarrass the plaintiff in a sense, that from the nature of his defence it may make him doubt as to what he ought to do, and how he ought to proceed with it. But so might other defences, as for instance if the Statute of Limitations were pleaded alone; for a plaintiff might be uncertain whether a statement on which he relied would prove sufficient to dispose of that defence. It may be that this plea was embarrassing to this plaintiff, but still it is not embarrassing within the meaning of Order XXVII. (1), it is embarrassing because of the nature of the plaintiff's defence, but it is not embarrassing apart from that, nor apart from that case difficult for him to deal with.

Then as to the expediency of allowing such a defence as this, I think it is expedient. Suppose that a plaintiff sues a defendant for having killed his horse by negligence, and says that the horse was worth 100*l*. The defendant denies that he is liable at all, but says also, that if he is liable, still the horse was only worth 5*l*.; he is willing to pay that amount into Court, and willing, if he can, to avoid litigation, but he is determined to deny his liability if the larger sum is claimed. Is there anything incongruous in his being allowed to do so? I think not. The same principle applies to a case of libel. A defendant may deny the libel, he may deny that he wrote it or that it bears the construction put upon it, but he may also be willing to pay a sum of money, say 5*l*., rather than have to litigate. I do not see why he should not do so. Where is the objection? It surely exists only in the nature of the plaintiff's case. In the present case I see no difficulty. Suppose, to put it in the abstract, that a plaintiff thinks the libel is a serious one, then he treats with contempt the sum of 40*s*. paid into Court, he joins issue on both the defences, the denial and the amount paid into Court, and at the trial his case is put before the jury as a case in which the sum paid into Court was in fact a further insult, and the jury are invited to mark their sense of such a defence. Or a plaintiff may not consider the libel serious and may think that 40*s*. is sufficient, he then accepts that sum and so the cause is at an end. That is desirable, and in such a case one would be inclined to say that the cause of action was a trumpery one and that the action should not have been brought. But there may be a sort of *tertium quid* when a plaintiff brings his action not to recover damages but to clear his character. Then in such a case if the defendant states that the libel is true and also pays 40*s*. into Court, it is asked what can the plaintiff do? The plaintiff does not want damages, but he goes to trial and claims to vindicate his character and to have a verdict, unless an apology is made in Court and 40*s*. more given him so as to carry costs. It is, I think, plain that the difficulty arises

Hawksley v. Bradshaw (App.), Q.B.

from the nature of the plaintiff's case and not from the nature of the defence set up.

The defendant indeed is the person who is embarrassed; an action is brought, he does not really know whether he is liable or not, whether what has been written is a libel or not. Is he then to apply to strike out the statement of claim as embarrassing, because he does not know what to do? Surely not, he then pleads a justification and also pays something into Court in case the plea of justification should not be proved.

I desire to imitate the prudence shewn in *Berdan v. Greenwood* (3), and I do not wish to lay down any hard and fast rule; but I may say that I think it is almost always reasonable that such a defence as this should be allowed. There may be cases where difficulties stand in the way of allowing such a defence, as, for instance, where a plaintiff claims a right of property; but even then I think that the plaintiff's course is clear, especially remembering the control which the Judges have over costs. If in any case, where a defence denying or justifying has been set up in addition to a payment into Court, a jury fails in a proper case to give proper damages, I think it is clear what the Judge ought to do, and clear therefore what he would do with regard to the costs. I think this appeal must be allowed, because it is reasonable that a defendant should be allowed to pay money into Court, and at the same time be allowed to deny the allegations contained in the plaintiff's statement of claim.

BAGGALLAY, L.J.—I am of the same opinion. I think that *Berdan v. Greenwood* (3) applies, and that the principle of that case is correctly represented in the first part of the marginal note, and that, as a general rule, a defendant may, by his statement of defence, deny the plaintiff's causes of action, and at the same time plead payment into Court in respect of the whole or any part of them.

We are bound by the principle, and I think it is a correct principle and decision. It is true that there may be exceptions, as was said both in the judgment of Thesiger, L.J., and in that

of Cotton, L.J., in *Berdan v. Greenwood* (3), and no doubt libel was mentioned as a case in which difficulties might arise, and in which it might be improper as a matter of practice to allow the defence of payment into Court concurrently with other defences; but no general rule as to any exception was there laid down, and the general principle ought to be applied. I do not think that the plaintiff can be in any way embarrassed by such a statement of defence as this, whereas the defendant would be much embarrassed if he were debarred from denying the libel and also paying a sum of money into Court.

It has been urged that this is a case in which the Divisional Court has exercised its discretion, and it is said that the Court of Appeal will not interfere with that discretion. Two cases were cited to us on that point, but it will be found that the discretion exercised in the cases of *Watson v. Rodwell* (7) and *Golding v. The Wharton Saltworks Company* (8) was different, it was a discretion as to the individual circumstances of the case, but that is not the kind of discretion which has been exercised in this case. Here the discretion has been exercised, regard being had to an abstract principle and not to the especial circumstances of the case. The Lord Chief Justice said that he made the observation as to the embarrassing nature of a defence "not with reference to this particular case, but with reference to cases of libel in general," so that the discretion which has been exercised in the Queen's Bench Division was a discretion as to a general principle; and that kind of discretion we are bound to review and, if necessary, to revise.

THESIGER, L.J.—I agree that this appeal must be allowed. *Berdan v. Greenwood* (3) lays down the general principle, and the only question is whether this case comes within an exception to that rule. It is clear from the judgments in the Divisional Court that the decision here proceeded on a general principle as to a particular class of cases, and we have to consider whether the exception to the general principle which that decision seeks to establish is well founded or not.

Winkley v. Bradshaw (App.), Q.B.

Winkley v. Greenwood (3), not to repeat what was there said, was based on a notion as intelligible to laymen as to lawyers, when a man is threatened with an action unless he is prepared to pay a sum of money, it is but reasonable that he should be allowed to pay a sum of money to stop that action, and that he should be able to do so and yet not be obliged to continue the cause of action. It may be reasonable that he should deny the right of the plaintiff to bring an action against him, and yet it may be reasonable that he should think it worth while to pay some money in order to avoid the expense of litigation. It is true that the principle has hitherto been applied especially to contracts, but it applies equally to a defendant in an action of libel, and the question is, whether the position of a plaintiff in an action for libel is so peculiar as to make his case an exception to the general rule. I do not think that it

money may be paid into Court with a defence in two states of circumstances. What embarrassment is there to a plaintiff in either? In the first the defendant says that he has not libelled the plaintiff; but adds that if he pays a certain sum into Court as damages. There is no repetition of the defence; there is also no assent by the defendant to the fact of his having libelled the plaintiff, so that if the plaintiff takes the money out of Court he does not leave any record any imputation on his character. If the sum paid in is sufficient it is reasonable that he should take it and thus put an end to the litigation? The sum paid in is not sufficient, how can the plaintiff be embarrassed, why should he not join issue upon the defence? Only questions would arise on the trial—whether there was a libel; and, secondly, whether the plaintiff was entitled to damages beyond the sum paid into Court.

And, in the second place, money may be paid into Court along with a plea of justification. If the justification is an offensive aggravation of the original libel, a plaintiff may safely be left to being protected by the Judge at the jury before whom the case may

come. If, however, the libel does not contain serious imputations, if it is on the border line between libel and no libel, such a case surely is one in which a plaintiff should accept the sum paid into Court and discontinue the action. If, however, he does not think the amount sufficient he can continue, and is not thereby prevented from trying the cause if he thinks fit.

It has been urged that this defence is a defence pleading an apology and payment into Court under Lord Campbell's Act (4). Does this make any difference? I think that the defence is intended, as was suggested by the appellant, to secure for the defendant the benefit both of Lord Campbell's Act (4) and of the Judicature Act. Assuming, however, that the defence was a defence under Lord Campbell's Act (4) I do not think that the argument for the plaintiff is thereby strengthened. The plea under that Act was a plea in addition to what I may call the Common Law plea of payment into Court. Such a plea could not be pleaded with other pleas save under certain conditions before the Judicature Act, but that is not the case now, as may be seen from the case of *Berdan v. Greenwood* (3). Either way the rule is now different from what it was. If this defence comes within Order XXX. (2), *Berdan v. Greenwood* (3) is the authority for it. If it is not a defence under Order XXX. (2), then it comes within the general rule introduced by the Judicature Act, that several defences may be pleaded together without leave, and a plea or defence is no less a plea because it is a statutory plea than if it is what may be called a Common Law plea or defence.

Judgment reversed.

Solicitors—Wansey & Bowen, for plaintiff; Taylor, Hoare & Taylor, agents for Bradshaw, Nottingham, for defendant.

Lancaster v. M. R. R. 50 L.J. 211.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880.
Feb. 23, 25,
March 16.

THE COUNCIL OF THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. THE LONDON AND PROVINCIAL SUPPLY ASSOCIATION, LIMITED.*

The Pharmacy Act, 1868 (31 & 32 Vict. c. 121), ss. 1, 15—Sale of Poisons by Unqualified Persons—Keeping open Shop for such Sale—Application of Statute to Corporations.

The provisions of the Pharmacy Act, 1868, which forbid any person to sell or keep open shop for retailing, dispensing or compounding of poisons unless such person shall be a pharmaceutical chemist or a chemist and druggist within the meaning of this Act do not apply to corporations, as they are not included under the word "person" in that Act.

So held by the Court of Appeal, reversing the decision of the Queen's Bench Division.

Appeal from the Queen's Bench Division. The case is reported 48 Law J. Rep. Q.B. 387.

The plaintiffs sued the defendants for penalties for having sold poisons and kept open shop in contravention of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121).

The defendant company was formed in 1878, and was then registered as a limited company under the Companies Acts. W. Mackness, a shareholder and the managing director, is not a duly registered pharmaceutical chemist or a chemist and druggist within the meaning of the Pharmacy Act, 1868. Another shareholder, Longmore, is a pharmaceutical chemist or chemist and druggist within the meaning of that Act, but none of the other five shareholders who form the company are so qualified.

The company took over the grocery business of Mackness, and carry on the business, amongst other departments, of a chemist and druggist, and keep an open shop for the retailing, dispensing and

compounding of poisons within the meaning of the Pharmacy Act, 1868. Longmore, with the help of his qualified assistants, attended to the drug department and to nothing else.

The Queen's Bench Division gave judgment for the plaintiffs, holding that the defendant company was liable to the penalties imposed by 31 & 32 Vict. c. 121, on any persons selling poisons and keeping open shop for the retailing, dispensing or compounding of poisons.

The defendants appealed.

A. Wills and Finlay, for the defendants.—The contention on behalf of the appellants is that the word "person" in the statute under consideration (1) does not include corporation. Reliance was placed by the plaintiffs on a passage in *Coke* (2) to the effect that the word "person" ought to bear its natural legal meaning and to include corporation. It was found that as a rule the word "person" when used in a statute does not, unless expressly provided that it shall, include corporation, and that will be found to be especially true of modern Acts and recent legislation. In statutes passed the same year as the Act now under consideration it will be found that the Legislature has inserted a provision that the word "person" shall include corporations when it has desired that it should do so. As instances may be cited—The Curragh

(1) 31 & 32 Vict. c. 121. s. 1, enacts that it shall be unlawful for any person to sell or keep open shop for retailing, dispensing or compounding poisons, or to assume or use the title "chemist and druggist," or chemist or druggist, or pharmacist or dispensing chemist or druggist, in any part of Great Britain, unless such person shall be a pharmaceutical chemist or a chemist and druggist within the meaning of this Act, and be registered under this Act. . . .

Section 15.—From and after the 31st day of December, 1868, any person who shall sell or keep an open shop for the retailing, dispensing or compounding poisons, or who shall take, use or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist and druggist, or who shall take, use or exhibit the name or title of pharmaceutical chemist, pharmacist or pharmacist, not being a pharmaceutical chemist . . . shall for every such offence be liable to pay a penalty . . .

(2) *Coke Inst. II. p. 722.*

* *Coram Bramwell, L.J.; Baggallay, L.J.; and Theisiger, L.J.*

Council of Pharmaceutical Soc. v. London, &c. Supply Assoc. (App.), Q.B.

Kildare Act (3); the Artisans and Journeymen Dwellings Act (4); the Sea Fisheries Act (5). The same will be found to be true of later Acts, as the Navigation of Rivers Act (6); the Fisheries Amendment Act (7); the Roads and Bridges Act (8); the Public Health, Ireland, Act (9). It was expressly provided that the rules made under the Judicature Act (10), and it has been decided that the word "person" in an Act empowers "person or persons" to sue as complainants. *St Leonard's, Shorditch, v. Franklin*. The Act which provided that male and female, singular plural, and singular, does not provide that shall include corporation (12). It is clear that the word "person" cannot include corporation in many sections of the Act, as in section 3, as no corporation has been registered; in section 4, for a corporation cannot be of full age; in section 5, for no corporation had been admitted as pharmaceutical chemists; in section 6, for no corporation could be named and receive a certificate; in section 11, for there were not certificates of the registrars of deaths of the death corporations; in section 18, for no corporation was at the time of the passing of the Act a chemist or druggist. The Act prescribes many steps to be taken which can only be taken by an individual; it requires things to be done which no corporation can do; it is, therefore, reasonable to infer that it was not intended to apply to corporations. The sale is effected by the person who actually hands the thing sold over the counter, and not by the owner of the goods, as may be seen, if the provisions of section 17 are considered. *Raynard v.*

Chase (13); *Walker v. Richardson* (14); *Harrison's Case* (15); the Factors Act, 6 Geo. 4. c. 94. s. 2, were also cited.

The Attorney-General (*Sir J. Holker*) and *L. Smith*, for the plaintiffs.—The question must be decided on the Pharmacy Act of 1868 and not by the analogy of other statutes, where interpretation clauses containing definitions may have been inserted *ex abundanti cautela*. This statute was passed for the protection of the public, as is shewn by the preamble, and unless it applies to corporations it will be possible for corporations to sell poisons without themselves being qualified or without their keeping a qualified servant. The person who sells within sections 1 and 15 (1) is the person who keeps the shop, the owner of the business, the master and proprietor, who derives the profit, and who ought to be the responsible and qualified person. It is true that some of the sections of the Act cannot be said to be applicable to corporations, such as section 11, as to the registration of deaths; but that presents no difficulty, for the intention of the statute and the theory on which it is to be construed is that a corporation cannot carry on such a business as is regulated by this Act.

If corporations commit torts they are liable to indictment, and therefore they can be sued in an action for penalties—*The Queen v. The Birmingham and Gloucester Railway Company* (16); *The Queen v. The Great North of England Railway Company* (17); *Yarborough v. The Bank of England* (18).

Wills, in reply.

Cur. adv. vult.

The following judgments were (on March 16) read.

BRAMWELL, L.J.—I am of opinion that this appeal must be allowed. I think the word "person" in section 15 of the

31 & 32 Vict. c. 60. s. 2.
31 & 32 Vict. c. 130. s. 3.
31 & 32 Vict. c. 45. s. 4.
39 & 40 Vict. c. 75. s. 20.
40 & 41 Vict. c. 42. s. 13.
41 & 42 Vict. c. 51. s. 3.
41 & 42 Vict. c. 52. s. 2.
(1) Rules of Court, Order LXIII.
(2) 47 Law J. Rep. C.P. 727; Law Rep. 3
D. 377.
(3) 13 & 14 Vict. c. 21. s. 4.

(13) 1 Burr. 2.
(14) 2 Mee. & W. 882.
(15) 1 L. C. C. 180.
(16) 11 Law J. Rep. M.C. 134; Law Rep. 3
Q.B. 223.
(17) 16 Law J. Rep. M.C. 16; Law Rep. 9 Q.B.
315.
(18) 16 East 6.

Council of Pharmaceutical Soc. v. London, &c. Supply Assoc. (App.). Q.B.

Pharmacy Act, 1868, does not include a corporation. That the word "person" may include corporation I will not deny, though at the same time, considering the way in which statutes are now drawn, that when "corporation" is meant it is always named, at least that there is no modern instance to the contrary, that when the Legislature made a general interpretation clause that "person" should be male and female, plural and singular, &c., it did not include "corporation," I should be reluctant to hold that in any particular statute "person" included "corporation" unless there was strong reason so to do. In this case there is in my opinion no such reason, but the contrary. Sections 1 and 15 of the Act create an offence and provide for its punishment. But for section 15 section 1 would create a misdemeanour punishable by indictment, fine and imprisonment. But offences, certainly offences of commission, are the offences of individuals, not of corporations. A corporation cannot have the *mens rea*. I do not say a corporation cannot be guilty of an offence of non-feasance, it certainly could be, and it has been so held as to a misfeasance; but though if the Legislature pleased it might enact that a corporation should in a certain event be taken to have committed an offence; the presumption is, that in speaking of offenders, it speaks of individuals. If a statute were to say that any person publishing a libel should be guilty of an offence, or that no person should publish a libel, a corporate printing company publishing a libel would not be guilty in its corporate capacity, but the individuals publishing would be the offenders. So, for instance, as to the sale of beer or spirits. No doubt if there was strong reason for saying "person" in this statute meant corporation, one ought so to hold. As for example, if the mischief to be prevented could not be otherwise. But that is not so here, for the individual offender may be got at. If the servant or shopman of a corporation sells poison, not being a pharmaceutical chemist, and registered under the Act, it will be no answer to an action for the penalty to say, that he did it as servant, whether of an individual or a corporation

not qualified. If the act is in itself unlawful, it is not the less so because done as servant. If it would be lawful because the servant was qualified, though his employer was not, I think the statute is shewn to be all the more reasonable, and in that case a corporation is on the same footing as a partnership, and there is no reason why it should not be.

It may be asked, how is the "keeping open shop" to be reached; the servant do not keep it open. No, but the directors or managers do, they are the offenders in that case. I cannot see how they could deny that they kept open that shop. They do—they do it in fact. If they committed a public nuisance by smell, vapours or otherwise in the preparation or (if supposable) in the sale of the drugs, they and not the corporation would be indictable. I see no reason then for including corporation in the word "person." I see many the other way. It is remarkable that in this particular statute "person" never includes corporation in any other section.

It is manifest that "persons" in the preamble keeping open shops, and "persons" known as chemists and druggists means individuals, for they are "persons" who it is expedient should possess a competent practical knowledge of the business.

A corporation as such cannot possess competent practical knowledge. Then surely "persons" are to be examined. It is manifest "persons" there does not include corporations, why should it in section 1? So "persons" in section 3 who have been assistants cannot include corporation. Nor the "person" in section 4 who is to be of full age. Nor the "persons" in section 6 who had been admitted pharmaceutical chemists, for no corporation has been. Nor the "person" in section 10 for a corporation never could have a certificate of competent skill, nor the "person" in section 10, who is a person that may die. In short "person" in no other section of this Act includes corporation.

Further than this, I am by no means certain that the statute is not levelled at the individual actually acting, and not (at least in all cases), at his employer. Who would be liable under section

Union of Pharmaceutical Soc. v. London, &c. Supply Assoc. (App.), Q.B.

compounding medicines of the British Pharmacopoeia otherwise than according to formularies? Surely the actual act of compounding.

Section 16 supposes there may be a qualified assistant and not a qualified master. Again, section 17 which specifies provides that for certain matters the master is liable, seems to suppose otherwise he would not be; then section 18 and the following when they use the word "person" clearly do not mean "corporation." There is this advantage as I have said, in this construction, it does not exclude a corporation from the benefit of carrying on this business nor the public from dealing with it. It is not needlessly in restraint of the act as it otherwise would be, at least indirectly. If it does indirectly operate to exclude a corporation carrying on the business, however qualified all its members are, it is to be regretted, but there is no need for making "person" include a corporation, nor for creating the novelty of a corporate offence. It only would operate against a corporation as it would operate against a partnership.

Further, how is this the act of the corporation if it is unlawful? For if it is, it is *ultra vires* of the directors. An agent hired by them to sell these poisons if so doing is unlawful could sustain no action against the corporation—they would have a good defence. Of course, if by their articles of association poisons are expressly to be sold, the sale would not be *ultra vires*; but what does not appear in this case, and in all events the possibility is a reason for fixing the individual and not the corporation.

On the result, considering the way in which modern statutes are drawn, that corporations are specified where corporations are meant, that offences are wilful breaches of law or inattention to its commands, and so the act of the individual offending, that there is no reason for holding corporations to be within the statute but that there are reasons to the contrary; and that in no other section of the Act does "persons" mean corporations. I am of opinion it does not in this section.

I am aware that the penalty is recoverable by plaintiff in the County Court (15 & 16 Vict. c. 56); but the sum recovered is at the disposition of the Crown (section 14), and it is a penalty, and the act is an "offence," and the person an "offender."

I am aware also that there is ground for saying that under section 15 all of several partners keeping a shop must be qualified, though none attend, and the shopman need not be qualified. If so, it may be said, so must all the shareholders and directors of a corporation. I do not know. The Act may have a more limited meaning and be more reasonable. If not, still this furnishes no argument in favour of "person" meaning corporation. But anyhow, this will effect the object of the statute. For if that is to impose the penalty on the person actually doing the prohibited act unless himself qualified, *e.g.*, the shopman, this opinion will not affect his liability. If the intention is to impose the penalty on the person actually doing the prohibited act unless his master, or employer, or principal, is qualified, this opinion will not affect that liability. If the statute—it can have no object except this—means to impose the penalty on him who commands the prohibited act to be done unless he is qualified, this opinion will not affect his liability, and if the penalty attaches to several unless all are qualified, they will be liable, notwithstanding this opinion. While it will avoid this absurdity that a corporation, though all its members, all its directors, and all its servants, were qualified, could not lawfully sell, nor acquire the power lawfully to sell the articles in question. The statute never meant to infringe the rules of free trade, nor to grant protection to chemists, only to the public, and this is assured by this opinion.

BAGGALLAY, L.J.—I agree in the opinion that this appeal should be allowed. In modern times, where the legislature had intended that the word "person," or any other word primarily importing one individual, should in any particular statute include a corporation, it has been usual to introduce an interpretation clause declaring that the word shall have such

Council of Pharmaceutical Soc. v. London, &c. Supply Assoc. (App.), Q.B.

extended meaning; and in the year 1868, the year in which the Act now under consideration was passed, at least four other Acts were passed into which such a clause was introduced, namely, the Sea Fisheries Act, the Curragh of Kildare Act (3), the Regulation of Railways Act (19), and the Artisans and Labourers Dwellings Act (4), and in another, the Fairs (Ireland) Act (20), the word "owner" was declared to have the same meaning.

Now the omission from Lord Brougham's Act (12), of any general declaration that the word "person," when used in subsequent statutes, shall include a corporation and the absence from the Act under consideration of any such interpretation clause, to my mind strongly supports the view that the legislature had no intention that the word "person," when used in an Act, should include a corporation.

It probably is the fact, as was suggested in argument, that at the time when the Act passed it was not in the contemplation of the legislature that a corporate body would embark in the business of selling or of dispensing or compounding poisons, and that consequently it had no intention of either including or excluding a corporation when using the word "person."

But however this may be, it must, I think, be admitted that although an Act may not contain a declaration that the word "person" shall include a corporation, and although it may be clear that the legislature could not reasonably be presumed to have had any intention in the matter, yet if it should be clear from the general scope and purpose of the Act, that the selling, dispensing or compounding of poisons by a corporation would or might be within the mischief intended to be guarded against, and if the extending the meaning of the word "persons" so as to include a corporation, would enable the necessary protection to be given, such an interpretation may and ought to be adopted.

But when I turn to the Act itself I can

find nothing to lead me to such a conclusion. The object of the Act is to prevent the selling, dispensing or compounding of poisons by unqualified persons. A corporation cannot of itself sell, dispense or compound, it can only do so by the aid of a servant or assistant, and if that servant or assistant is duly qualified in the manner required by the Act, as is admittedly the case as regards the dispensers employed by the defendants, the object of the Act is obtained. And from the view which I take of the Act, the protection intended to be given to the public is sufficiently secured in the case of a corporation keeping an open shop for the sale, dispensing and compounding of poisons; for in my opinion, the seller referred to in section 1 is the actual seller and not the individual or corporation on whose behalf he may act; and this view is supported by the language of section 17, which when dealing, not with the simple selling of poisons, but with selling particular poisons without the adoption of special precautions, imposes a comparatively small penalty on the seller but declares that for the purpose of this section, the person on whose behalf the sale is made shall be deemed to be the seller, thus implying, that except for the purposes of that section, the person referred to in the Act as selling, means the person actually selling and not the person by whom he is employed.

I need not refer to the many sections of the Act which are quite inapplicable to the case of a corporation, as they have been pointed out in detail by Bramwell L.J.

In the absence, then, of any declaration in the Act that the word "person" is to include a corporation and not gathering from the general scope and purport of the Act, that there is any necessity in the interest of the public that any such interpretation should be given to the word I have arrived at the conclusion that such an interpretation ought not to be put upon it, and that this appeal must be allowed.

THESIGER, L.J.—I also am of opinion not without doubt, that this appeal should be allowed.

(19) 31 & 32 Vict. c. 119.

(20) 31 & 32 Vict. c. 12.

Council of Pharmaceutical Soc. v. London, &c. Supply Assoc. (App.), Q.B.

The question for determination is, whether an incorporated company is subject to the prohibition contained in section 15, and liable to pay the penalty imposed in section 15 of the Pharmacy Act, or in other words, whether the "person," used in those sections, included such a company.

Dealing with this question I start with the axiom that the term "person" is, in phraseology, wide enough to include, not merely natural persons, i.e. individuals, but artificial persons, such as corporations, and to designate as well as sole. I start at the same time with the undisputed fact that the practice in modern statutes, where corporations are intended to be included, is either to expressly name them or to use in reference to them the term "person," with an interpretation clause expressly providing that corporations are intended to be included in the term. As a result of the opposition between the axiom and the practice it appears to me that the term "person," when used in a modern Act of Parliament, should never be construed to include corporations except where first, the term is expressly interpreted as including them; secondly, the context of the Act clearly shews that they are so intended; thirdly, the object and scope of the Act peremptorily require them to be so included, and the context does not clearly give a construction to that effect.

Neither the first nor the second condition exists in the particular Act under consideration; but for a long time I have doubted whether the judgment of the Court below might not be supported on the third. The object of the Act is that of providing for the safety of the public in the matter of the sale of poisons. The means by which that object is promoted to be attained is, *inter alia*, that of restricting those who keep open shop for retailing, dispensing or compounding poisons to certain conditions and regulations. Corporations may keep open their doing so without proper safeguards may expose the public to the mischief against which the Act is intended to guard. There is, therefore, a strong presumption, *a priori*, that they would be subject to the same conditions and

restrictions as those to which individuals would be subjected, or, at least, to some conditions and restrictions that would serve to the same end. Proceeding a step further, it may be said that a statutory provision under which a particular thing is made unlawful for any individual to do except under certain conditions, contains an indication that the thing itself is intended to be entirely prohibited, except under those conditions, and consequently cannot be done by a corporation, even though the conditions are in their nature such as cannot, under any circumstances, be complied with by them. Lastly, a penalty by which the prohibition is to be enforced, recoverable by civil suit, is as applicable to corporations, who may even under certain circumstances be the subject of indictment, as it is to individuals.

Notwithstanding, however, the force of these considerations which still press themselves upon me, I have come to the conclusion that the whole context of the Act too clearly points to individuals alone being intended by the term "persons" to allow of that term being held to include corporations in the 1st and 15th sections. I do not propose to repeat what Bramwell, L.J., has already said on that point. He has shewn conclusively that the preamble and every section of the Act, putting aside for the moment the two sections, the meaning of which is in dispute, when using the term "person" or "persons" refer to individuals alone. But in addition to what he has pointed out, I find in the 1st section itself evidence that the words "any person," in the earlier part of that section are limited to individuals and cannot be extended to corporations, for in a subsequent part of the same section the word "person" is again used with such a context as absolutely forbids its application to a corporation, and yet in such a relation to the same word contained in the earlier part of the section as to grammatically require that it should receive the same construction.

I do not think that under such circumstances the Court ought to strain the language of the Act so as to make it include corporations, even if it were clear that the mischief intended to be

Council of Pharmaceutical Soc. v. London, &c. Supply Assoc. (App.), Q.B.

provided against would otherwise, in the case of companies keeping open shop for the sale of poisons, be remediless.

But I feel bound to add that I am by no means satisfied, that although a corporation as a separate entity be not liable to the penalty which is sought to be recovered in this case, the individual members of the corporation, whether directors of a company or otherwise, may not be liable, and thus the mischief be remedied. I prefer, however, to give no definite opinion upon this point, for it involves the question whether the legislature intended or not to practically put an absolute veto upon the keeping open shop for the sale of drugs by trading companies, and the absence from the Act of any express reference to such companies is almost equally difficult to be accounted for upon the notion that the legislature had that intention as upon the notion that the legislature did not think of the matter at all, and thereby a *casus omissus* has occurred.

Judgment reversed.

Solicitors—Crouch & Spencer, for appellants;
Flux & Co., for respondents.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879. { THE QUEEN (on the prosecution
Dec. 19. { of the Lewisham Board of
Guardians) v. THE LONDON,
BRIGHTON AND SOUTH COAST
RAILWAY COMPANY.

Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), sect. 159—Rate—Inequality of Benefit—Exemption of, or Levy of Rate at a Lower Scale on, part of a Parish—Description of such part in Precept.

[For the report of the above case, see 49 Law J. Rep. M.C. 32.]

Ford v. Kettle 51 Z 262 559.
Leal v. Clauiffe 50 Z 362 316.
Brindley v. Moor 50 Z 362 327.
Hunt v. Roberts 51 Z 362 312. [N.]

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division)

1880. } DAVIS v. GOODMAN AND
March 19. } ANOTHER.*

Bill of Sale—Non-attestation of—Effect of as between Grantor and Grantee—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) ss. 8, 10. Hickson v. Darlow 52 L.

The non-attestation of a bill of sale which the Bills of Sale Act, 1878, applies does not make it void as between the grantor and grantee thereof.

So Held by the Court of Appeal, reversing the judgment of the Common Pleas Division.

Casson v. Churchley 53 L.
Appeal from a judgment of the Common Pleas Division.

The case is reported *ante*, p. 101.

The question raised in the appeal was whether a bill of sale made after the coming into operation of the Bills of Sale Act, 1878, is void as between the grantor and grantee thereof, if not attested in accordance with the provisions of the Act.

The Common Pleas Division held that such a bill was void as between grantor and grantee, and gave judgment for the plaintiff, who had sued the defendant for seizing his goods under a bill of sale which was not attested.

The defendants appealed.

Bompas, for the appellants.

The question turns upon the Bills of Sale Act, 1878 (1). It is submitted that

* *Coram* Bramwell, L.J.; Baggallay, L.J.; Thesiger, L.J.

(1) 41 & 42 Vict. c. 31, is entitled "An Act to Consolidate and Amend the Law for Preventing Frauds upon Creditors by Secret Bills of Sale of Personal Chattels."

Section 8—"Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act within seven days after making or giving thereof, and shall set forth a consideration for which such bill of sale is given, otherwise such bill of sale, as against trustees or assignees of the estate of the person whose chattels or any of them are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment of the benefit of the creditors of such person, shall also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill

vis v. Goodman (App.), C.P.

Section 8 (1) of that Act expressly says that a bill of sale not duly attested shall be void against creditors; but it nowhere says that it shall be void against the grantor, and as *expressio unius est exclusio alterius*, the inference to be drawn is that it is not void. It has been held in the Court below that the clause as to creditors only applies to the registration, and that the enactment as to attestation is a distinct general substantive enactment; but if reference be made to section 10 (1) and to the title of the Act (1), it can be seen that the intention of the Legislature was to prevent frauds upon creditors, and it is not possible to sever the clause and one condition from the other. The decision of the Court has been questioned in *Hill v. Kirk* (2).

As to the bill of sale, for the plaintiff.—The preamble of the new Act differs from the preamble of the former Act, and does not contain the recital that “Whereas frauds are daily committed upon creditors . . . it is therefore enacted.” The Act of 1878 moreover contains several new provisions which were inserted, not for the benefit of the creditor, but for that of the grantor. The provisions of section 10 (1) were intended to prevent frauds as those which resulted from the grantor coming forward and saying he had not been aware of what he was signing; the proviso as to attestation was inserted for his protection, not for the benefit of his creditors, and the only way in which com-

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

pliance with it can be enforced is by holding the bill of sale void in default of such compliance. Section 10 (1) is not merely explanatory of section 8, it contains a new condition, the performance of which is requisite if the bill of sale is not to be void.

Davis v. Goodman (App.), C.P.

plains the way in which the attestation and registration is to be effected, and so interprets section 8. Under the earlier Act a bill of sale was not void between grantor and grantee for want of the formalities being observed, and I think that a similar rule must be applied to the non-observance of the formalities required under the Act of 1878. No doubt the provision as to explanation and attestation may be said to be inserted in one sense for the benefit of the grantor; but I think that it is not possible to draw the conclusion that the bill is to be void as between grantor and grantee if the directions as to those matters are not observed. I therefore think that this appeal must be allowed.

THE SINGER, L.J.—The *intuitus* of the Act of 1854 and of the Act of 1866 was the protection of the creditors, and the *intuitus* of the Act of 1878, which amends and consolidates these Acts, is the same. The 8th section of the Act of 1878 provides that every bill of sale shall be attested; that it shall be registered, and that the consideration shall be set forth; and it provides that if those conditions are not complied with, certain results are to follow in favour of certain specified persons. The Act says, "otherwise such bill of sale . . . shall be deemed fraudulent and void." In my opinion the word "otherwise" governs all the preceding part of the section. The repetition of the word "shall," upon which Lord Coleridge appears to place reliance, does not, I think, support the argument sought to be based upon it, for it is to be observed that this word "shall" is again repeated in the sentence which relates to the setting forth of the consideration, so that if the clause as to attestation is to be taken alone, each of the other clauses must also be taken alone.

I am of opinion that the sense, the object and the grammatical construction of the sections of the Act all point to one conclusion, and that is that the only result of not performing the directions and not complying with the provisions of the clauses under discussion is, that the bill of sale is void only as against the classes of persons specified in section 8. I do

not think that the provisions of sub-section 1 of section 10 (1) carry the case any farther. Section 8 (1) enacts that certain things must be done *sub modo*, and section 10 (1) gives the *modus*. I think that section 10 should be read into and with section 8, and that both bear the same construction. I do not think that there is any ground for saying that these clauses do not exist for the benefit of creditors. The creditors of a grantor of a bill of sale are interested in having the purport of that bill of sale properly explained to the grantor. Such explanation is a protection to the grantor, and also to the grantee. I am therefore of opinion that this judgment cannot be supported, and that this appeal must succeed.

Judgment reversed.

Solicitors—Milne, Riddle & Mellor, agents for W. H. Tinsley, Dudley, for appellant; Harper, Broad & Batcock, agents for W. T. Travis, Tipton, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } SPAIGHT AND OTHERS v. FARN-
Jan. 12. } WORTH AND ANOTHER.

Ship and Shipping—Cargo of Timber—Charter-party—Freight "on intake Measure of Quantity delivered"—Measurement of Shipowner at Port of Loading—Portion of Cargo Lost during Voyage—Measurement at Port of Discharge—Mode of Calculating Freight.

The plaintiffs consigned to the defendants a cargo of deals and battens, with deal ends for broken stowage. Freight was, by the charter-party, to be paid on deals, battens, &c., at the rate of 3l. 5s. per St. Petersburg standard hundred of 1,980 super feet, and on deal ends at the rate of 2l. 1s. 8d. for the like hundred, eight feet and under. The charter-party contained the following provision as to freight, "Freight payable on deals and sawn lumber on the intake measure of quantity delivered." The bill of lading was signed for a specified number of pieces, deals, battens and scantlings, and

Freight v. Farnworth, Q.B.

specified number of pieces, deal ends, freight was made payable as per charter-party. The shipper adopted the course of business with respect to the measurement of timber, and made up his specification, shewing the number of pieces of various dimensions. The dimensions were arrived at by measuring length, breadth and depth of the various pieces of timber, on each of which, before shipment, were chalked the figures representing its dimensions. During the voyage, owing to the severe weather encountered by the vessel, a portion of the deals and deal ends was lost; there was evidence that the dimensions of such portion were an average size, compared with the dimensions of the cargo. The remainder of the cargo was duly delivered, though on some of the pieces so delivered the shipper's measurement had become obliterated:—

held, by BOWEN, J., on further consideration, that the freight to be paid under the charter-party was on the measure put upon the timber when measured at the port of loading, and not on the quantity delivered or measured according to the intake mode of measurement at the port of discharge; and as the pieces thrown overboard or lost were of a fair average size, as compared with the rest of the cargo, the proportion which they bore to the rest of the cargo was to be deducted from the specification total, and freight charged upon the residue.

This was a case tried at the Liverpool Commercial Assizes, 1879, and subsequently decided before Bowen, J., on further consideration. The facts and arguments succinctly appear in the judgment.

Worsell and Kennedy, for the plaintiffs; *Russell and Warr*, for the defendants.

Cur. adv. vult.

The following judgment was (on the 10th of January) delivered by BOWEN, J.—The question in this case is as to the manner in which freight should be calculated and paid upon a cargo of deals and battens carried by the ship *Shannon* from St. George's, New Brunswick, to Liverpool.

The plaintiffs are managing owners of the ship *Shannon*, and the defendants are timber merchants and brokers at Liverpool, and consignees of the cargo in question.

The charter-party under which the freight was payable, and on the construction of which the matter partly turns, was dated the 5th of September, 1878.

The cargo was to consist of deals and battens, with deal ends for broken stowage. Freight was, by the charter-party, to be paid on deals, battens, &c., at the rate of 3*l.* 5*s.* per St. Petersburg standard hundred of 1,980 super feet, and on deal ends at the rate of 2*l.* 1*s.* 8*d.* per the like hundred, 8 feet and under. The charter-party contains the following provision as to freight:—"Freight payable on deals and sawn lumber, on the intake measure of quantity delivered." A cargo of deals and battens, and deal ends, was duly shipped at St. George's by A. H. Gilmor, Juna & Brothers, for Liverpool, consigned to the defendants, and the bill of lading was signed for a specified number of pieces, deals, battens and scantlings, and a specified number of pieces, deal ends, and freight was payable as per charter-party.

The usual course of business at St. George's, and the one adopted in this instance, with respect to the measurement of timber, is for the shipper to make up his specification, shewing the number of pieces shipped of various dimensions. The dimensions are arrived at by measuring length, breadth and depth of the various pieces of timber, and on each piece of timber, before shipment, is chalked the figures representing its dimensions. There are various ways of measuring the dimensions of timber:—the overall method of measuring is one, measurement by the dieper is another. The overall measurement is that adopted at St. George's. In the measurement of the timber the ship takes no part. The pieces are measured alongside of the ship by the surveyor of the shipper, and pass directly from the surveyor's hands to the ship.

There is no dispute as to the exact number of pieces of timber that were shipped. The cargo consisted of between 30,000 and 40,000 deals, and between

Spaight v. Farnworth, Q.B.

3,000 and 4,000 deal ends. During the course of the voyage, owing to the severe weather encountered by the vessel, 348 deals and 303 deal ends were lost; the remainder were duly delivered. On some of the pieces delivered the measurement put on at St. George's had become obliterated during the voyage. On some the measurement still remained marked. The dimensions of the timber that was lost were not known, either to the ship or consignees, but there was some general evidence that the dimensions of the quantity lost were average dimensions as compared with the rest. What was done on landing was as follows:—The defendants took the St. George's marks as the true dimensions on all the pieces where the figures still remained visible. They re-measured *de novo*, according to the overall mode of measurement, all the pieces where the figures had become illegible. The defendants claim to pay freight upon those two sets of figures.

The result, however, of this mode of calculation would be that the dimensions so arrived at for the delivered cargo, if deducted from the total dimensions in the specifications, would make the residue representing the quantity lost on the voyage to have been of most unusual and abnormal dimensions, three or four times as great as the other sizes of timber shipped, assuming always that the specification was accurate. The plaintiffs, the shipowners, object to this method of assessing freight, and assuming that the pieces lost were a fair average of the cargo, they propose to deduct the proportion which the lost pieces bore to the rest of the cargo, and to pay for what has arrived and been delivered on the St. George's specification. It is between these two methods of assessment that I have to decide, and the question is, the meaning of the words in the charter-party, "Freight payable on the intake measure of the quantity delivered." The plaintiffs contend that these words mean freight payable on the measure actually attributed at the port of shipment to so much of the cargo as was delivered subsequently; the defendants, on the other hand, contend that "on the intake measure of quantity delivered" must be construed as equivalent to "on

the quantity delivered, measured according to the intake mode of measurement that is to say, the overall mode of measurement to be adopted in measurement taken, not at the port of shipment, but at the port of discharge.

As a general principle freight, in the absence of special agreement to the contrary, becomes payable only on so much cargo as has been both shipped, carried and delivered.

If less has been shipped than has been delivered, as in the case of cargoes which heat under seawater damage, freight is payable on the lesser quantity shipped. If less has been shipped and carried than has been delivered, as, for instance, in the case of goods which are compressed during the voyage and expand on being unloaded, freight is payable on the compressed amount, not on the expanded measurements. On the other hand, less has been delivered than shipped, as in the case of goods lost on the way, then freight would be payable only on the quantity delivered.

For the convenience of business contracts are frequently made to vary the *prima facie* rule. Inconvenience in practice must obviously often arise unless some one measurement of the quantity delivered is agreed upon for the purpose of the calculation of freights. Timber, of course, is a cargo that is not liable to change its dimensions between its time of shipment and its time of delivery; but the mode of measuring timber differs at various ports, and probably there is considerable difference in the accuracy of the modes. The measurement of large cargoes of timber moreover is probably conducted with more expedition than exactness.

There is nothing, accordingly, so natural that the ship and the charterparty should agree that freight is to be payable on the measurement figures arrived at at the port of lading. The shipper, who is interested as between himself and his consignee in not understating the timber in his specification, is a person whose measurements the ship can afford to trust. This is what seems to me to have been done in the present instance. The plain meaning of the words in the charter-party is that freight is to be paid on the intake

Spaight v. Farnworth, Q.B.

that is to say, the shipping measure, i.e. dimensions of the actual quantity delivered—the measure, that is to say, which the surveyors put upon the timber when it is measured for the purposes of the specification before shipment alongside the ship. I see no reason for attributing to the words, “intake measure,” the less obvious meaning “intake method of measurement.”

A provision that one principle of measurement should govern would no doubt for purposes of business be more convenient than no provision at all; but it would not obviate all measurement disputes which I think this charter-party desired to prevent, and it seems to me that it is more probable that freight was meant to be paid on the intake figures which will be found recorded in the specification, and so far as they remain legible on the timber actually delivered.

Assuming this to be the true construction of the charter-party, is the calculation proposed by the defendants or the plaintiffs the best mode of arriving at the question what freight is to be paid?

In the present instance part of the timber was delivered with the marks still on it; on part the marks were defaced, and part has been lost midway. If the above construction of the charter-party be correct, what has to be discovered is not the accurate measurement as taken here of the quantity delivered, but the measurement attributed at the port of lading to so much as had arrived and been delivered safely. The competitive modes of calculation between which I have to decide are as follows:—

1. The pieces thrown overboard or lost are assumed, in accordance with the captain's evidence, to be a fair average size as compared with the rest of the cargo. The proportion which they bear on this assumption to the rest of the cargo is deducted from the specification total, and freight is charged upon the residue. This is the plaintiffs' method.

2. The pieces on which the marks remain are taken at the figures still chalked upon them, the pieces on which the marks are obliterated are re-measured, and freight is paid upon the total so arrived at. This is the defendants' method.

It is obvious, to my mind, that neither of these methods can be said to be anything but a rough way of arriving at the measure attributed at the port of shipment to the quantity delivered here. As to the first, the plaintiffs' method, it is based in the first place on a rough calculation of the average size of the cargo that has been lost. It was not suggested before me that the specification figures were not correct reproductions of the measurements actually arrived at the port of loading, though if the point had been taken and pressed, evidence might have been necessary to shew that the measurements taken, whatever their correctness at St. George's, were accurately entered in the specification. It was no doubt contended on the part of the defendants that they ought not to be bound by a measurement to which they were no parties, but though the defendants are not bound by the specification as such, they are bound, in my opinion, by the figures taken at the port of lading; and assuming, as I do, that those figures are correctly entered in the specification, in that sense and to that extent, the defendants are bound by the specification. I can conceive that far better proof might have been given of the exact dimensions attributed at St. George's to the timber delivered here, but rough and rude as the plaintiffs' method of calculation is, it seems to me to be founded on the real materials for a judgment, namely, the shipment figures, or what in this case I treat as synonymous with those in the specification. The assumption that the pieces lost were of an average size is a piece of evidence which might certainly have been displaced, but still until it is displaced may properly be acted on. It is not exact evidence, but it is *prima facie* evidence, and having no better I accept it. The weakness of the second, the defendants' method of calculation, to my mind is, that in re-measuring the unmarked timber here, the defendants forget that what has to be discovered is not the exact measurement of the goods delivered, but the measurement affixed to those goods at St. George's on shipment. It is evident that there was some difference, probably some mistake in part of the St.

Spaight v. Farnworth, Q.B.

George's figures, and this mistake was one to the benefit of which the ship was entitled so far as it relates to the timber actually delivered. The defendants' method, by adopting the St. George's measure in part only, deprives the ship of the chance which in this case is a very appreciable one, that St. George's measurement of the timber on which the marks had been obliterated were more in the ship's favour than the measurements re-taken here. The object, I think, of the charter was that the shipping measurements should be taken as accurate. Errors of measurement in part would be corrected by opposite inaccuracies in another part. This object the defendants defeat by assuming that as to part the shipment figures are correct, while as to part the defendants substitute re-measurement of their own. If there was no mistake in the St. George's measurement, and if the mode of measuring here must produce identical results with the mode of measurement at St. George's, the plan of the defendants would be unimpeachable, but the defendants have no right to take the benefit of either of these assumptions.

I prefer of the two the plaintiffs' method as directed, however roughly, to the true problem which has to be solved, namely, the intake measure, that is to say, the intake figures and dimensions actually attributed at the port of loading to so much of the cargo as has been delivered safely.

Judgment will, therefore, be for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors—Gregory & Co., agents for Stone & Fletcher, Liverpool, for plaintiffs; Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for defendants.

The Alhambra 492, J.P. 84.73.
Hindley Price 52, 2002 604

[IN THE QUEEN'S BENCH DIVISION.
 1880. } CAPPER AND COMPANY v.
 Feb. 20, 26. } WALLACE BROTHERS.

Ship and Shipping—Charter-party—Place of Discharge—Termination of Voyage—“Safe Port, or so near thereto as Ship can safely get.”

By a charter-party it was agreed that ship should load a full cargo and proceed to a safe port within specified limits, or so near thereto as she could safely get; the port to be named on signing bills of lading. The cargo to be brought to and taken from alongside at merchant's expense. She was ordered to K., and the master signed bills of lading for delivery of the cargo at K.

K. was situated thirty miles up a canal which was not deep enough to admit of the ship when laden passing up it. The shipowners having during the voyage in violation of the charter-party, asked the charterers to give orders as to where the cargo was to be done when she should arrive at the mouth of the canal, and finding no orders there to take delivery, lightered one-third the cargo up to K., and took the rest up the ship whose draught was thus sufficiently reduced to allow her to pass into the canal.

On action brought to recover the expenses of taking the cargo from the mouth of the canal to K.,—

Held, that, under the circumstances, the master was justified in considering the voyage to be at an end at the mouth of the canal, and in treating it as the place of discharge, and that the plaintiffs were therefore entitled to recover.

This was a Special Case, of which the facts material to the points argued and decided were as follows:—

The plaintiffs were owners of a ship called the *Aberaman* and the defendants merchants. By a charter-party entered into between plaintiffs and defendants, it was agreed that the *Aberaman* should take in at Bombay a full cargo, and proceed therewith to a safe port in the United Kingdom or on the Continent, between Havre and Hamburg, as ordered on signing bills of lading, “or so near thereto as she might safely get,” and deliver the cargo on payment of freight. That the cargo should be brought to and taken

Capper v. Wallace, Q.B.

from alongside at merchants' risk and expense, and that the master should sign bills of lading as presented without prejudice to the charter-party, at rates not less than those current at the port of loading.

The ship was ordered to Koogerpolder in Holland, a port which is situated some distance from the sea up a canal. On receipt of the order the master signed bills of lading, which stated that the cargo was to be delivered "at the port of Koogerpolder," and in the margin of which was inserted the rate of freight and the words "and all other conditions as per charter-party."

The ship duly arrived at Nieuwediep, which is at the mouth of the canal, and it was impossible that she could proceed further towards Koogerpolder, because her draught was $19\frac{1}{2}$ feet and the depth of the canal about fifteen feet only. In view of this difficulty, the plaintiffs had before the ship's arrival at Nieuwediep written to ask the defendants what course they proposed to adopt, alleging that Nieuwediep would be as near to Koogerpolder as the ship could safely get. The defendants in reply, alleged that the plaintiffs had undertaken to deliver at Koogerpolder as a safe port, and that they should not interfere. They declined to make any arrangements for taking delivery of any part of the cargo at Nieuwediep. Thereupon the master on arriving at Nieuwediep unloaded so much of the cargo, about one-third of the whole, as would admit of the ship passing into the canal, and sent that portion by lighters to Koogerpolder, proceeding thither with the rest in the ship. This was a course which was not unfrequently adopted at Nieuwediep by ships bound for Koogerpolder, though ships also were in the habit of discharging their whole cargo at Nieuwediep, and sending it forward by lighters to Koogerpolder. In the present case, with regard to the *Aberaman*, it would have cost 167*l.* if the latter course had been adopted by the master, whereas 184*l.* was the actual cost incurred in delivering the cargo at Koogerpolder beyond the freight earned by the ship on reaching Nieuwediep.

The action was brought by the ship-

owners to recover this sum of 184*l.*, which consisted of pilotage, harbour dues and other expenses of going into port, and demurrage of the ship, and the cost of lightering the portion of the cargo taken out of the ship at Nieuwediep.

Herschell and *A. L. Smith*, for the plaintiffs.—The vessel could not when laden get nearer to the port than the mouth of the canal. Thereupon all obligations to take delivery arose at once—*Nelson v. Dahl* (1). It is admitted that plaintiffs are not entitled to the whole demurrage, for though 184*l.* is the actual cost, yet it is found that the cargo could have been taken for 167*l.*, and the plaintiffs ought no doubt to have delivered it in the cheapest way.

C. P. Butt and *Arbuthnot*, for the defendants.—The charter-party provided that the ship should proceed to a safe port, and bills of lading were signed for delivery at Koogerpolder. The plaintiffs cannot get rid of that part of the contract by means of the clause as to signing the bills of lading without prejudice to the charter-party, for that refers only to freight.

[*LUSH, J.*—The master could not mean that he undertook to go to Koogerpolder whether he could get there safely or not.]

No; but it must mean that he would go as near as he could, and do what was reasonable—*Shand v. Sanderson* (2). A practice of lightening ships to go up the canal is found in the case, and is a reasonable one.

[*LUSH, J.*—But the charter-party says, "and there deliver;" she cannot get loaded to Koogerpolder, and she is obliged to take a full cargo.]

By taking a little out she can get up—*Hayton v. Irwin* (3), *Hillstrom v. Gibson* (4).

Herschell, in reply, cited *Burgon v. Sharp* (5).

Our. adv. vult.

(1) *Law Rep.* 12 Ch. D. 568.

(2) 4 *Hurl. & N.* 381; 28 *Law J. Rep. Exch.* 278.

(3) 28 *W.R.* 138.

(4) 8 *Sess. Cas. Scotch*, 3rd series, 463.

(5) 2 *Campb.* 529.

Capper v. Wallace, Q.B.

The judgment of the Court (6) was (on Feb. 26) delivered by

LUSH, J.—This is an action for the cost of lightering a cargo from Nieuwediep through the North Holland Canal to the port of Koogerpolder, which is situated at the extremity of the canal and about thirty miles from its mouth.

By a charter-party between the plaintiffs, as owners of the *Aberaman*, and the defendants, it was agreed that the vessel should take in at Bombay a full cargo of merchandise, and proceed therewith to a safe port in the United Kingdom or on the Continent between Havre and Hamburg, as ordered on signing bills of lading, "or so near thereunto as she may safely get," and deliver the cargo on payment of a specified tonnage freight.

The only other material terms were that the cargo was to be brought to and taken from alongside at merchants' risk and expense, and that the master was to sign bills of lading as presented without prejudice to the charter-party, at rates not less than those current at the port of loading. The ship was ordered to Koogerpolder in Holland, and the master signed bills of lading which stated that the cargo was to be delivered at the port of Koogerpolder. A marginal note stated the rate of freight, and to it were added the words, "and all other conditions as per charter-party."

The *Aberaman* drew nineteen feet, six inches of water, being about four feet deeper than the canal, consequently she could not get nearer to Koogerpolder than Nieuwediep without discharging a considerable part of the cargo. Before the arrival of the vessel the plaintiffs had opened a correspondence with the defendants, with a view to ascertain what course they proposed to adopt on the arrival of the vessel as near to Koogerpolder as she could safely get, stating what her draught was and what was the capacity of the canal. The defendants having sold the cargo afloat refused to interfere, contending that by the bills of lading the owners had admitted Koogerpolder to be a safe port, and had undertaken to carry the cargo there.

(6) Lush, J., and Manisty, J.

The master had, therefore, no alternative on arriving at Nieuwediep but either to lighter the whole of the cargo to port of Koogerpolder, or to discharge in lighters a sufficient portion to enable the ship to proceed there with the residue. He adopted the latter alternative, and procured lighters in which he discharged 573½ tons and thereby reduced the draught to fifteen feet eight inches, and having lightered that portion of the cargo to Koogerpolder, and discharged twenty-two of the crew, he had the vessel towed through the canal and discharged the residue of the cargo at the port.

The plaintiffs claimed the pilotage, harbour dues and other expenses of going into port, as well as demurrage, but in the argument they consented to accept of what it would have cost to lighter the whole, and this was agreed at 167*l*. The defendants paid into Court sufficient to cover the lighterage of the 573½ tons, but denied their liability to the residue of the claim.

We are of opinion that the bills of lading have not the effect of altering the contract so as to bind the owners, against the charterers, to deliver at the port of Koogerpolder. The master has no authority so to alter the contract if he had intended to do so; but we are satisfied that such was not his intention, but that he signed the bills of lading in the form presented to him in compliance with an order in order to carry out the terms of the charter-party. The only effect which can be given to the bills of lading, as between these parties, is to preclude the plaintiffs from objecting that Koogerpolder was not a safe port, and to bind the plaintiffs to the same extent as and no further than if Koogerpolder had been named in the charter-party as the port of discharge.

It cannot, we think, be laid down as an inflexible rule, that when a ship has gone as near to the port as she can get, and the only impediment to proceeding further is overdraught, the master is under no circumstances entitled to consider the voyage at an end. He is bound to use all reasonable means to reach the port. The words, "as near thereto as she can safely get," must receive a reasonable and not a literal application; the overdraught

Capper v. Wallace, Q.B.

may be such, and the cargo so easily dealt with, as that the surplus may be removed and the ship sufficiently lightened without exposing her to extra risk or the owner to any prejudice, and without substantially breaking the continuity of the voyage, and in such a case, if the consignee is at hand to receive the surplus cargo and so relieve the overdraught, we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port. This is the principle laid down by the Court of Session in the case of *Hillstrom v. Gibson* (4). In that case, the master who was bound to Glasgow was unable to proceed beyond a point near Greenock with his full cargo on board. The consignee being at hand requested him to discharge what was necessary to lighten the ship and to proceed with the residue. The majority of the Court held this to be a reasonable request under the circumstances. The master complied with the request, and it was held that his going on to Glasgow was in the course of his duty, and that he could not claim damages for the time taken in reaching the port.

In this case the circumstances are essentially different. We are not informed what the actual tonnage was, but the registered tonnage is stated to have been 1,090 tons, and 573½ tons, which was at least one-third, had to be taken out before the draught could be sufficiently reduced to enable the ship to pass through the canal in safety. Moreover, the consignee was not at hand to receive. The charterers had refused to make any arrangement and no one appeared to take delivery.

Under these circumstances, we are of opinion that the master was justified in considering the voyage at an end, and in treating the mouth of the canal where he was anchored as the place of discharge.

We therefore adjudge the plaintiffs to be entitled to 102L., being the balance after deducting the sum paid into Court, and give judgment for that sum with costs.

Judgment for plaintiffs.

Solicitors—Ingledew & Ince, agents for Ingledew, Ince & Vachell, Cardiff, for plaintiffs; Johnsons, Upton & Co., for defendants.

affid. 5238.422,

[IN THE QUEEN'S BENCH DIVISION.]

1880. }
Jan. 13. } RAINBOW AND WIFE v. JUGGINS.

Principal and Surety—Collateral Security—Bankruptcy of Debtor—Proof of Debt without valuing the Security—Discharge of Surety.

The defendant became surety for the repayment of moneys advanced by the plaintiff to P., and it was part of the arrangement that P. should deposit, as collateral security for the debt, a policy of insurance on his life. P. was subsequently adjudicated a bankrupt, and the plaintiff proved for the full amount of his debt, but put no value upon the above-mentioned policy, as one of the securities which he held for the debt. The policy was afterwards ordered to be given up to the trustee in bankruptcy for the benefit of P.'s creditors. The defendant, in an action brought against him as surety, contended that having lost the benefit of the policy he was damnified, and was released from all obligation:—Held, by MANISTY, J., that, assuming the policy to have had some value at the time when the debt was proved, the neglect or omission on the part of the plaintiff to put some value on it, could only discharge the defendant from his liability as surety to the extent of the value of the policy.

CASE reserved by Manisty, J., at the Oxford Summer Assizes, 1879, for further consideration. The facts and arguments sufficiently appear in the judgment of the Court.

Alfred Wills and H. D. Greene, for the plaintiffs.

Henry Matthews and R. T. Reid, for the defendants.

Curr. adv. vult.

The following judgment was delivered (on Jan. 13) by

MANISTY, J.—This is an action which was tried before me without a jury. It was brought by the plaintiffs to recover the amount of a joint and several promissory note, dated the 17th of February, 1876, signed by one John Pratt and the

Rainbow v. Juggins, Q.B.

defendant, to secure the repayment to the plaintiff, Mary Ann Rainbow, on demand, of 400*l.*, advanced and lent by her to Pratt out of her separate estate, with interest at the rate of five per cent. per annum.

The defence set up by the defendant Juggins is that he was only a surety for Pratt, and that it was part of the arrangement whereby he became surety, that Pratt should deposit with Mrs. Rainbow as collateral security for the debt a policy of insurance for 250*l.* on the life of Pratt, which had been effected by him on the 7th of November, 1866. That the policy was accordingly deposited by Pratt with Mrs. Rainbow, the annual premium being 7*l.* 8*s.* 4*d.* payable half-yearly on the 2nd of May and the 2nd of November.

That on the 18th of November, 1878, Pratt filed a petition in the Oxford County Court for liquidation of his affairs by arrangement. That on the 7th of December Mrs. Rainbow proved for 425*l.* 11*s.* 9*d.*, the full amount of principal and interest due upon the promissory note. That she voted against liquidation by arrangement, and the proceedings became abortive owing to the statutory number of creditors not voting for it. That on the 21st of December, 1878, Pratt was adjudicated bankrupt, the act of bankruptcy being his petition for liquidation, and all the proofs which had been made, including Mrs. Rainbow's, were by order of the Court, made on the 23rd of December, transferred into the Court of Bankruptcy. That Mrs. Rainbow in her proof mentioned the policy as one of the securities which she held for the debt, but did not put any value upon it, though her solicitor was warned by the defendant's solicitor that if she did not put a value upon it, the effect would be, as he alleged, to release the defendant from his obligation as surety for the payment of the promissory note. That in March, 1879, the Court of Bankruptcy ordered the plaintiffs to give up the policy to the trustee in bankruptcy for the benefit of Pratt's creditors, no value having been put upon it, and Mrs. Rainbow having proved for the full amount of her debt. That the policy was given up to the trustee accordingly.

And the defendant contends that having thus lost the benefit of the policy he has been damnified, and his position and rights as surety have been altered, and by reason of the premises he submits that he is released from his obligation on the promissory note.

The plaintiffs by their reply denied that the defendant joined in the note as surety for Pratt. They also denied the alleged arrangement as to the deposit of the policy.

The plaintiffs further alleged by way of reply that the policy had lapsed, and was void and inoperative on the 7th of December, 1878, and in the alternative they alleged that the policy was not in force when the debt was proved, nor had it ever since been, of greater value than 32*l.*

I find, as facts, that the defendant did join in the note as surety for Pratt, and that the policy was deposited with the plaintiff, Mrs. Rainbow, as collateral security for the 400*l.* and interest.

The question which I have to decide is whether, under those circumstances, and upon the facts which I am about to state, the defendant has been discharged in point of law from his liability as surety either in whole or in part.

The policy, as I have already stated, was for 200*l.* Pratt was under an agreement to execute an assignment of it to Mrs. Rainbow, and to pay the premiums as they accrued due. He never did execute an assignment, and he failed to pay the two half-yearly premiums of 3*l.* 14*s.* 2*d.* each of which became due on the 2nd of May and the 2nd of November, 1878, in consequence of which the policy lapsed and became void at the expiration of thirty days from the 2nd of May, 1878, say on the 1st of June, 1878. On the 4th of November, 1878, notice was given by the Oxford local agent of the insurance office to the plaintiffs' solicitor that the two premiums had not been paid, and communications took place between the plaintiffs' solicitor and the defendant's solicitor, which resulted in the latter sending a cheque to the former on the 23rd of November, 1878, for 7*l.* 8*s.* 4*d.* being the amount of the two premiums accompanied by the following letter:—

Rainbow v. Juggins, Q.B.

"Dear Sir,—We hand herewith as arranged our cheque for 7l. 8s. 4d., the amount of the premiums on Pratt's life policy now overdue. In sending us a receipt be good enough to refer to the personal arrangement we verbally came to, that on the payments off by Mr. Juggins of Mrs. Rainbow's claim upon him as Pratt's surety, this life policy would be handed over to him discharged from any claim thereon by your client. We hope early on Monday to see you with the promised 50l.—We are, &c.,

"F. & G. Mallam.

"W. W. Robinson, Esq."

On the same day plaintiffs' solicitor wrote to the defendant's solicitor as follows:—

"Nov. 23, 1878.

"Dear Sirs,—I have received your note and cheque for 7l. 8s. 4d. in payment of the premiums due on life policy, No. 8,268, on life of John Pratt in General Life Office for 250l. When Mrs. Rainbow's claim on Mr. Juggins for 400l. and interest is discharged, this policy, if then in force, is to be handed over to Mr. Juggins.—Yours, &c.,

W. W. Robinson.

"To Messrs. T. & G. Mallam."

On the same 23rd of November, 1878, the plaintiffs paid the Oxford local agent of the insurance company the amount of the two premiums (7l. 8s. 4d.), and obtained receipt for the same, but each receipt had a notice at the foot of it, to the effect that if the premiums mentioned in it had not been paid within thirty days from the day on which it became due the receipt would be of no avail, as the policy was cancelled. At this time there was an arrangement that the defendant should pay the debt by instalments, but unfortunately it came to nothing owing to the defendant's inability to pay down the first instalment of 50l. It was not until the 15th of December, 1878, that the insurance office agreed to reinstate the policy, and in the mean time, namely, on the 7th of December, the meeting of Pratt's creditors was held under his petition for liquidation, and on that day Mrs. Rainbow proved, as already stated, for the whole amount due on the pro-

missory note, stating in her proof that she held the policy as collateral security, but not putting any value upon it. On the 23rd of December, the proofs made on the 7th of December were, by order of the Court, transferred into the Court of Bankruptcy.

I am of opinion, and so decide, that, assuming the defendant to have been discharged to the extent of the value of the policy when reinstated, which, I think, admits of considerable doubt, still he remains liable as surety for the residue of the debt. It is unnecessary to consider whether the defendant was discharged to the extent of the value of the policy because the plaintiffs' counsel, wisely in my opinion, agreed to give credit for 32l., which the defendant's counsel admitted was full value of the policy after it was reinstated by the insurance office.

It was contended by the counsel for the defendant that Mrs. Rainbow having been warned as she was by the defendant's solicitor, that if she did not put a value on the policy she would discharge the defendant from his liability, by not doing so wilfully gave up or abandoned the policy, and so discharged the defendants from all liability as surety. In support of that contention they cited *Polak v. Everett* (1). In that case the complicated arrangement into which the parties had entered, and for the part performance of which the defendant had become surety, was substantially altered and varied without the defendant's consent. No doubt some *dicta* are to be found in the judgment of the Judges in the Queen's Bench Division which seem in the abstract to be in favour of the defendant in the present case, but the *ratio decidendi* in *Polak v. Everett* (1) was that to which I have already adverted, and I do not think it is applicable to the present case. The Court of Appeal simply said they had no doubt that the view taken by the Judges of the Queen's Bench Division was correct and affirmed the judgment.

I think this case is at the most one of

(1) 45 Law J. Rep. Q.B. 369; Law Rep. 1 Q.B.D. 669.

Rainbow v. Juggins, Q.B.

neglect or omission to put a value upon the policy, assuming it to have had some value, when Mrs. Rainbow proved her debt, and that in accordance with several authorities, including *Wulf v. Jay* (2), the defendant was only discharged from his liability as surety to the extent of the value of the policy.

Assuming that Mrs. Rainbow was bound to put some value upon the policy, at what sum ought she to have assessed it? At the time when her proof was admitted the insurance office had not accepted the premiums and the policy had lapsed. Suppose that Mrs. Rainbow had valued the chance of their reinstating it at a nominal or very small sum and proved for the balance, I take for granted that she could not then have been deemed guilty of any neglect or omission. At whatever sum she had valued the policy, and in the event of it proving to be worth more, the trustee in bankruptcy would have been entitled to the excess—*Ex parte King*; in *re Palethorpe* (3), so that in any view of the case it is difficult to see to what extent (if any) the defendant was damaged by Mrs. Rainbow not putting a value upon the policy. At all events the utmost extent to which in my opinion the defendant is entitled to relief is the agreed value of the policy after it was reinstated, say 32*l*.

I ought, perhaps, to notice an argument which was advanced by the defendant's counsel, to the effect that the plaintiffs, by their solicitor, received the amount of the two premiums from the defendant upon the understanding mentioned in the letters of the 23rd of November, 1878, namely, that when the debt was paid the policy, if then in force, was to be handed over to the defendant.

Assuming that there was a binding agreement to that effect, I fail to see how it affects the present question. At most it would only have given the defendant a right of action for breach of the agreement in the event of his having paid off the debt as arranged, and of his having kept the policy alive in the mean time.

(2) 41 Law J. Rep. Q.B. 322; Law Rep. 7 Q.B. 756.

(3) Law Rep. 20 Eq. 273.

I give judgment for the plaintiff 41*l*. 18*s*. 4*d*., being 400*l*. and interest less 32*l*., with costs. The defendant will have the costs, if any, of the issues of fact which I have found for him.

Judgment for plaintiffs.

Solicitors—Prior, Bigg, Church & Adams, agent for W. W. Robinson, Oxford, for plaintiff; Charles Mallam, agent for T. & G. Mallam, Oxford, for defendant.

[IN THE COURT OF APPEAL.]

1880. } SOUTHWELL AND ANOTHER
Mar. 12. } v. SCOTTER.*

Landlord and Tenant—Assignment Chose in Action—Surrender after Notice Assignment of future Rent—Judicature Act 1873, sect. 25, sub-sect. 6.

The plaintiffs sub-let a portion of premises, of which they had a lease, to the defendant. They afterwards assigned their interest in the premises to B., and agreed in writing with B., that notwithstanding the assignment they should receive the rent due from the defendant for the remainder of the lease, and notice of this agreement was given to the defendant. The defendant afterwards surrendered her lease to B.

In an action for rent claimed as accruing after the surrender,—

Held, that even if there was a valid assignment of a chose in action, still that the plaintiffs could not recover, for that the assignment was of rent to become due whereas no rent had accrued due after the surrender, and the defendant could not be prevented by the agreement between the plaintiffs and B. from surrendering her lease to B.

Claim for two quarters' rent due, one quarter on the 24th of June, 1878, and the other on the 29th of September, 1878.

At the trial before Stephen, J., with

* *Coram* Bramwell, L.J.; Baggallay, L.J., and Thesiger, L.J.

Southwell v. Scotter (App.), Excn.

out a jury, the statements in the pleadings were admitted, and it appeared that the plaintiffs, F. & E. Southwell, who had the lease of a house in Baker Street, let the upper part of the house to the defendant in September, 1875, for three and a half years. The plaintiffs on the 13th of November, 1876, assigned their interest in the premises to two persons named Burrows and Cotton.

The conveyance contained the following clause:—"Notwithstanding the assignment of the said premises to the said Frederick Thomas Burrows and Joseph Dupuis Cotton hereinbefore recited, the said Frederick Southwell and Edwin Southwell shall be at liberty to receive the rent payable during the continuance of the said now existing term, expiring on the 25th day of March, one thousand eight hundred and seventy-nine, from Miss Sarah Scotter, the under-tenant of part of the said premises; and the said Frederick Thomas Burrows and Joseph Dupuis Cotton hereby promise and agree to afford every facility to them for obtaining payment of and recovering the said rent, including the use of their names, as may be necessary, the said Frederick Southwell and Edwin Southwell hereby agreeing to indemnify them in all respects with regard to such use of names, and also in respect of any repairs which may be necessary to that portion of the said premises which are in the possession and occupation of the said Miss Sarah Scotter, which said repairs (should any be necessary) they the said Frederick Southwell and Edwin Southwell hereby undertake to carry out, execute and effect during such tenancy of the said Sarah Scotter."

On the 5th of January, 1877, the premises were conveyed by Burrows and Cotton to one Gibb, who gave the defendant notice, in May, 1877, of the assignment to him, and directed her to pay the rent to him only.

On the 22nd of August, 1877, Gibb re-assigned the premises to Burrows, who, on the 25th of March, 1878, agreed with the defendant to accept a surrender of her tenancy as from that date, and she accordingly quitted possession on that day.

The plaintiffs gave the defendant no-

tice on the 13th of October, 1877, that they claimed the rent down to the 25th of March, 1879, under the clause in the deed of the 13th of November, 1876, and gave her notice not to pay the rent to any other person.

Stephen, J., gave judgment for the plaintiffs.

The defendant appealed.

Bompas and French, for the appellant.—There has not been an absolute assignment of a chose in action within section 6 of sub-section 25 of the Judicature Act (1).

There has only been an agreement between the plaintiffs and Burrows to allow the rent to be paid to the former, and that as a matter of account. The surrender by the defendant is a good surrender in law, for the tenant has quitted possession, and the landlord has re-taken possession, and if the surrender is valid there is no need to enquire into the effect of the assignment. The defendant was *prima facie* entitled to surrender to Burrows. Has there been then any charge upon the estate, either at equity or in law, which destroys his right to accept that surrender? There cannot be any in law, for this assignment was not by deed, and therefore it is void, for it does not satisfy the requirements of 8 & 9 Vict. c. 106. sect. 3.

[THE SINGER, L.J.—Does not that argument assume that the assignment affects an interest in land?]

Brice v. Bannister (2) can be distin-

(1) Judicature Act, 1873, sect. 25, sub-sect. 6, "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action shall be, and shall be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignor if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor . . ."

(2) 47 Law J. Rep. Q.B. 722; Law Rep. 3 Q.B. D. 569.

Southwell v. Scotter (App.), Exch.

guished from this—there admittedly the money became due; but in this case no rent has accrued, and to cause the rent to arise the landlord must secure to the tenant quiet enjoyment, so that the rent does not arise without the performance of certain conditions by the landlord, for a covenant to pay rent is not an absolute promise to pay.

The plaintiffs and Burrows cannot, by an agreement to which the defendant was no party, attach novel incidents to her tenure—*Keppell v. Bailey* (3).

They cannot take away her right to surrender her lease if the landlord consents to accept that surrender; a future interest in something which might or might not arise cannot thus be created. The defendant could not surrender to the plaintiffs, as they were not her lessors. This is an attempt to fetter dealings with property, and to extend the doctrine of an assignment of a chose in action to something which does not exist, which may never exist, and which cannot therefore be assigned—*Tooth v. Hallett* (4).

A. Wills and Wilberforce, for the plaintiffs.—This action could not have been maintained before the Judicature Act, but that Act enables these plaintiffs to recover this rent, as the defendant had due notice of the assignment. The surrender of the term, even if valid, cannot affect an interest in that lease previously created—*Doe v. Pyke* (5), and cannot defeat prior charges on the estate. Burrows is, in fact, a trustee of the rent for the plaintiffs, and he cannot be permitted to defeat the rights of his *cestuis que trust*.

[THESIGER, L.J.—That may be so, as between the plaintiffs and Burrows; but if the surrender by the defendant is a good surrender, the rent is gone, and all that remains is possibly an equity to get something in the place of rent. BRAMWELL, L.J.—Can it be said that the plaintiffs are assignees of an express covenant to pay rent, and is what is claimed here rent?]

(3) 2 Myl. & K. 517.

(4) 38 Law J. Rep. Chanc. 396; Law Rep. 4 Ch. Ap. 242.

(5) 6 M. & S. 146.

Whether it be technically rent or not, the plaintiffs have a right to something arising out of the lease. There cannot be a merger to defeat the interests of the plaintiffs, it is like a reversionary interest, and equity would not allow such an interest to be defeated—*Whittle v. Henning* (6). If the particular estate is merged, still it must have continuance in law, in order to protect the interests of these plaintiffs (7).

[THESIGER, L.J.—That is to say, the defendant must remain in such a position as to be liable to pay that rent.]

The plaintiffs have a right to have the rent accrue, and it must be held that a right to distrain would exist, if it be needed to support the particular estate carved out by Burrows. The plaintiffs here had no right to control Burrows, but he could not agree with the defendant to alter the condition of the property any more than the obligor of a bond who accepted a release after notice that there had been an assignment would be allowed to set up that release—*Legh v. Legh* (8).

[BRAMWELL, L.J.—There a debt is due; but is not the present case like that of two persons who agree that one shall build a house for the other, and can they not rescind by mutual consent that agreement, even though the builder has assigned the money he is to receive when the house is built, to a third person?]

Bompas was not called on to reply.

BAGGALLAY, L.J.—I have been asked to deliver judgment first in this case. I am of opinion that by the indenture of assignment of November 1876, Burrows acquired *prima facie* power of accepting a surrender of the lease from the defendant. There might be an equity between him and the plaintiffs or other parties which might render it inequitable that he should accept such a surrender, and which might render him liable in an action for damages if brought by them. It is not necessary to give an opinion on this point; but I am of opinion that a surrender accepted by him from the de-

(6) 2 Phillips, 731.

(7) 3 *Preston on Conveyancing*, 447, 448.

(8) 1 Bos. & P. 447.

Southwell v. Scotter (App.), Excu.

defendant is binding in favour of that defendant. I agree with Stephen, J., that the clause in the agreement of November 13, 1876, is an absolute assignment of all the rents which might hereafter accrue due under that lease; but as that lease was determined by the agreement of surrender made by the defendant and Burrows on March 25, 1878, no rent could accrue after that date. The claim in this action is for rent alleged to be due after the date of that surrender, the defendant therefore cannot be liable to pay to the plaintiffs that which they claim, and this appeal must be allowed.

BRAMWELL, L.J.—I am of the same opinion. When Burrows became the assignee of the reversion by virtue of the indenture of August, 1877, he thereby became able to accept a surrender of her lease from the defendant, and there was nothing to prevent the defendant from making such a surrender. That is how the matters stood with regard to Burrows and the defendant.

Whether Burrows could accept such a surrender without thereby incurring liability to the plaintiffs, it is not necessary to determine. The defendant was under no prohibition, and could and did surrender, and thereby the rent ceased. Now the assignment was of the rent payable during the continuance of the defendant's term, but the defendant's term has ceased, and that which was assigned has ceased. I think it would be hard if because of this assignment it were held that the defendant could not surrender the lease, if the defendant were obliged, because of arrangements between other persons to which she was no party, to continue a lease which might be unprofitable or undesirable. I do not think that this can be so; there was a right to surrender, and, the surrender made, the lease is gone, and the rent is also gone. It has been said that this was an assignment of a chose in action, that is to say, an assignment of future accruing rents. I have my doubts as to this, but even assuming it were so, it could only be an assignment of rent which should become due during the rest of the term. Now this rent never became due, so that it was

an assignment of a chose in action which never became due. This case therefore is like that which was put in argument where an agreement has been made by two people for doing something which in their own interest they afterwards agree shall not be done, and they are not precluded from making such an agreement because one of them has given an interest under the contract to a third person who has given notice thereof. These are some of the reasons why I think this appeal must be allowed.

THESSIGER, L.J.—I am of the same opinion. It is important, I think, to look at the position of the different parties to this suit on November 13, 1876. At that time the defendant was in the enjoyment of certain rights, subject to certain liabilities, under the lease which had been granted to her. The plaintiffs were at that time strangers to that lease, for they had assigned the reversion to Burrows and Cotton, who may therefore be considered as though they were the original lessors. Among other rights which the defendant enjoyed under this lease was the important right of surrendering her lease to the lessor.

It is however urged that an agreement of November 13, 1876, made between the plaintiffs and Burrows, but to which the defendant was no party, deprived her of that right and determined the power, which she confessedly had up to that date, of entering into an agreement with Burrows for the surrender of the residue of her term. I cannot think that this can be so. I will assume in favour of the plaintiffs that the agreement of November 13 constituted an assignment in accordance with the provisions of sub-section 6 of section 25 of the Judicature Act, 1873 (1). I will assume also in favour of the plaintiffs that future rent is a debt or chose in action assignable under the Judicature Act, and I will assume that there was an absolute assignment in writing of future rent. Therefore I agree that if after notice of the assignment had been given to the defendant any rent had been due from her, it would have been her duty to pay it to the assignee. How can it be said that that

Southwell v. Scotter (App.), Exch.

was the duty of the defendant in this case? No rent ever became due; how then can she be held to be liable as though rent had become due? How can she be said to become, by virtue of an agreement to which she was no party, liable to the obligations of a lease from which the lessor has released her?

I do not think the authorities cited touch this case; in those cases I find that during the continuance of a lease the lessee creates an actual estate or interest in land, an interest which may be either in the land itself or in the fixtures, or sometimes a merely equitable interest, as was the case in *Whittle v. Henning* (6), but in all these cases an estate is legally or equitably created during the term and continuance of the tenancy, so that it is both reasonable and good law to say that on a surrender of the term out of which these interests have been carved, those interests should be kept alive, or in other words, the term should be kept alive as far as is necessary for supporting these estates and interests. It has been attempted by the plaintiffs to carry that doctrine further than it has ever before been carried, and to extend the doctrine of assignment with notice. To support the claim of the plaintiffs in this case it is necessary to say that a person who receives notice of an assignment, although no party to the agreement which constituted the assignment, must thereafter keep himself in a position to enable the liabilities created by that assignment to be met whenever they may arise. I think that this would be a monstrous and unjust doctrine, and that the instance put by Bramwell, L.J., of a contract between two persons that a house should be built by one for the other for a named sum of money, and an assignment by the person to whom that money was to be paid to a third person, and notice to the other party to the contract, is unanswerable, and it was conceded to be so in argument. For it would be, if the argument for the plaintiffs were to succeed, impossible for the two contracting parties to rescind their contract, even though both should desire to do so. There is, I think, no distinction between that case and the case of a lease. It would result in this,

that a person who had taken a public-house with a covenant that he would carry it on, who had found it did not prosper, and whose landlord wished to change the tenant, would be unable to surrender his tenancy because a covenant had been entered into behind his back with regard to the rent. I do not think that this can be so.

Although the learned Judge may have been right in holding that there was an assignment, and that there was a valid surrender, still I do not think that his judgment can be supported, because I do not agree that the assignee of the rent could in fact compel the tenant to continue in occupation in order that the rent might accrue.

Judgment reversed.

Solicitors—J. G. Joyce, for plaintiff; W. H. Herbert, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879. { THE QUEEN, on the prosecution
Dec. 16. { of H. CRISP, v. PEMBERTON
AND ANOTHER, Justices.
THE SAME v. SMITH AND AN-
OTHER.

Pauper Lunatic in Workhouse—Where Resident—Order for Removal to Asylum made by Officiating Clergyman—16 & 17 Vict. c. 97. sect. 67; 7 & 8 Vict. c. 101. sect. 56—Practice—Appeal from Order of Sessions—Appeal from Divisional Court without Leave—Judicature Act, 1873. sect. 45.

[For the report of the above case, see 49 Law J. Rep. M.C. 29.]

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1880. } FOULKES v. THE METROPOLITAN
Feb. 26, 27. } DISTRICT RAILWAY COM-
March 9. } PANY.*

Railway Company—Negligence—Liability of Company with running Powers over another Company's Line—Liability of carrying Company apart from Contract.

The South Western Railway Company have a station at Richmond; above the booking office are the words "S. W. and Metropolitan Booking Office and District Railway." The defendants have a railway from Hammersmith to Shaftesbury Road, and running powers over the S. W. line from Shaftesbury Road to Richmond. The plaintiff took from a servant of the S. W. Railway Company at Richmond a return ticket to Hammersmith, the ticket was stamped "via Shaftesbury Road and District Railway;" on his return journey he travelled by a train belonging to and managed by the defendants. The defendants' carriages, although suited to their own stations, were unsuited to the platform of the S. W. station, and the plaintiff was hurt in alighting at Richmond. In an action for damages the jury found that the accident was caused by the negligence of the defendants:—

Held (affirming the judgment of the Common Pleas Division), that whether there was a contract made by the plaintiff with the defendants or not, they were liable for the injuries received by him while travelling in their train.

Appeal from the Common Pleas Division. The case is reported 48 Law J. Rep. C.P. 555.

Action for damages for injuries caused by the negligence of the defendants.

It appeared that the plaintiff took a return ticket from Richmond to Hammersmith at the Richmond Station of the London and South Western Railway Company; the booking office at that station is labelled "South Western and Metropolitan Booking Office and District Railway." The defendants have a sta-

tion at Hammersmith, which is a distinct station from the Hammersmith station of the South Western Company; they also have a line of rail running from their Hammersmith station and joining the South Western Company's line to Richmond at a station called Shaftesbury Road, and they have running powers over the South Western Company's line from that station to Richmond.

The ticket taken by the plaintiff had not the name of any company on it, but was marked "via Shaftesbury Road and District Railway;" it was issued to him by a clerk of the South Western Railway Company.

The plaintiff travelled to the Hammersmith station of the South Western Railway Company, and then returned from the Hammersmith station of the defendants to Richmond by one of the defendants' trains, which was under the charge of the defendants' servants, such train forming part of the through traffic of the defendants' company. The plaintiff was injured while alighting at Richmond owing to the carriages of the defendants being unsuitable to the platform at Richmond station. The verdict passed for the plaintiff; a rule nisi was afterwards obtained in the Common Pleas Division to set aside such verdict, and to enter judgment for the defendants, and this rule being discharged, the defendants appealed.

The Solicitor-General (Sir H. Giffard) (Waddy and Clarke with him), for the appellants.—The question is whether this action has been brought against the right parties. There was no duty on the part of the defendants to the plaintiff unless it arose from a contract entered into by them with him. The contract of carriage, however, was made with the South Western Company by the taking of a return ticket at their station at Richmond.

The South Western Company received the fare and paid a portion of it to the defendants. The company with which the contract was made is liable for the consequences of an accident which occurs even if the train were under the management of the defendants. *The Great*

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Theigier, L.J.

Foulkes v. Metropolitan District Rail. Co. (App.), C.P.

Western Railway Company v. Blake (1); *Thomas v. The Rhymney Railway Company* (2); *The Bristol and Exeter Railway Company v. Collins* (3). The defendants were but the agents of the South Western Company, and they cannot be held liable for acts of non-feasance or omission.

A. L. Smith (Macrae with him), for the plaintiff.—The plaintiff could not sue the South Western Company; the ticket was taken at a booking office, labelled "South Western and District Railway Company;" the ticket has District Company on it; he was not in a South Western Company's carriage; and therefore the contract was altogether a contract between him and the defendants.

But further, the defendants owe a duty to the plaintiff apart from any question of contract, because they were carrying him. Supposing even that the contract were with the South Western Railway Company, still although the plaintiff can sue on the contract, yet he can also sue the tortfeasors, because the act of carrying him creates a duty in them—*Martin v. The Great Indian Peninsular Company* (4); *Hayn, Roman & Co. v. Oulliford* (5).

[*THE SINGER, L.J.*—In that case there was no contract; here there is a contract with one of these two companies.]

Dalyell v. Tyrer (6) is an authority that a plaintiff can recover for a tort committed by a stranger when he is being carried under a contract. *Marshall v. The York, Newcastle and Berwick Railway Company* (7); *Austin v. The Great Western Railway Company* (8);

(1) 7 Hurl. & N. 987; 31 Law J. Rep. Exch. 346.

(2) 40 Law J. Rep. Q.B. 89; Law Rep. 6 Q.B. 266.

(3) 7 H.L. Cas. 194; 29 Law J. Rep. Exch. 41.

(4) 37 Law J. Rep. Exch. 27; Law Rep. 3 Exch. 9.

(5) 48 Law J. Rep. C.P. 372; Law Rep. 4 C.P. D. 182.

(6) 1 E., B. & E. 899; 28 Law J. Rep. Q.B. 52.

(7) 11 Com. B. Rep. 655; 21 Law J. Rep. C.P. 34.

(8) 36 Law J. Rep. Q.B. 201; Law Rep. 2 Q.B. 442.

Wright v. The Midland Railway Company (9); were also cited.

The Solicitor-General, in reply.

Cour. adv. vult.

The following judgments were (March 9) read by

BRAMWELL, L.J.—In this case the first question is, with whom did the plaintiff contract? The contract was a contract for carriage, the carriage of himself, and who were the carriers? The defendants say the carriages are theirs, the motive power and the servants driving and conducting them; they have a right to carry over the whole length the plaintiff was to be carried, and they get and keep at least part of the reward for these things.

What ground or reason is there for saying they are not the contractors who carry? The journey is indeed part of the road of the South Western Company, and the servants of the South Western Company in the first instance receive the fare. But how does that affect the case? If the defendants' servants had in the first instance received the fare it is clear the contract would have been with the defendants, and it is therefore clear that the ownership of the road does not affect the question. Nor can it matter whether the defendants receive the fare by the hands of their own servants or those of others. Nor in truth that by arrangement with the South Western Company the latter company should receive the fare mainly for themselves, and only in part for the defendants.

The defendants, I repeat, are the carriers, and the contract of carriage is with them. If the interest of the South Western in the matter affects this reasoning, it would at the outside go to show that the two companies are partners, and that the contract was with them jointly. That would not disentitle the plaintiff to recover against these defendants alone.

It is impossible to say that the fare was received for the South Western only. Suppose a receiver were appointed of the South Western tolls and takings, could

(9) 42 Law J. Rep. Exch. 89; Law Rep. Exch. 137.

Foulkes v. Metropolitan District Rail. Co. (App.), C.P.

be contended that this money could be taken by him without the defendants being entitled to a share of it?

But further, though the contract was with the South Western, the plaintiff is entitled to recover against these defendants. In that case there would be no duty of contract, and consequently no cause of action for a non-feasance. But there would be that duty which the law imposes on all, namely, to do no act to injure another. It is clear that if a porter of the defendants had aimed a truck against the plaintiff at Broadway station and hurt him, the plaintiff could maintain his action against the defendants. So if he had left the carriage there, and while getting in the train had improperly started and he was hurt, or if his hand was wrongfully pinched. These are clear cases, but the law is the same in cases not so clear. For example, if the carriage he was put in was dangerous, if the step he had to tread on was rotten. Now apply that to the present case. The difficulty is with the question and finding. The jury have found there was negligence. Now there was no negligence. What was done or omitted was wilful. But the substance of the finding of the jury is that the carriage was dangerous with reference to the platform or the platform with reference to the carriage, and that the plaintiff might and did reasonably act in the belief that they were not in that state, but safe for him to use. In truth the combined arrangements were a trap or snare. So that if he had been carried gratuitously as by a friend he would have had a right of action against him. With the propriety of this finding we have nothing to do. This was according to that finding a tort, whether in the defendants alone or in conjunction with the South Western does not matter, and the plaintiff is entitled to recover. I say nothing about the authorities. But if this contract had not been a contract with the defendants, and all that could have been complained of was a non-feasance by them, I should hold they were not liable.

BAGGALLAY, L.J.—This is an appeal

from an order of a Divisional Court of the Common Pleas Division discharging a rule which had been granted on the motion of the defendants after verdict and judgment for the plaintiff, and which was treated by the Divisional Court as being in effect, though expressed in somewhat doubtful terms, as a rule to enter the verdict for the defendants on the ground that, upon the facts proved at the trial, there was no evidence to go to the jury of any liability on the part of the defendants in respect of the alleged negligence, or in the alternative for a new trial.

I agree with the Divisional Court in the conclusion at which it has arrived as to both of these alternatives. The mistakes which have been made in the course of the proceedings in the action as to material facts and circumstances and the corrections from time to time made or purported to be made of such mistakes, appear to me to have so important a bearing upon the question whether a new trial should be directed, that I propose to allude to them somewhat in detail.

At the very outset of the proceedings, the pleadings on both sides were framed on the erroneous assumption that, on the occasion of the accident which gave rise to the litigation, the plaintiff was travelling from Hammersmith to Richmond with a ticket taken by him at the Hammersmith station of the district company, whereas he had in fact travelled with a return ticket which he had previously taken at the Richmond station of the South Western Company; and this erroneous view was apparently acted upon by both parties, at any rate by the defendants until after the verdict and judgment. For it appears from the notes of the Lord Chief Justice taken at the trial that the statement then made by the plaintiff that he had taken a return ticket to New Richmond station (a statement in one sense true, but nevertheless calculated to mislead) was in no respect contradicted by evidence on the part of the defendants, nor was he cross-examined upon it. Indeed so far as I can form an opinion from the notes of the Judge and from the allusions to the trial in the printed report of the proceedings before the Divi-

Foulkes v. Metropolitan District Rail. Co. (App.), C.P.

sional Court, it would appear to have been assumed that, if negligence was proved against the carrying company and that the contributory negligence which had been suggested was negatived, the verdict must be against the defendants. That this general impression prevailed is, I think, further shewn by the circumstance that in the printed report (10) it is stated that the paragraph of the statement of claim in which the plaintiff alleged that he had been received by the defendants as a passenger, to be carried by them from Hammersmith to Richmond for reward to the defendants, was admitted by the defendants, whereas in fact it was not admitted, and it would consequently have been open to the defendants to negative it at the trial, had they been in a position to do so. This mistake in the report could hardly have occurred had it not been that the allegation was not in fact disputed, though technically speaking it was not admitted. It was also stated by the counsel for the plaintiff in the proceedings before the Divisional Court and apparently without contradiction that it had been admitted by the pleadings and proved at the trial that the contract of carriage was made with the defendants. I am aware that in the course of those proceedings allusion was made to certain answers to interrogatories which it was alleged had been the subject of comment at the trial, but those answers amounted to no more than a general statement that tickets issued at the Richmond station were issued by the South Western Company and not by the defendants, and it was in no way stated in the answers or suggested by them that the ticket with which the plaintiff had travelled had been signed by the South Western Company. So far, then, as the facts proved at the trial are concerned, I entirely agree with the views expressed by Grove, J., to the effect that there was ample evidence for the plaintiff and none for the defendants.

But I have now to refer to another mistake of a very singular character. Upon the application to the Common

Pleas Division, affidavits were read on behalf of the defendants drawing attention to the mistake under which the pleadings had been framed and to the fact that the ticket by which the plaintiff travelled had been issued to him by the South Western Company, and upon this fact as proved the argument which has been repeated before us was that the contract for carrying was with the South Western Railway Company, and that no liability upon it attached to the defendants. The earlier mistake originated in a statement made by the plaintiff in one of the many conversations held by him with officials of the defendants when he was referred from one to another upon the subject of his complaint.

Among the affidavits so read on behalf of the defendants was one by Mr. Forbes, the chairman of the district company, in which he purported to explain the nature of the arrangements between the South Western District Company for the working of the traffic between Richmond and the district station at Hammersmith, and in so doing he stated as the effect of such arrangements that the plaintiff while returning from Hammersmith to Richmond by the return ticket which he had previously taken at the South Western Company's station at Richmond, was a local passenger of the South Western Company, and that the District Company would not receive any part of the toll paid by him.

That this was the true nature and effect of the arrangements between the two companies was assumed and acted upon in the proceedings before the Divisional Court, and the arguments before us were commenced and were for some time continued upon the same footing. But in the course of the arguments before us more accurate and certain information as to the nature and effect of those working arrangements was asked for, and it was then ascertained and it is now admitted that, according to the actual arrangements between the two companies, the plaintiff on the occasion in question, was not, as erroneously stated by Mr. Forbes, a local passenger of the South Western Company, but a *through* passenger, and in that

(10) 48 Law J. Rep. C.P. at p. 556; Law Rep. 4 C.P. D. at p. 268.

Foulkes v. Metropolitan District Rail. Co. (App.), C.P.

sense a passenger of both companies, and further that the District Company was entitled to a proportionate part of the price which had been paid by him on his taking his return ticket at the office of the South Western Company. It is difficult to understand how such a mistake could have been made by Mr. Forbes in respect of a matter so completely within his own cognisance; it is, however, only fair to that gentleman to point out that the other paragraphs of the same affidavit contain information quite sufficient to shew that the statement to which I have referred could not be accurate, for he had not only explained the distinction as recognised by the railway clearing-house between through and local traffic, but had so far indicated the nature and extent of the interest of the two companies in the line between Richmond and the District Company's station at Hammer-smith, as to lead to the conclusion that the traffic over such line must, according to the information given, be through and not local.

But however this may be, we have now before us, for our consideration, a very different state of circumstances from that which was placed before the jury at the trial or was in evidence before the Divisional Court from whose order the appeal is brought, though Grove, J., appears to have expressed an opinion to the effect that it was not probable that a railway company would run their trains and carriages for several miles as a mere gratuity to the public. This, however, was only an inference drawn by him from surrounding circumstances. Now having regard to this succession of mistakes and misapprehensions, and bearing in mind that the actual state of circumstances upon which a decision ought eventually to be pronounced, had not been submitted to the consideration of a jury, and that this was in part at least if not entirely owing to a misrepresentation originating with the plaintiff himself, I for some time during the earlier arguments inclined and somewhat strongly inclined to the opinion that a new trial should be directed, and that in such case it might be desirable to abstain from expressing any opinion upon the questions which

might eventually arise from decisions, and I was the more inclined to this view from the consideration that I was by no means convinced that we were even then fully informed as to the actual working arrangements which were in force between the two companies at the time when the accident occurred.

But upon further consideration of the matter, I have come to the conclusion that we are apparently in possession of all the material facts essential to a final decision; that if there are any other such material facts they are within the cognisance of the defendants who have not thought it necessary to direct our attention to them, and that under these circumstances a jury could not with propriety come to any other conclusion than one in favour of the plaintiff, provided that they were, as we must presume they would be, properly directed as to the law bearing upon the facts detailed to them. To send the matter to a new trial under such circumstances would, I think, be to entail additional and useless expense upon all parties concerned.

My reasons for coming to the conclusion that a new trial must of necessity have such a result are as follows:—As I have already stated, it has been urged on behalf of the defendants, the District Company, that the contract of carriage, having been created by the issuing and taking of a return ticket at the South Western Company's station at Richmond, must be regarded as a contract between the last-named company and the plaintiff, and not as a contract for a breach of which the District Company could be held liable.

I by no means intend to express any dissent from the suggestion so made of a liability on the part of the South Western Company in respect of a breach of the contract of carriage. It may well be that such a liability may co-exist with a liability on the part of the District Company in respect of the negligence alleged against them. We know not, and we have no present means of ascertaining what the South Western Company might urge by way of answer to any such suggested liability on their part; nor again, do I deem it necessary to the decision of this

Foulkes v. Metropolitan District Rail. Co. (App.), C.P.

case to express any decided opinion as to whether, under all the circumstances of this case, a contract of carriage, in the ordinary acceptance of the term, was created between the District Company and the plaintiff, though the strong indication of my opinion is in favour of the view that such a contract was created. It appears to me sufficient apart from, and irrespective of, any such questions as those to which I have just referred, that a duty or obligation was imposed upon the District Company when they accepted the plaintiff as a passenger by their train, not only to carry him safely to the station where he was to alight, but to provide safe means for alighting when he arrived at that station. The train by which the plaintiff travelled was in every sense their own; the locomotives and carriages belonged to them; the guards and the other servants in charge of it were in their employment and in their pay; the line over which it ran was in part their own, and over the other part they had running powers, and in respect of that portion of the line over which they had and were exercising running powers, they had the same duties and were under the same obligations relatively to their passengers and to the public generally, as they had and were under in respect of the portions of the line which were their own. The plaintiff was admittedly properly travelling by their line. He had, in the sense in which the word is ordinarily used, been invited to travel by it; the ticket purporting to give him the right to travel, and by virtue of which he did in fact travel by it, had been issued to and paid for by him, with their full consent and concurrence, whether such issue created a contract of carriage binding on, and to be performed by them or not; and on arriving at Richmond, the plaintiff was invited by the defendants (required would perhaps be the more correct expression) to alight.

Now whether the defendants were or were not entitled to any share or interest in the price paid by the plaintiff for his ticket, appears to me to be a matter of no importance as regards the obligation which they took upon themselves when they invited him and received him as a passenger by their train to carry him

safely to his journey's end, and to carry him no injury by wilful or careless acts or omissions; but even if the element of pecuniary interest were necessary to impose the obligation I have referred to, such element existed, inasmuch as the District Company had a direct pecuniary interest, small perhaps, but nevertheless substantial, in the price paid for his ticket as well as in the price paid for every other ticket issued by the South Western Railway Company under similar circumstances.

Such, then, being the duty or obligation imposed upon the defendants, the question cannot, I think, be any question or doubt as to their having failed to discharge it. That the arrangements for the alighting of the plaintiff at the Richmond station were of an insufficient and improper character cannot now be questioned, and it is in my opinion, immaterial whether the platform was improperly constructed relatively to the carriage, or the carriage improperly constructed relatively to the platform. The latter is perhaps the more correct view, for though a footboard only an inch and a half in width might occasion no danger or inconvenience; but on the contrary, may be both safe and convenient when the carriage is stopped at a platform differing but little in level from that of the floor of the carriage, when the footboard serves only to stop the gap between the carriage and the platform as is the case at the stations on the District Company's own lines, it manifestly must become a source, not only of inconvenience, but of possible if not probable danger, when the level of the platform is upwards of two feet below that of the carriage, as was the case at Richmond station on the occasion of the accident to the plaintiff. I should not have adverted to the subject had it not been suggested in argument, that the accident was occasioned to the plaintiff, not by reason of any improper construction of the carriage in which the plaintiff travelled, but by reason of the improper construction of the platform, and that the construction and maintenance of the platform was under the control of the South Western Railway Company; but admitting the fact to be so, as it probably is, it was the duty of the defendants either to adapt the foot-

Foulkes v. Metropolitan District Rail. Co. (App.), C.P.

board or step of their carriage to the platform it would have to approach, or to arrange for an alteration being made in the platform itself.

To carry their passengers in carriages which were in every respect or for any purpose dangerous, was, in my opinion, a misfeasance rather than a nonfeasance.

I regret to have to add that, in my opinion, negligence is too mild a term to apply to the carelessness of which the defendants have been guilty, for it appears from the correspondence which has been put in evidence that they were warned, I believe, before they commenced to run trains to the platform in question, but at any rate before the accident occurred, that their carriages were not adapted for the safe descent of passengers at the Richmond station, and that, should they persist in running carriages so constructed, an accident would almost inevitably occur. The last of these warnings was apparently given two days only before the accident occurred.

For the reasons which I have assigned, I am of opinion that the defendants have entirely failed to make out a case for having judgment entered for them in the action, and that, having regard to all the circumstances of the case, a new trial ought not to be directed.

THESEIGNER, L.J.—I agree that this appeal should be dismissed. If the right of the plaintiff to maintain his judgment depended solely upon his establishing a contractual relation between him and the defendants, I should not dissent from the view that such relation has been proved.

The affidavit of Mr. Forbes is not in itself inconsistent with the notion that the London and South Western Railway Company in issuing tickets at their Richmond station for stations on the defendants' line, so issue them as agents for, or as partners with the defendants.

The notion, too, receives sanction from the decision in the case of *Gill v. The Manchester Railway Company* (11). There the contract of carriage purported to be made with the Great Northern Railway

Company, but the animal, which was the subject of the contract, was to be conveyed upon the defendants' line, and there were traffic arrangements between the two companies, under which their rolling stock was treated as one stock, their traffic was interchanged, and the receipts from through traffic were divided by mileage. It was held that, by virtue of those arrangements, the Great Northern Railway Company, whether as partners with the defendants or otherwise, became the agents of the latter to make the contract of carriage with the plaintiff. In the present case, under the traffic arrangements between the two railway companies, the defendants supply the rolling stock, and carry, in the exercise of their running powers, the whole of the through traffic, taking a mileage proportion of the receipts of such traffic, with an allowance for working expenses. It is admitted that traffic between Richmond and the defendants' station at Hammersmith constitutes through traffic, and it may therefore be urged with force, that in booking such through traffic at Richmond the London and South Western Railway Company contract either as agents for the defendants, or for the defendants jointly with themselves. This view is further strengthened by the form of the ticket issued at Richmond to passengers travelling from Richmond on to the Metropolitan District line, when contrasted with that issued to passengers travelling elsewhere, and by what is written over the booking offices, and although I am by no means prepared to hold that, under traffic arrangements similar to those which exist between the two companies, it is not open to a company in the position of the South Western Railway Company to make contracts of carriage in such a way as to make itself exclusively liable upon them, or to deny that in most cases it must be a question for the jury whose the particular contract may be, yet I think that, under the peculiar circumstances of the present case, and upon the materials before us, the Court would not be justified in disturbing the judgment for the plaintiffs, and sending that question down for trial.

But it is not necessary for us to rest

(11) 42 Law J. Rep. Q.B. 89; Law Rep. 8 Q.B. 186.

Foulkes v. Metropolitan District Rail. Co. (App.), C.P.

our judgment upon any contractual relation between the plaintiff and the defendants, for I am of opinion that it has been rightly contended for him that, even assuming the contract of carriage from and to Richmond and Hammersmith to have been made between him and the South Western Railway Company exclusively, the defendants are still liable in respect of the wrongful act which led to the plaintiff's injuries, by virtue of their actual reception of him in their carriage on his return journey from Hammersmith to Richmond. In arriving at a conclusion upon the validity or invalidity of this contention it is necessary to premise the following facts:—

1. The accident to the plaintiff occurred as he was alighting from the carriage in which he rode, on to the platform of Richmond station. 2. The station, including the platform, is the station of the London and South Western Railway Company, but which the defendants have a right to use in the exercise of their running powers. 3. The accident was due to what may be termed equally a defect in the construction of the defendants' carriage, relatively to the construction of the platform, and a defect in the construction of the platform relatively to the construction of the carriage; but as at the trial the contract of carriage was treated by the Lord Chief Justice as a contract with the defendants, it was quite immaterial in which way the defect was viewed, and he accordingly put to the jury only the questions whether there was negligence in the construction of the platform relatively to the construction of the carriage, leading to the accident, and whether there was contributory negligence on the part of the plaintiff. 4. The finding of the jury in favour of the plaintiff, so far as those questions are concerned, is not now impugned.

Starting with these premises of fact, there are certain admitted propositions of law to be borne in mind.

1. A railway company issuing a ticket to a passenger for a journey, partly on the company's own line, and partly on the line of another company, may be, and presumably is, responsible for the safety of the passenger on his whole journey,

and is liable to compensate him for injuries caused to him by the negligence of railway servants, or defective construction of carriages or stations, to which company they belong—*The Great Western Railway Company v. Blake* (1), *The Rhymney Railway Company v. The Rhymney Railway Company*.

2. A railway company may, under certain circumstances, be subject in favour of a passenger upon such a journey last mentioned to similar responsibilities although as between the company and the individual passenger there may have been no contract, as for instance, in the case of a servant travelling with his master, upon a ticket taken by the latter—*Marshall v. The York, Newcastle and Berwick Railway Company* (7), or of a child of tender years travelling upon a ticket taken by its parent; and even in the case of a child above the age at which the company holds itself out as willing to carry children gratis, but taken by the mother without a ticket—*Austen v. The Great Western Railway Company*.

The ground upon which these fundamental responsibilities of railway companies are rested is either that stated by Lord Blackburn, then Blackburn, J., in the last cited case, p. 445, where he said: "I think that what was said in the case of *Marshall v. The York, Newcastle and Berwick Railway Company* (7) was quite correct. It was there laid down that the responsibility of a passenger by railway has to be carried safely, does not depend on whether he has made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely;" or it is that to which Lord Lush and Shee, J., in the same case inclined, namely, a contract, although not a contract with the individual injured passenger. Whichever ground be taken, the responsibilities are not directly founded upon contract.

But 3. The responsibilities of a railway company or any other carrier may be carried still a step further. There are cases in which a carrier may be liable for injuries received by a passenger then carried by him, although no contract for carriage may exist between the carrier and the passenger, or any person contracted directly for his carriage.

Foulkes v. Metropolitan District Rail. Co. (App.), C.P.

In *Dalyell v. Tyrer* (6) the plaintiff had made a contract with a public ferryman, under which the latter was bound to carry him daily for a certain period. The ferryman being unable upon a particular day to work the ferry, hired a boat and crew for the purpose, and an accident having occurred to the plaintiff through the mismanagement by the crew of a rope, the owner of the boat and crew was held liable to him. So again, a case of *Reynolds v. The North Eastern Railway Company*, reported in *Roscoe's Nisi Prius*, 14th ed. p. 591, decided that where a passenger took a ticket of Company A. for a journey over the lines of Companies A., B. and C., and a collision occurred on the B. Railway by reason of the train in which the plaintiff was, running into trucks negligently left on the line, the B. Company were liable to the plaintiff in an action for negligence.

These propositions of law have not been disputed by the Solicitor-General in his arguments for the defendants in the present case, and he admits that for certain which he denominated misfeasances or tortious acts, the defendants might have become liable to the plaintiff, carried as he was in fact by them; but he denies that they incurred any liability in respect of the defect which led to the plaintiff's accident, whether it be treated as a defect of carriage or of platform.

He attempts to draw a line in a case like the present between the commission of an act which is in itself wrongful, and the omission of some act to which the company would admittedly be bound if the passengers were carried by them under a contract. It is, however, very difficult to see how such a line can be reasonably drawn. Suppose the carriage in which the plaintiff rode had been allowed, by the neglect of the defendants, to be in an insecure and dangerous condition, and an accident had thereby occurred to him, why should the defendants be less liable to him than if their porter had, as the train was leaving Hammer-smith Station, negligently shut the carriage-door upon the plaintiff's finger, in which case the Solicitor-General admits the defendants would be liable? Why

again, on the other hand, if there is any duty on the part of the defendants towards the plaintiff in respect of the security of the carriage in which he rides, should there not be a duty also in respect of the place at which he is called upon to alight?

I think that the true principle in such a case as the present is, that the carrying company, so far as concerns its own line, in which term I include a line over which running powers are exercised, and its own acts or omissions, is under the same obligations in reference to the security of the passenger as it would have been if it had directly contracted with him. That principle is a reasonable one, for underlying it is the fact, that, more or less directly or indirectly, the carrying company derives a benefit from its carriage of the passenger, and should therefore come under some corresponding obligation towards him, and what more appropriate obligation can there be than the ordinary one undertaken by railway companies towards their passengers, namely, that of taking due and reasonable care for their safety?

I am of opinion, then, that the duty of the defendants towards the plaintiff was such as I have described, and inasmuch as upon the verdict of the jury it must be taken that the defendants negligently failed to fulfil their duty, it follows that the judgment of the Court below in favour of the plaintiff was right, and should be affirmed.

Judgment affirmed.

Solicitors—Faithfull & Owen, for plaintiff; Baxters & Co., for defendants.

[IN THE HOUSE OF LORDS.]

1880. } HOOPER AND ANOTHER v. BOURNE
Feb. 9. } AND OTHERS.

Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 127—Superfluous Land—Mines under Superfluous Land.

Lands had been acquired by a railway company by agreement under their statutory powers. The time within which they might be sold if not required for railway purposes, expired in 1863; at which time they had not been used for such purposes nor sold. The lands were in close proximity to W. station; and since the year 1868 additional sidings had been required at the station, for which the lands would be needed, but for want of funds such sidings had not been constructed. Meanwhile the lands were let, first to an agricultural tenant, and afterwards to a mining company, the lessors having the right to re-enter at any time at short notice.

Upon an action brought in 1875 by adjoining landowners to recover the lands as superfluous within 8 & 9 Vict. c. 18. s. 127,—Held, that the lands were not superfluous, the fact that they were required for the railway in 1868 being strong presumptive evidence that they were so required in 1863, and the burden of proof, especially after so great a lapse of time, being upon the plaintiffs to shew that they were not.

The lease to the mining company reserved to the lessors the right to regulate the manner of removing the minerals, so as to prevent injury to the surface:—

Held, that the minerals were not superfluous.

Semble, that where land is bought by a railway company with the mines under it the mines cannot be claimed as superfluous land apart from the surface.

This was an appeal from a decision of the Court of Appeal affirming one of the Queen's Bench Division. The case is reported in the Courts below, 46 Law J. Rep. Q.B. 509; 47 Law J. Rep. Q.B. 437; Law Rep. 2 Q.B. D. 339; 3 Q.B. D. 258.

The plaintiffs brought an action to recover as adjoining owners three parcels of land at Westbury, in the county of Wilts, as superfluous land within the

provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 127.

The facts, which were found by a special case, were as follows:—

The land in question and all mines thereunder was with other land sold by agreement and conveyed in the month of March, 1848, to the Wilts, Somerset and Weymouth Railway Company. The company entered upon the land so conveyed to them, and upon part of it constructed the Westbury Station and a section of their line of railway. They also used a part of the said land as a road for the purposes of access to the station; and on one of the pieces of land claimed in this action, and numbered Lot 1, they sank a well for supplying a tank of water for the purpose of their engines.

The residue of the land, including Lot 1, they let to the defendant Bourne, an agricultural tenant, from year to year, subject to their right to resume possession on giving two months' notice whenever it might be required for railway purposes.

In the year 1851 the Wilts, Somerset and Weymouth Railway Company was dissolved by Act of Parliament, and its undertaking was transferred to the Great Western Railway Company. The latter company shortly afterwards made a reservoir on another part of Lot 1 to improve the supply of water for their engines. A cottage, standing on Lot 1, which was bought with the said land, was occupied by one of the railway servants. On the 18th of August, 1871, the Great Western Railway Company let the land formerly occupied by Bourne to the Westbury Iron Company, Limited, for mining purposes, the works to be carried on to the satisfaction of the railway company's engineer, and the railway company having the right to re-enter at any time upon giving twenty-eight days' notice. The said land was at the time of the bringing of the action still in the occupation of the Westbury Iron Company.

It was found by the Special Case that since the year 1868 the traffic at the Westbury Station had much increased, and that during that period the three pieces of land had been, and still were, required for the purpose of constructing

Hooper v. Bourne, H.L.

additional sidings upon them to accommodate the increased traffic. It further appeared that the want of such additional accommodation had been the subject of much discussion by the district officers of the railway having the supervision of the traffic at that station, but owing to financial reasons and the necessity of applying the funds of the company to other works, nothing had yet been done to supply additional accommodation at the Westbury Station.

The Lands Clauses Consolidation Act, 1845, was incorporated with the special Acts of the railway companies. The time within which land not required might be sold expired in 1863.

The plaintiffs, in their action commenced in 1875, claimed that the land, let to Bourne and afterwards to the mining company, was not required for the purposes of the railway when the said time expired, and that it thereupon vested in them as superfluous land.

The Queen's Bench Division, and on appeal the Court of Appeal, held that the land was not superfluous within 8 & 9 Vict. c. 127, and gave judgment for the defendant.

The plaintiffs appealed.

Benjamin (Merewether with him), for the appellants.—This case falls within the principle of the decision in *The Great Western Railway Company v. May* (1), which decided the meaning of s. 127 of the Lands Clauses Consolidation Act to be that, if at the end of the prescribed period land acquired by a company and still retained was not needed for the purposes of the undertaking, it vested in the adjoining landowner. If s. 6, which refers to purchase of lands by agreement, be read with ss. 127 & 128, it clearly appears that the provisions as to superfluous lands apply to lands taken by agreement; and so it has been held by the Courts below.

In *Betts v. The Great Eastern Railway Company* (2), it was found that the lands had been purchased "solely for the pur-

poses of the railway, and had ever since been retained *bona fide* for such purposes." There is no such finding here; all that is found is that five years afterwards the land became necessary. There is nothing to shew that in 1863 anyone foresaw the great development of traffic which took place after 1868, or could have said at that time that the land was required. The fact that it was not used for so many years after 1863 is strong evidence that it was not then required, and that there was no reasonable prospect of its being required.

Sections 77 & 78 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), which provide that mines shall not pass by a conveyance to a railway company, unless expressly included, and that a railway company may purchase mines under adjoining lands to prevent injury to their works, shew that in the contemplation of the legislature mines are treated as a separate property from the surface. *The Great Western Railway Company v. Bennett* (3) shews that the object of sections 77 & 78 is to enable the company to obtain vertical and lateral support for its works. It may buy the mines under its own and the adjoining lands if necessary for that purpose. Being treated thus as a separate property, and coming within the definition of the word "lands" in the Lands Clauses Act, namely, "messuages, lands, tenements and hereditaments of any tenure," it is contended that mines may be superfluous lands within s. 127. Here it is clear that the minerals were not necessary as a support, since the company has granted a lease for the purpose of working them and carrying them away. The inference of fact has been drawn by all the Judges that they were not required. The appellants are therefore entitled to them, even if it be held that the surface is not superfluous.

Davey, Charles and Moulton, for the respondents, were not called upon.

THE LORD CHANCELLOR (EARL CAIRNS).—Several questions have been argued in

(1) 43 Law J. Rep. Q.B. 233; Law Rep. 7 H.L. 283.

(2) *Ante*, p. 197.

(3) 36 Law J. Rep. Q.B. 133; Law Rep. 2 H.L. 27.

Hooper v. Bourns, H.L.

this case by the learned counsel who have presented the case to your Lordships on behalf of the appellants, but it will not, in the view which I take of the case, be necessary to refer to more than one of those questions. If it turns out that the land which is here sought to be recovered is not "superfluous land" within the meaning of the Lands Clauses Consolidation Act, the other questions which have been argued in the case become immaterial.

The action is brought in the year 1875 to recover against the Great Western Railway Company certain closes of land, three in number, which are alleged to be superfluous land. The plaintiffs (the appellants), who seek to recover the land, allege that they are, and for the purpose of the present argument (and for that purpose only) I will assume that they are, the "adjoining owners" who would be entitled to recover the land, if it be superfluous land. The case of the plaintiffs, therefore, is one in which they seek to establish, I will not say a forfeiture of the land, but, at all events, that the land has been divested out of the railway company in which undoubtedly it was vested, and has become vested in the plaintiffs. The case of the plaintiffs must be that this divesting from the railway company and vesting in the plaintiffs took place in the year 1863. The case, therefore, is one in which the plaintiffs have to recover upon their own title, and they have to shew, affirmatively, that, as a matter of fact, the land in question had become at the date which I have mentioned superfluous land, and until they establish that fact, they do not advance their case. The mere circumstance that at one particular period the land was unbuilt upon, or unused for the purposes of the railway, will not be material, at all events will not be conclusive. It must be shewn affirmatively that, within the meaning of the Act of Parliament, it had become at the date I have mentioned superfluous land, that is to say, "land not required for the purpose of the railway company's undertaking."

The case did not go before a jury, and therefore there is no finding of a jury on the subject. By the agreement of the

parties a special case was stated, and the Court was at liberty, by the agreement of the parties, to draw inferences on the question of fact from the statements made in the special case. I will refer your Lordships to one of those statements, the statement in paragraph 14:— [His Lordship read the paragraph relating to the increase of traffic, and consequent necessity for additional accommodation.] Your Lordships have this statement positively made—it is common ground, therefore, between the parties in the case—that, since the year 1868, these pieces of land have been, and still are, required for the purpose of constructing additional sidings upon them to accommodate the increased traffic. There is no doubt, therefore, as to what was the case in 1868.

Upon that, the first observation I make is this, that if the question had been presented for solution before a jury, or any other tribunal of fact, in the year 1863, it is quite possible that a controversy might have arisen as to whether in the development of the traffic of the company these lands would be required for these additional sidings, and at that time, perhaps, there would not have been a possibility of predicating what was predicated in the year 1868, that the increase of traffic necessitating these additional works had actually taken place. That may be so; but there is a very strong presumption which arises when you find that in 1868, without its being said that there was any unexpected, unnatural, casual or fortuitous development of traffic, but merely that the traffic had developed so as to require this additional siding accommodation—there is, I say, the strongest presumption that those elements were at work in the year 1863, and that any person with proper foresight, properly acquainted with the way in which railway traffic does develop, would have said, and would have said rightly in the year 1863, that these pieces of ground would be required for the development of the traffic which afterwards took place. As your Lordships well know, it is not at all necessary that at the end of the ten years there should have been then the immediate possibility of em-

Hooper v. Bourne, H.L.

plying, or the immediate necessity for employing, the pieces of land for the additional work. It would not have been superfluous land if it could have been reasonably said at the end of the ten years that there was a purpose for which, even after that period, it would be required in connection with the railway. That is the first observation.

But a second observation is this: these pieces of land were not pieces of land adjacent to, or in the neighbourhood of, a railway in some wild and unpopulated part of the country, but they were three pieces of land immediately contiguous to a station, which itself was a station of a populous town. Therefore, without any evidence on the subject, without any statement in the special case, your Lordships, or any tribunal taking notice of facts which are notorious, and within the knowledge of every person, would naturally conclude that there was a strong presumption that land taken by the railway company immediately around its station, near a populous town, was land as to which there was strong probability, at all events, that it would be required for the purposes of an extension of the station accommodation of that place.

That is a second circumstance; but there is a third. Your Lordships find that in the documents which have dealt with this land for temporary purposes, a document, for example, which leased it to the first person who was in occupation of it, a person of the name of Bourne, and the documents which afterwards dealt with it (although the latter are documents dated after the expiration of the ten years)—in all those documents the directors of the railway, in speaking of the land, speak of it always as land as to which there was the probability that it might at any time, and at very short notice, be required for the purposes of the railway, and take care while putting the land into the occupation of other persons to reserve to themselves the power of reclaiming it upon short notice for the purposes of their railway undertaking.

Now, bearing in mind that it is, as I have already said, for the plaintiffs to establish their case, and to shew that at

the end of the ten years the land was superfluous land, I take leave in the first place to say that they have not shewn that fact by any affirmative evidence of their own, and that, on the other hand, the positive statement in the case to which I have referred—a statement no doubt relating to 1868, but reflecting back upon the year 1863—and the other considerations which I have mentioned, go in my mind very far indeed to shew, even if the *onus* had been upon the railway company, that this land was not superfluous land or land not required for the purposes of their undertaking. Therefore, so far from differing from the conclusion arrived at by the Court of Queen's Bench, the tribunal which the parties selected for the purpose of determining in the first instance this question of fact, I am bound to say for myself that, had the case been presented to me in the first instance, I should have arrived at the same conclusion. I understand that in the Court of Appeal all the Judges did arrive at the same conclusion, some of them no doubt expressing their opinions more strongly than others, and I see no reason to differ from any of those opinions.

I will only say one word on the subject of the mines. It was attempted by Mr. Benjamin to make a distinction between the mines or minerals under these closes of land and the surface of the closes themselves. Now the facts of the case as to that are simply these. The minerals were bought by the railway company along with the lands. I asked this question in the course of the argument: if a railway company buys a close of land with the minerals under it, and if it afterwards turns out that the surface of the close itself is required for the purposes of the railway, but that those purposes could be answered without preserving to the surface the mineral support in the usual way, is there any authority that the railway company is bound to sell the minerals apart from the surface, and that, in default of being so sold, the minerals would vest in the adjacent owners? I could not learn that there was any authority for that proposition; but whether that be so or not, that is not simply the case here, because it is

Hooper v. Bourne, H.L.

perfectly apparent here, from the documents which form part of the case, that the opinion of the railway directors was that, although it would be safe, and would be consistent with the purpose for which these closes were wanted, that some portion of the minerals under them might be taken away, the agreement by which permission was given for this to be done, reserved to themselves, through their engineer, the control of the manner and the form in which, and the extent to which, these minerals should be taken away. They therefore reserved the power and the authority to regulate the extent to which the support of the minerals should be taken from the land in a way that they could not have done if they had sold the minerals absolutely apart from the surface.

I therefore think it is impossible here to make any distinction between that part of these closes which was subjacent, consisting of minerals, and that part of the closes which was merely surface land.

On the whole I submit to your Lordships that there is no ground for dissenting from the judgment of the Court below, and I will move your Lordships that the appeal should be dismissed, with costs.

LORD HATHERLEY.—I am of the same opinion, and so entirely for the same reasons that I do not think it necessary to detain your Lordships by expressing my view on this case at any length.

It appears to me that the plain object of the Legislature in these clauses that have been commented upon, in reference to these superfluous lands, has been this. It is a very high act of authority, and one only to be justified by the public advantage which is thereby secured, to insist on a landowner selling his property and parting with his estate for the purpose of having a railroad made over it, which is to be in itself such a public benefit as is supposed to justify the interference with his rights. The Legislature conceiving, and in my view rightly conceiving, that to be a matter in which the greatest moderation should be used with reference to the interests of all

parties concerned, has provided that companies making these works shall not, under pretence of the benefit they are about to confer on the public, acquire to themselves property which can be dealt with in any other way than for that specific public purpose for which alone they were authorised to take it. Therefore clauses have been introduced into the general Acts, by which, the time for the execution of the works being limited, the company is bound within a period of ten years after that time to sell all that land which it does not want; or, in default of selling it, and to induce the companies to sell it, clauses are put in with reference to (it cannot properly be called a reverter) the handing over of the lands to the adjacent owners. Who are the adjacent owners, it is not necessary to decide in the present case.

That being so, it appears to me that the cases, which have been numerous in various shapes, as to superfluous lands, have simply proceeded at all times on the *bona fides* of the transaction; and the question is, therefore, always peculiarly a subject for consideration by a jury. There have been cases in Chancery where injunctions have been applied for before the land was taken, on the ground that it was impossible that the land could be required, or that notice had been given to take a much greater quantity of land than could be required for the purposes of the railway. That is a much more difficult case than the case which arises afterwards when the works have been executed. But the question having arisen in different forms it all comes round to this result, whether or not the companies are proceeding *bona fide*, and whether or not the land is actually wanted for the execution of the undertaking which they have in hand.

Now, what do we find in this case? We find a fact upon which my noble and learned friend on the woolsack has observed. But before coming to that, I will add, that where the directors, having entered into a contract, have acquired land, and there is no suggestion of *mala fides*, and there appears to be no reason in the world why they should have attempted to take the land, except for the

Hooper v. Bourns, H.L.

particular business they had in hand, they have been held entitled to retain it. They would, naturally, not be desirous of taking more land than they wanted if they were acting *bona fide*. But besides that, as my noble and learned friend has said, you have it found by the special case, which is equivalent here to a verdict, the Judges being empowered to draw such inferences of fact as they may think warranted by that statement of facts, that after the making of the railway and in the period between the expiration of the ten years and the taking of the present proceedings, the land, in consequence of the development of traffic, has become necessary and is now necessary for the purposes of the undertaking. There appears to be no direct evidence on the subject, but that is the finding. That seems to me to answer the question at once, because, as I took the liberty of saying to Mr. Benjamin during the course of his argument, it seemed to me that his argument throughout assumed that, though, when the plaintiffs in the present case took their proceedings, they had found the land in question covered with railroads and tramroads crossing each other for the purposes of a station, and had found it in daily use for sidings, and had found a largely increased traffic coming into the station, they would nevertheless, because of the mere lapse of time, have been entitled to say that the land was superfluous, in the face of the very strong inference that must arise from the fact of its being largely used and beneficially used at the then present time. A strong inference would arise in such a case that it was land that was required for the purposes of the undertaking, because all traffic admits of development, and the purpose for which this land had been acquired having been, at all events as regards part of it, to use it for the purpose of a railway, you find the whole of it, at the moment of the dispute arising in the case I am supposing, so covered with a network of railways as to be assisting the growth of that traffic, and assisting it profitably and beneficially to the company and the public. Yet, according to Mr. Benjamin's argument, you are to say, all that is to come to an

end, because, although I did not choose to stir ten years ago, ten years ago I might have stirred, and if I had stirred ten years ago, you would not have been in a condition to say what you now can say, that it was then wanted for the development of your traffic. The fair inference is that it was wanted from the first, unless you can shew that this development was something preternatural, and not a mere ordinary development of railway traffic. Of course, cases of that kind might be conceived. All that would have a bearing upon the subject I first mentioned, namely, the *bona fides* of the company in taking this land. A very strong inference is to be drawn from the facts stated in the case that it was from the first intended for that object, which it appears during this long period from 1863 has been attained by it.

It also appears to me that, so far from the various instruments and deeds which have been executed, affording any inference that there was a *mala fides* in this transaction, or that the company did not want this land to develop the traffic, every one of them seems to have a contrary bearing. There is always a power reserved for determining the arrangements which have been entered into; and what could that be for, except because the directors say, "We think we shall or may want the land, and if we do want it we may take it again, else we should not put in any such stipulation." In a case of this description, where there is so much that may be considered conjectural, and where the work has first to be executed, you must leave a considerable margin to the judgment of those who undertake the work as to what would be the best mode of developing it, and how much, when it is so developed, they may want for the development.

That being so, I really think we have here everything to justify the inference which the learned Judge in the Court below have unanimously drawn from the facts now apparent on the case before us, and the conclusion is not one which admits of dispute, unless some question could be raised upon that subject on which Mr. Benjamin laid great stress to-day in his argument, namely, the question of

Hooper v. Bourne, H.L.

mines as distinguished from other parts of the property. The finding in the 14th paragraph of the special case is one which seems to me in fact to carry, to its full extent, the justice of the inference that has been drawn by those learned Judges. For the reasons already assigned by my noble and learned friend, the Lord Chancellor, which I have scarcely done more than repeat for my own satisfaction, I think it was a right decision. In the first place, the inference they have drawn is, in my opinion, only a just inference from the statement of the case in the 14th paragraph, and from the dealings of the railway company in reference to this property. It is true they have not built over it, and it is not found to be in a state of utility at present; but the whole argument we have heard to-day might have been justly urged to the same extent and the same degree if it had been found to have been covered with works at the time when this action was brought. That was not the case; but I think there is nothing whatever to authorise a suspicion or a doubt that that which has been done from the year 1868 down to the present time has been a reasonable development of the original purpose of the railway company, and that this was during the intervening time (including the year 1863) a purpose which at some distant time might be carried into effect, and which it seems has been carried into effect during the period referred to in the 14th paragraph.

The learned Judges have relied upon that in coming to the conclusion they have come to, that this land cannot be held to be superfluous land. I think that the proof of its being superfluous really lies on the plaintiffs. They have no title whatever, and can pretend to no title whatever, unless the land be superfluous, and therefore, in the face of the total absence of any evidence on their part that it was superfluous from 1863 to 1868, with the finding that from 1868 it never has been superfluous, and there always has been an intention to use it, I think that there is made out a very strong ground for holding that the railway company really wanted it from the first. There is not a tittle of evidence on the

part of the plaintiffs to shew that it is superfluous land, beyond the mere fact that the railway directors have never executed works upon it. But I must assume that it is still within the competency of the railway company to carry such works into effect, in order to fulfil the statement of facts in the 14th paragraph, namely, that it has been from 1868, and is now, land that is not superfluous. There is not any evidence, therefore, before us to the contrary, which ought to lead us to depart from that view or from the just inference to be drawn from that statement, namely, that what was wanted after 1868 was wanted at a period earlier than that, because clearly, in the purview of the parties undertaking the work, there was in this, as there is in every railway case, a notion of a development of traffic, which alone induces parties to enter into these undertakings at all. That development of traffic has, in fact, taken place; and this being, and having been from that time (1868) downwards, land which is not superfluous, I do not see what single point I can put my finger upon in the plaintiffs' case to justify me in coming to a contrary conclusion from the views which have been taken by the other learned Judges who have considered the subject.

LORD O'HAGAN.—I concur with Lord Justice Bramwell in thinking that this is an action "which ought not to have been brought," and I see no sufficient reason for dissenting from the unanimous opinion of the Judges of the Court of Queen's Bench and of the Court of Appeal in favour of the respondents.

Reaching the conclusion, in common I believe with all your Lordships, that the land which is the subject of dispute cannot, upon the evidence, be held to have been "superfluous" at the end of the ten years, I do not deem it necessary to discuss the questions which have been raised as to adjacent ownership and the conveyances of mines and minerals.

It seems to me that on the 3rd of August, 1863, the day to which, according to the decision of this House in *The Great Western Railway Company v. May*

Hooper v. Bourns, H.L.

(1), our attention should be directed, the land which the plaintiffs claim might reasonably have been dealt with, on an examination of the state of the railway, and a fair estimate of its capabilities of development, and the works which the profitable use of them might involve, as "required" for the purposes of the Act within the meaning of the 127th section.

I cannot adopt the view which was somewhat pressed in the argument, that an actual present intention to employ the land for those purposes must have been formed by the company within the prescribed time, to prevent a forfeiture at the end of it. I think it is enough if, though no such intention was consciously formed or explicitly formulated, the circumstances of the railway indicated a probable development and a requirement of farther accommodation within an ascertainable and reasonable period. If the want of an express intention to undertake a specific work in the month of August, 1863, forfeited the interest of the company and transferred it to the adjoining occupier, the latter might have lain by, as he has done, for a long series of years, the company might have gone on with large and expensive works, and he would have been entitled to come in after their completion and secure them as his own. This would not be just or reasonable, and nothing in the statute compels us to such a conclusion. I adopt the words of Lord Justice Brett as expressive of the view I have taken of the statute. "In my opinion," he says, "the real meaning is, can the tribunal which has to try the case say, at the time when the case is tried, that if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person, he would have said, at that time, that the lands in question would, by the ordinary development of the railway or neighbourhood, be required to be actually applied to the purpose of the railway within a reasonable time?" And this I repeat, although at that period there was no present, definite, or formal resolution so to apply them.

The question before the Queen's Bench was one of fact. The Judges had the same powers of drawing inferences as a

jury would have had. They exercised that power, and found that in August, 1863, the land in controversy was required for the purposes of the railway, although it had not then been dedicated to them. I need not repeat the reasons which have seemed to my noble and learned friends, and seem to me, to make this finding satisfactory. The burden of proof, as has been said, is on the plaintiffs. They seek to work a forfeiture and to disturb a possession, and they are bound to establish that the land they seek to appropriate is "superfluous land" not required for the purposes of the Act. They have failed to do so. During the great lapse of time since the railway was completed, the company has not utilised the land, and this has been fairly urged as leading to the inference that, not having been used, it cannot be said to have been "required." If the action had been brought immediately after the expiration of the ten years, it might have been more difficult to answer that argument.

When a company purchases land, after full consideration, on the advice of competent engineers, and with ample information as to its probable requirements, it may be fairly, in the first instance, presumed to have taken only what its real interests compelled it to take. The Legislature, for very good reasons, has fixed a period within which the correctness of its judgment in this respect may be tested, and at the end of the ten years any such presumption is done away, and the lands not then "required" are to be sold or to go to the adjoining owners. A new presumption then arises on which the appellants might properly rely, but in the case before us this is encountered by positive evidence of a very persuasive kind. It has been found by the special case, first, that since the year 1868 the railway traffic has much increased; secondly, that during that period of time the three pieces of land have been required for the purpose of constructing additional sidings upon them to accommodate the increased traffic; and thirdly, that they are still required for that purpose. Is it reasonable to say that if the land was "required" in 1868, and is still "required," it was not so "required" in

Hooper v. Bourne, H.L.

1863? Railway traffic does not increase largely in a day or a year, and skilled persons can foresee and determine beforehand the changes of accommodation which its increase may probably necessitate. Can we suppose, looking back at the state of things in 1863 with the light reflected from 1868, that the managers of the railway company did not anticipate some changes like those which so soon after made the land essential to the line? Or, whether they did or did not so anticipate, can we suppose that in fact the necessity, although only to become real in the near future, would not have been held by any official of competent experience, knowing the condition of things, to have then had potential existence? We are not bound to look only to the case which might have been made on either side if the action had been brought earlier. We have facts established from which it may be inferred that in 1863 the land was "required," as it was in 1868, and has been ever since; and that all who were conversant with the affairs and the prospects of the railway must, or might, have known it to be so.

The inactivity of the directors since 1868 has fairly been relied on; and if there were any question as to their *bona fides*—a consideration, as has been observed by my noble and learned friend (Lord Hatherley), of great importance in cases of this kind—it would have had material claims to our attention. But the special case explains the delay in providing the additional accommodation, shewing that it was the subject of frequent discussion amongst the officers of the company, and that it was not supplied because of pecuniary complications created by a large expenditure upon other works.

The lettings for agricultural and farming purposes can scarcely be used adversely to the respondents, as the leases all contain provisions for the resumption of possession by the company upon short notice, and are, therefore, rather evidence of a continuous purpose to use the grounds demised for railway purposes.

On the whole I think that the judgment should be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN.—I am of the same opinion.

In this case the railway directors had purchased a plot of land about nineteen acres in extent, with the minerals under it, and on that plot of land they might construct works for the purposes of the undertaking; but ten years after the time limited for making the works, that is to say, on the 10th of August, 1863, such lands as they then held as were not required for the purposes of the undertaking were to vest in the owners of the adjoining lands. Now when that time, the 10th of August, 1863, arrived, the railway company had erected a station upon the spot, and had made the railway and made some works, which together occupied about six acres out of the nineteen. Between twelve and thirteen acres of the purchased land were not yet used for any purpose of the railway, and the question comes to be, was it land which was no longer required for the purposes of the undertaking? or, in the other phrase which is used in the Act of Parliament, was it superfluous land? That was a question of fact at that time.

One can see that there are several things to be considered upon that. First of all, there is no doubt that the fact that the lands had not been used, although more than ten years had elapsed since the time when they were purchased, was evidence to suggest the conclusion that they were not required. There is also no doubt that inasmuch as we all know that a station is peculiarly a place where the extent of land that may be required for buildings, and for sidings and for other things, is likely to increase with the traffic, the fact that this land was adjoining to a station was a reason for saying that it was very likely that the land might be wanted for the purposes of the railway, although if the same plot of land had been situated elsewhere alongside the railway, very far from the station, it would be hardly conceivable that it ever should be required at all for the purposes of the undertaking. That was also a question to be considered.

But all these matters had to be considered as they appeared on the evidence

Hooper v. Bourne, H.L.

at a later time, by the tribunal which had to decide the fact. I quite agree that the fact to be decided was, were these superfluous lands on the 10th of August, 1863? But that was to be decided upon the evidence produced before the arbitrator who was settling the case, and that was in the year 1878. Fifteen years had elapsed, during which many things had happened, and many things had become clear which would not have been clear, but would have been speculation in 1863. Had the action been brought and the matter required to be decided in the year 1863, the railway company must have called witnesses to say, "We expect that the traffic will increase, we expect that this will happen, or that that will happen." But, in fact, the question came to be decided in 1878, when fifteen years had elapsed, when new things had happened; and some of these things are things which make in favour of its being superfluous land, and some make against it. I may say that the fact that fifteen years more had elapsed during which the land was not used for buildings or for sidings, is strong evidence—as strong as any the plaintiffs had—that it was superfluous land.

On the other hand, there was also a minor thing with regard to the minerals during these fifteen years. Beginning in 1871, the directors had utilised the land for the purpose of working out the minerals underneath it. They had sold the minerals to a company to work them out upon the terms which were alluded to by my noble and learned friend the Lord Chancellor, and which I shall not repeat. If it can be supposed that that was evidence which led those who had to draw the inference of fact, to the conclusion that the land was kept for the purpose of working mines, and not *bona fide* for the purposes of the undertaking, that would be evidence that they were superfluous lands. I can only say, for my own part, I do not think there is the least ground for saying that it was kept for the purpose of working minerals. I think the company kept the land under the belief, whether rightly or wrongly, that it would be used at a future time for the purposes of the undertaking, and the directors thought only to

get what could be got from the minerals in the meantime, and I do not see that they are in the slightest degree to blame for that.

Then, on the other hand, comes what is to be said for the defence, upon which I not only so far agree with the Court below that I cannot disturb the finding, but I must say that I should have come myself, independently, to the same finding. I think when that is shewn, which has been proved, namely, that in 1868 and from 1868 down to 1878, the state of things existed which is mentioned in paragraph 14 of the case stated by the arbitrator, and which in substance amounts to this: that during these last ten years it has been ascertained as a fact, and I, the arbitrator stating the case find as a fact, that, although the lands are not now used, it is quite certain they will be wanted at some reasonable time for the purposes of the undertaking—when that is found with regard to 1868, I think it throws very great light indeed upon what took place in 1863. It may be that the evidence in 1863 would not have convinced a jury of what the evidence in 1878 did convince the arbitrator, but when you find that during the last ten years it has been clearly ascertained that the lands were wanted, I think it is very reasonable to draw the inference that in the five years from 1863 to 1868 they were so wanted too, unless the contrary is shewn; I do not say that it is conclusive, but I say it is reasonable to draw that inference.

For myself I confess I should be inclined to go so far as to say, without hesitation (though Mr. Benjamin thought it would be a monstrous conclusion), that wherever it is shewn that lands have not been actually claimed by adjoining owners until some years after the time when they might have been claimed as superfluous, but still remain in the hands of a railway company, and they are required for the purposes of the railway at the time when they are claimed, it is a reasonable conclusion that the *onus* of proof is shifted to the other side. No doubt in such a case the adjoining owners claiming the land may be allowed to prove that which generally they will find it very difficult to do, namely, that it was not wanted at

Hooper v. Bourne, H.L.

the time when the ten years began. It is not necessary, however, to go so far as that in the present case. I think, in the absence of evidence to the contrary, since it is shewn that in 1868 the lands were required, it is a reasonable inference that they were required in 1863 also.

I will only add one word as to the minerals. The railway directors did here what they were not bound to do. They might have bought the land, leaving the minerals severed from it in the hands of the vendor. They agreed (it matters not why) as they might do, to purchase the lands and the minerals together, so that the lands were not severed from the minerals. I see Lord Justice Bramwell says that he thinks even if the surface was not required for the purpose of the railway, and therefore was superfluous land, some sort of severance may be made so that the defendants may keep the minerals, although the surface of the land may have to be returned to the owners of the adjoining lands. That is not the case before the House, and it is not necessary to decide anything with respect to it, but I must say that I should pause very long before I came to that conclusion. I doubt it very much.

The real question here is the converse of that; it is the question raised by Mr. Benjamin in his argument. He says even if it be established (as for the reasons I have given I think it is established) that the surface was required for the purpose of the railway company's undertaking, you are to say you will sever the minerals below from it, and that they must be sold, and that they vest in the owners of the adjoining land. That would be, I think, a very inconvenient result, and I certainly can see nothing whatever in the sections which were quoted by Mr. Benjamin from the Railways Clauses Act, to point to any such conclusion as that. What is there said is, that companies need not buy the minerals until they find that it would be dangerous to the undertaking if they do not buy them, and then they may buy them, but there is nothing whatever said to the effect that they shall not buy them before; still less is it said that if there be any minerals in the land which belongs to companies, which they have actually

bought, they must sell those minerals independently, whatever mischief it may do to their undertaking. I confess I cannot see any reason for making such an enactment, and Mr. Benjamin did not succeed in pointing to anything in the Act of Parliament which seemed to me to amount to that. I believe I am not wrong in saying that there is no case in which there is a decision or *dictum* of authority pointing that way; certainly I think the case of *The Great Western Railway Company v. Bennett* (3) in this House does not point that way.

Therefore, as I have said, I think the fact was rightly found below, and that being quite enough to decide this question, I do not think it necessary to give an opinion on any of the other points which have been urged.

*Judgment appealed against affirmed;
and appeal dismissed with costs.*

Solicitors—Field, Roscoe & Co., for appellants;
R. R. Nelson, for respondents.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1880.
Feb. 21, 23, { THE YORKSHIRE BANKING COM-
24. { PANY V. BEATSON AND MYCOCK;
March 11. { THE LEEDS AND COUNTY BANK
V. THE SAME.*

Partnership—Firm Name the same as that of individual Member—Bill of Exchange—Liability of dormant Partner on acceptance by individual Member.

Action on two bills of exchange, one indorsed by the defendant W. B., the other addressed to him as "Mr. W. B., Chemical Works, R.," and accepted "W. B."

The defendant W. B. carried on a chemical business at R. In 1878 he and the defendant M. became partners, and thenceforth carried on the same business at the

* Coram Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

Yorkshire Banking Co. v. Beatson (App.), C.P.

same place, under the same name, "W. B." The account of the defendant W. B. at the bank became the firm account, and no alteration was made either in the name or the mode of keeping that account. It was agreed that the defendant M. should be a dormant partner, that the defendant W. B. should manage the business, and that neither partner should draw, indorse or accept bills without the written consent of the other. The bills sued on were made after the formation of the partnership, and were negotiated by the defendant W. B. without the knowledge or consent of the defendant M. in renewal of accommodation transactions entered into prior to the partnership. The proceeds of the two bills were paid into the account at the bank. W. B. drew on this account for goods supplied to the business but also drew out for his private purposes sums exceeding in amount the proceeds of these bills, and he never treated these accommodation transactions as part of the chemical business, nor did he consider that he was binding the partnership by them. The plaintiffs, when they discounted the bills, did not know of the existence of M. or of the partnership.

The jury found that the signature "W. B." on each of the bills was intended to denote the firm:—

Held (affirming the decision of the Common Pleas Division), that the finding of the jury was against the weight of evidence; that there was nothing to prevent the defendant M. from denying his liability upon these bills to which he was no party, and from which he derived no benefit; that he was not liable on them, and that judgment ought to be entered for him.

Held also (reversing the decision of the Common Pleas Division), that where a signature to a bill is common to an individual and a firm of which the individual is a member, and when the individual carries on no business separate from the firm, there is a presumption that the bill is given for and is binding on the firm.

Appeal from the Common Pleas Division. The case is reported 48 Law J. Rep. C.P. 428.

Action on two bills of exchange. The defendant Beatson allowed judgment to go by default, and a verdict and judgment

were entered for the plaintiffs against both the defendants.

A rule for a new trial was obtained in the Common Pleas Division, and upon the argument of the rule judgment was entered under Order XL. rule 10, for the defendant Mycock.

The plaintiffs appealed.

Bompas and Forbes (Benjamin and H. T. Atkinson with them), for the plaintiffs.

Waddy and Bruce, for the defendant Mycock.

The facts of the case and the arguments will be found set out at length in the judgment. The following authorities were cited and discussed, in addition to those referred to in the judgment of the Court:—*South v. Wigley* (1), *Sutton v. Gregory* (2), *Ex parte Bushell* (3), *Baker v. Charlton* (4), *Lloyd v. Ashby* (5), *Ex parte Baird* (6), *Palmer v. Stephens* (7), *Boyle v. Skinner* (8), *The Mercantile Bank v. Cox* (9), *The National Bank of Chemung v. Ingraham* (10), *Ludlow v. The Union Insurance Company* (11).

Cur. adv. vult.

THE SINGER, L.J. (on March 11) read the judgment of the Court.

This is an action brought upon two bills of exchange, of which the plaintiffs are the holders. The first is a bill for 276*l.* 15*s.*, dated the 6th of March, 1878, drawn by R. K. Kelly & Co. upon and accepted by Messrs. J. & R. Wilson, payable to the order of the drawers four months after date, and bearing the endorsement, "R. K. Kelly & Co.," "Wm. Beatson" and "Josiah Carr & Son." The second is a bill for 484*l.* 13*s.*, dated the 13th of March, 1878, drawn by Josiah Carr & Son, addressed

- (1) 3 Mo. & Sc. 174.
- (2) 2 Peake 150.
- (3) 3 Mont. D. & D. 615.
- (4) 1 Peake 111.
- (5) 2 Car. & P. 138; 2 B. & Ad. 23.
- (6) Law Rep. 5 Ch. App. 725.
- (7) 1 Den. 471.
- (8) 19 Missouri Rep. 82.
- (9) 38 Maine, 500.
- (10) 58 Barbour, 290.
- (11) 2 Sergeant & Rawle, 110.

Yorkshire Banking Co. v. Beatson (App.), C.P.

"Mr. Wm. Beatson, Chemical Works, Rotherham," and accepted in the name "William Beatson," payable to the order of the drawers four months after date, and indorsed by them; both bills were discounted by the plaintiffs upon the 16th of March, 1878.

The defendants to the action are William Beatson and John Henry Mycock. The signature "Wm. Beatson" upon each of the bills was the signature of the defendant Wm. Beatson. He has allowed judgment to go by default, and the action is defended by Mycock alone, who disputes his liability upon either of the bills.

The circumstances of the case are as follows:—Beatson for many years prior to December, 1877, carried on business as a chemical manufacturer at certain works at Rotherham. At the end of the year 1873 and the beginning of the year 1874, the plaintiffs made enquiries as to Beatson's commercial position of Josiah Carr, who was bringing them paper for discount with Beatson's name upon it, and the result of the enquiries being satisfactory, they discounted such paper. Beatson and Carr had some trade transactions together, but apart from these trade transactions there was a series of accommodation transactions carried out by accommodation bills between Beatson and the other parties to the bills now sued upon, including Carr himself, and these accommodation bills were from time to time renewed.

Down to the end of the year 1877 Beatson had no partner; but upon the 11th of December in that year a deed of partnership was entered into between him and the defendant Mycock.

By its terms the partnership was to last for a period of five years, with power of continuance. The value of the goodwill of the business, the works and premises where the same was carried on, and the machinery, plant and effects belonging to it, were estimated at 25,000*l.*, and Mycock was to purchase a one-fifth share of the business by the payment of the sum of 5,000*l.* The business was to be carried on under the style of "William Beatson;" the works and premises were to remain vested in Beatson, who

was to stand possessed of them for the purposes of the partnership; and the business was to be managed by Beatson, his partner not being required to attend to the business any further than he should think fit.

By the 11th clause of the deed it was provided that "Neither of the partners, without the written consent of the other first obtained, should on the credit of the firm make any payment advance or other application of the moneys or effects of the said partnership, or in any manner engage or use the same, or the name or credit of the partnership firm, except on account and for the benefit of the partnership, and in the usual manner of carrying on the business;" and by the 12th clause it was provided "that neither of the partners should lend or deliver upon credit any of the moneys or effects belonging to the partnership to any person whom the other partner should previously have forbidden to be trusted, nor without the previous consent in writing of the other partner would become bail, surety or security with or for any person whomsoever, or make, give, draw, accept or indorse any bond, bill, promissory note or other instrument, or enter into any obligation or engagement, or make any default whereby the estate and effects of the partnership might be made liable for the payment or satisfaction of any sum of money for which the partnership should not have received a full and sufficient consideration."

The object with which Mycock entered into this partnership was that of ultimately putting his son, who was then under age, into it, and as a matter of fact Mycock never interfered in any way with the management of the business, or occupied any other position in connection with it than that of a dormant partner. Beatson concealed from him any information relating to his accommodation transactions, and for his fraud upon him in this and other matters connected with the inception of the partnership was ultimately prosecuted and convicted. The plaintiffs never knew of the partnership until after July, 1878, at which date Beatson was a bankrupt. For some time

Yorkshire Banking Co. v. Beatson (App.), C.P.

prior to the formation of the partnership, Beatson had kept an account at the Sheffield and Rotherham Bank, headed "William Beatson," and after the formation of the partnership that account was continued without any change in its heading, and into this account Beatson paid all moneys, whether moneys belonging to the partnership or his own private moneys, and upon it he drew, whether for the purposes of the business or his own private purposes.

Beatson himself was called as a witness for the plaintiffs, and in addition to proving the facts already mentioned, gave evidence to the effect that he kept two cash books, of which one was, as he stated, a private book kept as manager at the place of business, the other a partnership cash book; that in the former he did not enter cash received on account of the partnership, but that in the latter all business payments were entered. With reference to his bill accommodation transactions generally, he stated that none of these were brought into the ledger either before the partnership or after, that the cash transactions relating to these accommodation bills were entered in the private cash book to which Mycock had no access, and were never put into the partnership cash book to which Mycock himself might have had access. With reference to his particular transactions with Josiah Carr, he stated that all trade transactions between them were over before the partnership, and that as regards the particular bills sued on they were bills drawn for his and Carr's accommodation, not for Mycock's, although he added that they were in a degree for the business as one way of finding capital, and that without the bill transactions there was not capital enough to work the business. He admitted that Mycock found the 5,000*l.* which he was to pay for his share in the business, that he never told Mycock that money was wanted, that he thought he was not making Mycock liable for any of the accommodation bills whether renewals or otherwise, and that he considered them private transactions and did not enter them in the partnership book. He further said that he considered the bank book

private, and that Mycock had left him to keep the banking account as he thought proper, that the proceeds of accommodation bills were paid into the banking account, and that out of such proceeds the price of goods supplied to the business and wages were sometimes paid. As regards the proceeds of the bills sued on, it appeared that a portion of them found their way into the banking account, but that upon the same day as this occurred Beatson drew out more than he paid in. On the part of Mycock an accountant was called, who upon an examination of Beatson's books proved, that apart from the accommodation bill transactions, the business had during the period between the beginning of January and the end of May, 1878, a cash balance to its credit, that the net result of the accommodation transactions was to reduce the balance, and that Beatson had drawn out for his own purposes, independent of the business, about 4,000*l.* Upon these facts taken from the notes of Lindley, J., before whom with a jury the case was tried, that learned Judge stated to the jury, as appears from the short-hand writer's notes, that the questions for them were—First. "Was the name William Beatson put to the bills to denote the firm or to denote William Beatson?"—Secondly "Did the bank take the bills as the bills of the chemical works whoever the proprietors might be, or as the bills of William Beatson only?"

The jury retired, and upon returning into Court the foreman stated that as regards the bill for 484*l.* 13*s.*, it having been drawn upon William Beatson at the chemical works Rotherham, the jury agreed that William Beatson's acceptance of it must be held to denote the acceptance of the firm, but that as regards the other bill they found no evidence upon the point. Upon being asked by the learned Judge to answer the question as regards that bill according to their judgment, the jury conferred again, and subsequently stated that from the fact of that bill being put in connection with the other they might take it as being the same thing, and to the second question they answered that the bank took the bills as the bills of the chemical works.

Yorkshire Banking Co. v. Beatson (App.), C.P.

Upon these findings a verdict and judgment was entered for the plaintiffs against the defendant Mycock. That judgment was subsequently set aside and judgment entered for Mycock by the Common Pleas Division upon the ground stated shortly, that in a case where the name of an individual is the name also of a firm, and that name is put to a bill, the presumption is that the signature is the signature of the individual and not of the firm; that consequently it lay upon the plaintiffs in this case to displace that presumption by shewing that the signatures to the bills sued upon were respectively the signatures of the firm, and that Beatson was authorised to use the firm name on the particular occasion and for the particular purposes; in other words, that the bills were given for partnership objects and as partnership acts, and that the plaintiffs had failed to discharge the burden cast upon them (12). Against the judgment of the Common Pleas Division the present appeal is brought.

In support of the appeal it is contended for the plaintiffs, either first, that where, as in this case, a signature is common to an individual and the firm of which the individual is a member, it is open to the *bona fide* holder for value without notice whose paper it is of a bill with such a signature upon it to sue either the individual or the firm; or secondly, that if this option is not open to the holder, there is a presumption that the bill was given for the firm and is binding upon it, at least where the individual carries on no business separate from the business of the firm of which he is a member. As regards the first of these two contentions, we think that it is not a well-founded one. The only authoritative sanction to it, upon which the learned counsel for the plaintiffs rely, is in a case of *McNair v. Fleming* (13), which appears to have been decided in the House of Lords in 1812, but which is not reported otherwise than in *Montague on Partnership*, vol. i. p. 37, and in the opinion of Lord Eldon, delivered to the House of Lords in the case

of *Davidson v. Robertson* (14), and which without further knowledge of the facts of the case and the exact bearing of the judgment upon them, it is impossible to treat as an authority. Lord Eldon does not quote it in support of so wide a proposition as that under consideration, but as bearing upon the proposition that a joint adventure was as proper a partnership as any other, and one of the adventurers would be bound by the indorsement and acceptance of the other, a proposition which had been negatived by one of the interlocutors of the Scotch Court, finding that whatever might be the case in a proper partnership, one person concerned in a joint adventure is not entitled by subscribing a firm to bind the other. While, therefore, there is really no authoritative sanction for this contention, there is abundance of authority against it in the numerous cases in the English and American Courts where the liability of partners upon a bill signed in a name common to the firm and an individual member of it has come under consideration and has been discussed, not upon the footing of any right of election on the part of the holder of the bill, but upon the particular circumstances of each case and the presumption as applicable to them, cases which we shall have to refer to in connection with the plaintiffs' second contention. Apart, too, from authority, it appears to us manifestly contrary to the true principles of law, that the holder of a bill bearing upon it a name which *prima facie* indicates an individual, and would naturally lead to credit being given to the individual alone, should, upon discovery and proof that there is a firm of which the individual is a member carrying on business under his name, have the right of going against the firm although at the same time that the proof is given, it is proved also that the bill was signed by the individual for himself and not for his firm, and for consideration entirely unconnected with any partnership purpose.

The second contention made on behalf of the plaintiffs is one of more weight,

(12) See 48 Law J. Rep. C.P. 428; Law Rep. 4 C.P. D. 204, 212.

(13) 1 *Montague on Partnership*, 37.

(14) 3 Dow. 218, at p. 239.

Yorkshire Banking Co. v. Beatson (App.), C.P.

and apart from the intrinsic importance of the question involved in it, there is an additional importance derived from the fact that if the contention be correct, it at least displaces the ground upon which the judgment of the Court below rests, although it will still remain to be considered whether the judgment may not be rested upon another ground.

As a matter of principle there is considerable force in the arguments both for and against the contention. Against it it is said that where a signature to a bill is of a name which in itself and *prima facie* indicates an individual, and would lead to credit being given to the individual, and the holder of the bill suing upon it is therefore compelled to give some proof that the name indicates a partnership, it is but just that he should be compelled to go the whole length of proving not only that a partnership existed under the particular name, and that the individual carried on no business separate from that carried on by the firm, but further that the bill was signed by the individual as a partnership act, and for partnership objects. In support of the contention it is said that inasmuch as a bill of exchange is ordinarily used as a trade instrument, there is a presumption that a bill having upon it a name common to the firm and to the individual is a trade bill, and therefore the bill of the firm in a case where it is proved or admitted that there is no trading in the name except by the firm. In the absence of authority upon this question, our opinion upon it would be in favour of the plaintiffs' contention. In point of convenience and expediency and in the interest of trade it has much to support it. The vast majority of bills given under the circumstances supposed would be really partnership bills, and yet it would be often difficult if not impossible for the holders of such bills to do more than prove that the only trade carried on under the individual name was the trade of a partnership, and if they were compelled to go further and prove that the particular bill was a partnership bill, the effect might be that in many cases dormant partners, and in some cases ostensible ones too, might escape from great

liabilities. On the other hand the partners sought to be made responsible on the bills, would in most instances be able to prove whether any particular bill sued upon was or was not a partnership bill, and should, as it appears to us, at least have the *onus* of doing so thrown upon them when it is through their own act in allowing the firm name to be the same as that of an individual in the firm that difficulty and doubt arise. But in the Court below it was considered that the American authorities clearly negated this view, and that the weight of English authority is in favour of the American view of the law.

We propose then to consider first the English authorities.

In *Swan v. Steele* (15) two persons of the name of Wood and Payne were wholesale grocers in Liverpool, trading under the firm name of Wood and Payne, and also carrying on under the same firm name, and at their counting-house, the business of buying and selling cotton. The defendant Steele was a dormant partner with them in this latter business. It was held that he was liable upon an indorsement in the firm name of a bill which had been paid to Wood and Payne for cotton sold by the firm, but which had been delivered by them to provide for an acceptance in the firm name for sugar supplied to the grocery business.

It is difficult to see how the case could have been otherwise decided, for the bill sued upon was admittedly a bill in which Steele was interested as indorser and holder with his partner, and consequently the indorsement over of that bill, although improper under the circumstances, was still manifestly an indorsement in fact by the partnership of which Steele was a member. The evidence shewed what the facts were, and the judgment of Lord Ellenborough assumed that the indorsement was in the name of the partnership of which Steele was a member, and upon that assumption decided that in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners.

Emily v. Lye (16), which is commented

(15) 7 East, 210.

(16) 16 East, 7.

3 D

Yorkshire Banking Co. v. Beaton (App.), C.P.

on in the judgment of the Court below as an authority in favour of the defendant upon the point under consideration, has really no bearing upon it. There in an action upon several bills of exchange, and for money had and received, it was attempted to make the defendant liable, either upon the bills, or in respect of the money received upon the discount of the bills, which was applied to partnership purposes, where the signature upon the bills was not in the firm name, which was George Lye & Son, but in the name E. L. Lye, which was the individual name of the partner signing. The counts upon the bills were upon the argument abandoned, as it was obvious, as Lord Ellenborough said in his judgment, that "on a bill of exchange drawn by one only, it cannot be allowed to supply by intentment the names of others in order to charge them," and it was held that on the mere discount of the bill no right could arise against the defendant by reason of the proceeds being used for partnership purposes; in other words, that the transaction was nothing more than a purchase of the bills from the signing partner.

The case of *Ex parte Bolitho* (17) is claimed as an authority for the defendant. There Peter Blackburn was a secret partner in a business carried on by Isaac Blackburn in his own name, and was sought to be made liable as drawer in respect of bills drawn in the name of Isaac Blackburn by Isaac himself. Upon the affidavits, it appeared that Peter Blackburn also carried on a separate business, and that after Isaac Blackburn had drawn and indorsed the bills Peter Blackburn indorsed them also with his own name, for the purpose of getting them discounted. The Lord Chancellor stated that it was impossible for him, upon the affidavits, to decide between the parties, and that the case must be sent to a Court of law for its deliberation, and he directed an issue whether the two Blackburns were jointly liable upon all or any of the bills.

In the course of his judgment, however, he said, "If the money is advanced to A. and B. and the lender takes a bill from

one of them only, he cannot maintain an action upon the bill against the two. Now if A. and B. are partners and also separate traders, and A. draws a bill and indorses it in his own name, and B. also indorses it and they become bankrupts, what is there to prevent the holder of a bill from proving against the separate estate of each of them? And unless you can shew that when A. drew the bill he drew it not as A. but as A. and B., there can be no legal contract upon the bill as against the two." In these remarks of Lord Eldon the introduction of the element of separate trading by A. and B., and of the further element of both A. and B. putting their names to the bill so differs Lord Eldon's supposed case from the case we are considering of a bill signed in a name common to a firm and an individual member of the firm, where there is no trading separate from the trading of the firm, and no signature to the bill but that of the common name, that *Ex parte Bolitho* (17) appears to us rather to support the contention of the plaintiffs' counsel than to assist the defendant Mycock.

The case of *The Bank of South Carolina v. Case* (18) was one in which three persons carried on business in partnership in England under the firm name of Crowder, Clough & Co. One of the partners, J. B. Clough, was sent out to America to form a branch house, which he did form under his own individual name. He was restricted, under the partnership articles, from transacting any business in America except on the partnership account; and, as a matter of fact, as appears from the report, p. 432, he had no individual business, and the name of J. B. Clough was never used by him in trade, or in drawing, indorsing or accepting, or negotiating bills of exchange, except for the benefit and on account of the partnership. Under the circumstances it was held that all the partners were liable as indorsers, in respect of certain bills indorsed by Clough in the name of J. B. Clough, and which were connected with partnership transactions, although Clough, in indorsing them, disregarded certain specific instruc-

(17) 1 Buck, 100.

(18) 8 B. & C. 427.

Yorkshire Banking Co. v. Beatson (App.), C.P.

tions given him by his partners, and exceeded his authority. It is not necessary to discuss whether the doubts raised by Crompton, J., in *Nicholson v. Ricketts* (19), as to the correctness of this decision, are or are not well-founded. It is sufficient for our present purpose to say that the decision proceeded upon all the facts of the case, and not upon any doctrine as to presumption or burden of proof. But the case of *Furne v. Sharwood* (20) is a distinct authority upon the point under consideration. There a business was carried on by trustees for creditors in the name of Samuel Maine, one of the persons who had previously carried it on in partnership. Maine had also for a time a separate business of his own. The plaintiff had discounted for the old partnership, and also had been accustomed to lend Maine money for the purposes of his private business. Maine, after a time, sold his separate business and ceased to carry it on, and having subsequently indorsed bills in the name "Samuel Maine," one of which had been discounted by the plaintiff, and was sued on, and the proceeds of which were placed to his credit at his banker's, and were drawn upon indiscriminately for the purpose of the business to which he was agent, not for his own private purposes, the trustees were held liable as indorsers, and Lord Denman, C.J., in delivering the judgment of the Court, said (21):—"Prima facie, therefore, the signature, 'Samuel Maine,' was their signature, and they would be bound by it. But it is said that Maine carried on a separate business of his own, and that the plaintiff was bound to shew that the indorsements in question were on account of the business of the trustees and not in his separate business. Now it appears that the bills were discounted with persons who were in the habit of discounting for the former firm who assigned their effects to the defendants, as trustees; and moreover that the bills in question were not discounted till after Maine had ceased to carry on his separate business. Under these circumstances, we think that the *onus* of shew-

ing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, lay on the defendants. Several cases were cited, which it is not necessary minutely to examine; it is sufficient to say that they are not inconsistent with this view of the present case. We are therefore of opinion that the defendants were bound by the indorsement of Maine, and that the plaintiff, on this ground of objection, would be entitled to our judgment."

This decision is in no way shaken by that in *Nicholson v. Ricketts* (19), where two firms with distinct trade names agreed to carry on joint exchange operations under such circumstances as to make them partners in them; and it was held that the signature to bills of one of the two firms drawn in course of the exchange operations did not make both firms liable as drawers; for the decision proceeded simply on the ground that by the arrangements between the two firms the names of the two firms were to be used separately, the paper to be dealt in being drawn by one firm and accepted by the other, and, as Cockburn, C.J., said at p. 523, it did not appear that the drawing firm had any authority, express or implied, to bind the defendant by drawing bills. The case of *In re the Adansonian Fibre Company; Miles's Claim* (22) was substantially the same as that of *Nicholson v. Ricketts* (19), and was decided upon the same considerations. In each of these cases the Court came to the conclusion, as a matter of fact, upon all the circumstances before it, that the name on the bill was not intended to be and was not the name of the partnership sought to be made liable upon it.

Upon this view of the English authorities they appear to support the view that where a name is common to a firm, and to an individual member of such firm, and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn, accepted or indorsed in the common name is a bill drawn, accepted or indorsed for the partnership, and for

(19) 2 E. & E. 497.

(20) 2 Q.B. Rep. 388; 11 Law J. Rep. Q.B. 119.

(21) 2 Q.B. Rep. 418.

(22) Law Rep. 9 Ch. App. 635.

Yorkshire Banking Co. v. Beaton (App.), C.P.

which the partnership is liable, and that it lies upon the defendants in an action against the partners upon such bill to get rid of the *prima facie* case made against them. But as the Court below relies much upon the American authorities as uniformly negating that view, and those authorities have been much discussed in the argument before this Court, we think it desirable to refer to them. The authorities specially cited in the judgment of the Court below are *Parsons on Bills of Exchange*, p. 531, *Story on Partnership*, pp. 106, 142, the decision in the Supreme Court of New York of *Oliphant v. Mathews* (23), and the direction of Story, J., to the jury in *The United States Bank v. Binney* (24).

The passage referred to in *Parsons* does not bear out the proposition for which it is cited. He says, "The burden of proof is upon the plaintiff to shew that the paper was given in the business and for the use of the firm, for it will be intended *prima facie* to have been given in the separate business of the partner signing it, and to be binding on him alone, at least if he is also engaged in business on his own separate account." The views of Story, J., are best to be taken from his ruling in *The United States Bank v. Binney* (24), wherein directing the jury he used this language: "In the present case the signature of John Winship may be on his own individual account as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof is upon the plaintiffs to establish that it is a contract of the firm and ought to bind them."

But there was evidence to go to the jury in that case that the partnership was limited to a soap and candle business, and that the accommodation notes which were sued on were given in respect of consignments of meat, which might have constituted, and it was contended did constitute, the separate business of Winship. It is doubtful, therefore, whether Story, J., intended his proposition to extend to a case where no separate business could even be suggested as existing.

(23) 16 Barbour, 608.

(24) 5 Mason, 126, 185.

On the other hand, in the case of *Mifflin v. Smith* (25), Rogers, J., dealt with the doctrine of presumption in a case where the question was, whether a loan of money obtained by a member of a partnership carried on in his individual name, was obtained on the faith of the partnership business or on the credit of private speculations of the individual partner, and he laid it down that the presumption was that it was made on the faith and credit of the business, saying—"If a retail merchant gets a note discounted, is it not to be presumed to be in the regular prosecution of his business;" and adding, "The difficulty arises from the name of the individual and the name of the firm being the same. That is the presumption, liable, however, to be rebutted if the jury believe from the evidence that was not the state of the fact."

A motion to the Supreme Court of Pennsylvania founded, amongst other things, upon the alleged error of this direction, was refused. This case was decided in 1827. The case before Story, J., was in 1828.

In 1845 the question under consideration again arose in the Supreme Court of New York in the case of *The Bank of Rochester v. Monteath* (26), where the name of William Monteath, an agent of a firm, had been used as the firm name, and the Court said—"If William Monteath had also been in business on his own account, then the acceptance by writing his name on the face of the bills would have been an equivocal act, and it would have been necessary to shew that he accepted on account of the partnership, and not in his own private business;" and after citing among the authorities for this proposition, *The United States Bank v. Binney* (24), thus indicating that they must have thought that in this case there was a separate business carried on by the individual whose name was used, the Court added, "but there was no evidence that William Monteath was engaged in any other business than the affairs of this partnership. We must then regard those bills as drawn on and accepted by the house doing business in the name of Wil-

(25) 17 Sergeant & Rawle, 166.

(26) 1 Den. 402.

Yorkshire Banking Co. v. Beatson (App.), C.P.

liam Monteath." In 1853 was decided also in the Supreme Court of New York the case of *Oliphant v. Mathews* (23), which is the second of the two cases cited in the judgment of the Court below. That case when critically examined will be found not to be inconsistent with the cases of *Mifflin v. Smith* (25), and *The Bank of Rochester v. Monteath* (26). It is true that the Court laid down in general terms that where a partnership is carried on in the name of an individual, and a suit is brought against the partners upon a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual and not of the partners, the Court immediately qualified the generality of the proposition laid down by saying that the presumption might be repelled and overcome (in other words, the *onus* of proof might be shifted) by proof as to the business in which such person was engaged, and while citing *Mifflin v. Smith* (25), as explaining what proof would be sufficient, the Court pointed out that in the case before them it was proved that the individual did business and borrowed money on his own account as well as on account of the partnership, and it was not shewn that one was not as constant and regular as the other.

This case, therefore, is in no way inconsistent with the previous case decided in the same Court of *The Bank of Rochester v. Monteath* (26), and none of the other cases cited in the argument before us carry the doctrine of presumption in favour of the defendants further.

It appears to us, therefore, that the American authorities are in accord with the English upon the point under consideration, and that both fail to support the view taken by the Court below, and are in favour of the second contention urged in this case on behalf of the plaintiffs.

Applying then the presumption for which the plaintiffs contend to the circumstances of the present case, the matter stands thus:—

The only business carried on in the year 1878 in the name of and by William Beatson was the business of the partner-

ship and both the bills sued upon have the appearance of trade bills.

Prima facie, then, the bills were bills indorsed and accepted respectively, in the name and on account of the partnership, and if that *prima facie* case were not displaced, Mycock would be liable upon them to the plaintiffs as *bona fide* holders for value without notice, even though they were so endorsed and accepted for private purposes of Beatson and in fraud of his partner.

The nature of the partnership business was such as to give Beatson, in respect to persons dealing with him in business, an implied authority to bind his partner by bills of exchange, and his partner, although a secret one, must be held responsible upon any bill signed by Beatson in the name of the firm in favour of a holder whose title cannot be impeached, however much Beatson in signing that name may have exceeded the authority and broken the trust reposed in him by the agreement of partnership, as was said by the Court in giving judgment in the case of *Wintle v. Crowther* (27). "Where a partnership name is pledged, the partnership of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound unless the title of the person who seeks to charge them can be impeached," and the authorities generally, both English and American, are uniform in support of this view. There is no difference in this respect between the dormant and the ostensible partner, and when once it is established that a name common to a firm, and an individual member of it, has been put to a bill as the name of the firm, there is no difference between the liability of partners carrying on business in such a name and the liability of partners carrying on business in a name which bears in itself the stamp and evidence of a partnership. It may perhaps be argued that in the latter case the *bona fide* holder, without notice, is induced by the name itself to trust a firm, and is therefore entitled to have all the responsibility of all the members

(27) 1 Cr. & J. 316, at p. 318.

Yorkshire Banking Co. v. Beatson (App.), C.P.

of that firm, while an individual name would suggest no responsibility other than that of the individual whose name it is, but when it is remembered that firm names are often used by individual traders while individual names are often used by firms, the argument practically comes to nothing, and a common principle applicable to both cases, remains alone consistent with mercantile expediency and general law.

But assuming that there is no difference as matter of law between the two cases, there is as matter of evidence a very real and very practical difference. A name in itself indicating a firm does not, except in rare instances, of which the case of *Stephens v. Reynolds* (28), is an example, leave open any doubt as to the meaning of a signature in such name, but a name which in itself indicates an individual is, notwithstanding the effect of any legal presumption, ambiguous, and there are likely to be few, if any, cases where the decision of the jury or of a Court will be rested upon the presumption alone. The present case is no exception to the rule, and the presumption in favour of the plaintiffs arising from the fact that Beatson carried on no business separate from that of the partnership really sinks into comparative insignificance by the side of additional facts which are proved in the case. Upon those facts we have to decide as the Courts in *Nicholson v. Bicketts* (19) and *In re the Adanson Fibre Company; Miles' Claim* (22), were called upon to decide, whether the signature to the bills upon which the dispute arises was intended to denote, and did denote, the partnership of which the defendant was a member. In the first place it is clear that the bills were bills which, if signed by Beatson for the partnership, were so signed by him without the authority and in fraud of his partner, and in respect of which no action would have lain against Mycock, if they had remained in the hands of Josiah Carr & Son who took them with notice. In the second place it is, we think, equally clear that, as between Beatson and Mycock, the bills

were not treated as having been signed by Beatson on partnership account.

They were not entered in any partnership book, and indeed even before the partnership as well as after it commenced, the accommodation transactions of Beatson were treated as not forming any part of the transaction of his business and were excluded from the ledger.

In the third place the evidence establishes that the accommodation transactions of Beatson after the commencement of the partnership diminished rather than added anything even temporarily to the capital of the firm, and, lastly, Beatson himself, called as a witness by the plaintiffs themselves, disproved, as it appears to us, the fact that in signing the bills in question he signed for the partnership.

He stated that he thought he was not making Mycock liable for any of the accommodation bills whether renewals or otherwise, and that he considered them private transactions and did not enter them into the partnership books. Can any inference be reasonably drawn from such evidence than that Beatson, in signing the bills, intended to sign and did sign them for himself? We think that no other inference ought to be drawn and that the jury in finding that "William Beatson," upon each of the bills, was intended to denote the firm, gave a verdict against the evidence, and one which ought not to stand. The reason given in support of their finding by the jury that one bill was addressed to the drawee or drawees as of the Chemical Works, Rotherham, and that the other was so connected with it as to stand or fall with it, might have been a good reason in a case where the evidence was, in other respects, doubtful, but in the present case met to some extent by the very form of the bill itself, which, while addressed to the drawee or drawees at the partnership works, contains in the term "Mr." prefixed to the name "William Beatson," an indication that the individual, and not the firm, was intended, and is entirely outweighed by the clear evidence to which we have referred; and we understand that the learned Judge who tried the case was himself dissatisfied with the finding. The additional finding that the bank took

Yorkshire Banking Co. v. Beatson (App.), C.P.

the bills as the bills of the Chemical Works is clearly irrelevant if the former finding is wrong, for if the bills were in fact signed, not in the name of the partnership, but of William Beatson individually, and for his private purposes, the fact that the plaintiffs were unaware that Mycock was a partner with Beatson, and never advanced any money on the faith of his credit, but did at the same time give credit to the name of Beatson as being the name of the owner of the Chemical Works, can give them no more right against Mycock than if he had been a mortgagee of the works instead of a partner in them.

The law in a case of bankruptcy asserts a title in the general body of creditors of a bankrupt to property, of which he may have been at the time of his bankruptcy in apparent possession with the consent of the true owner, and upon the faith of which he gained a false credit. But in actions founded upon purely personal contracts, the law does not recognise the mere moral right which a creditor may attempt to assert against a person, in consequence of such person having entrusted to another property, in the belief of his ownership of which the creditor may have contracted with him.

In other words, in a case like the present, there is no conduct on the part of the dormant partner which makes it inequitable on his part to deny, or which estops him from denying his liability upon a contract to which he was, in fact, no party, from which he has derived no benefit, and in respect of which he was not held out to the person suing him as liable. As regards the point nothing turns on the subject-matter of the action being negotiable instruments. Beatson, by giving the use of his name to a partnership of which he was a member, and the only ostensible member, did not preclude himself from making contracts binding himself alone, and in any contracts, *de facto*, made by him, whether by parol or in writing, the question, the answer to which would determine Mycock's liability or freedom from liability, would not be whether the other contracting party trusted Beatson because he supposed him to be sole owner of the Chemical Works;

but whether Beatson, whom alone he knew and actually trusted, was acting as agent for the partnership or in his individual capacity for himself. This kind of question was raised in the case of *The Bank of Scotland v. Watson* (29), where the bank and its agents carried on a separate banking business at the same office, and the bank was unsuccessfully sued by a person who relied in support of his claim against the bank upon a receipt which bore the address of the common office.

One point only remains for decision. The verdict and judgment for the plaintiffs have been properly set aside by the Court below, but is it right that the judgment entered instead for the defendant Mycock should stand? We have entertained some doubt whether the case ought not to go to another jury to be decided upon the principle laid down in this judgment; but we have come to the conclusion that the Court ought not to put the parties to this expense.

The case is one in which no additional facts remain to be proved, and in which, upon the facts proved, no jury would be justified in finding a verdict adverse to the defendant Mycock.

It is one, therefore, in which, to use the words of Order XL. rule 10 of the general rules of the Supreme Court, we have before us, as the Court below had, all the materials necessary for finally determining the questions in dispute, and in this state of circumstances we think that the judgment of the Court below should stand, and that this appeal should consequently be dismissed.

Appeal dismissed. Judgment for the defendant Mycock.

Solicitors—Jacobs & Vincent, agents for North & Sons, Leeds, for plaintiffs; Learoyd, Learoyd & Peace, for defendant Mycock.

[IN THE COURT OF APPEAL.]

1879.
Nov. 29.
Dec, 1, 2, 5.

SIMM AND OTHERS v. THE
ANGLO-AMERICAN TELE-
GRAPH COMPANY.

THE ANGLO-AMERICAN TELE-
GRAPH COMPANY v. SPUR-
LING AND OTHERS.*

Company—Transfer of Stock—Registration—Stock Certificate—Estoppel.

On a transfer of stock in a company, incorporated under the Companies Act, 1862, the issue of the company's stock certificate to the transferee is not a representation that the immediate transfer to him is valid, so as to give him any right of action against the company if it proves invalid.

A buyer, on the Stock Exchange, of stock in a company incorporated under the Companies Act, 1862, received, and lodged with the company for registration, an instrument which purported to be a transfer of the stock from the registered holder to himself. After making enquiries, the company registered the transfer, and the buyer, having transferred the stock to a bank in order to secure advances, the company registered that transfer also, and issued their stock certificate to the bank as the registered holders. The original transfer to the buyer was discovered to be a forgery, and he thereupon paid off his debt to the bank, and brought an action, in which he and the bank were plaintiffs, to recover the value of the stock from the company:—

Held, that the buyer had no right by estoppel against the company in respect of the stock; that the company, by issuing their stock certificate to the bank, as the buyer's transferees, had made no representation to the buyer that the original transfer to him was valid; and, therefore, that the action was not maintainable.

These were appeals from the judgment of Lindley, J., given in two actions tried together before him without a jury.

The material facts common to both actions, and not in dispute at the trial, were as follows:—

At the beginning of November, 1876, T. Coates was the owner and the registered holder of 5,000*l.* consolidated stock

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

in the defendant company, who were a company registered under the Companies Act, 1862. In the same month one Phillips, a clerk employed by Coates, instructed W. Thomson, a stock broker and member of the Stock Exchange, to sell this stock on behalf of Coates. Thompson accordingly offered the stock for sale on the market in the usual way, and on the 25th of November, 1876, it was purchased by Burge, Brown & Co., brokers, for the settlement on the 30th of November. On that day a transfer of the stock, purporting to be executed by Coates, together with the company's certificate that Coates was the registered holder of the stock, was handed by Thompson to Burge & Co., who thereupon paid to Thompson the purchase money for the same.

This transfer and certificate had been given to Thompson by Phillips, who had forged Coates's signature to the transfer, and stolen the certificate from a drawer in his master's office.

The transfer, at the request of Burge & Co., was made out to Spurling and Skinner, as transferees of the stock, with a view to a proposed loan by Spurling and Skinner to Burge & Co. on the security of the stock. The transfer was in ordinary form, and purported to be for a nominal consideration of five shillings. The carrying out of the proposed loan was afterwards abandoned by both parties, but the names of Spurling and Skinner having been inserted in the deed of transfer as transferees, they, at the request of Burge & Co., accepted the transfer on the 1st of December, and on the same or the following day lodged it with the company for registration. On receiving notice of the transfer from Coates to Spurling and Skinner, the company's secretary wrote to Coates, informing him that a transfer, purporting to be from him to Spurling and Skinner, had been lodged at the company's office for registration, and that if the company did not hear from him to the contrary by return of post, the transfer would be assumed to be correct. This letter having been intercepted by Phillips, the company received no answer to it. On the 2nd of December the company drew up their stock certificate, certifying that Spurling and Skinner were the re-

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

gistered holders of the 5,000*l.* consolidated stock, and they were duly registered in the company's stock ledger as transferees and holders of the stock, but the certificate was not issued to them. On termination of the negotiations for the loan from Spurling and Skinner, Burge & Co. arranged for a loan on the security of the stock from their bankers, the National Bank.

On the 6th of December Spurling and Skinner, at the request of Burge & Co., executed a transfer of the stock in ordinary form, and for a nominal consideration of five shillings, to Simm and Ingelow, the plaintiffs in the first action, who were respectively the secretary and manager of the National Bank.

On this transfer being lodged with the stock certificate by the transferees at the company's office for registration, the company's secretary wrote a letter to Spurling and Skinner, informing them of the fact, and saying that unless an answer was received by return of post the transfer would be assumed to be correct.

No answer to this letter was received, and on the 9th of December the company issued their stock certificate to Simm and Ingelow, and duly registered their names in the stock ledger as holders of the stock.

The certificate was in the following form:—

"This is to certify that of &c., is the registered holder of £ of consolidated stock in the Anglo-American Telegraph Company, Limited, subject to the articles of association and regulations of the company.

"Given under the common seal of the company the 9th day of December, 1876.

"Signed, &c.

"£

"Entered at S.R.B.

"T. Weaver, registrar.

"NOTE.—This stock certificate, together with the deed of transfer, must be deposited with the company previous to any new certificate being issued, either for the whole or any portion of the stock," &c.

The National Bank, on or about the 9th of December, made the advances to Burge & Co. on the security of the

stock, as previously arranged, and the company treated the plaintiffs in the first action as holders of the stock, and paid them the dividends upon it up to October, 1877.

About this date the fraudulent dealings of Phillips were discovered. The company refused to pay the dividend due in January, 1878, and declared that they should treat the transfer to the plaintiffs as invalid, and refuse to recognise them as holders of the stock.

Burge & Co. thereupon paid off the bank's charge on the stock, and brought their action in the names of Simm and Ingelow, to recover the price of the stock, and some dividends on it then due, as damages for the wrongful refusal of the company to recognise the plaintiffs as the owners of the stock. This was the first action.

The second action was brought by the company against Spurling and Skinner, as Burge & Co.'s nominees, to recover, in the event of the telegraph company being liable in the first action, the price of the stock, as damages for an untrue representation by the defendants that the transfer from Coates to them was valid.

At the trial, Burge & Co. were added as plaintiffs in the first action, and as defendants in the second.

Lindley, J., in giving judgment, said, that he drew the inference of fact that there was no negligence, in the sense of want of reasonable care, on the part of any of the parties before him, and no fraud was imputed to anyone in the transaction except Phillips. The learned Judge held, on the authority of *In re The Bahia and San Francisco Railway Company* (1), and *Hart v. The Frontino, &c. Gold Mining Company* (2), that Simm and Ingelow had a good title, by estoppel, to the stock; that their title did not at any time cease by reason of anything affecting the relation between them and Burge & Co.; that as an obligation was cast upon the telegraph company, by section 29 of the Companies Act, 1862, to keep a correct register; and further, as they did

(1) 37 Law J. Rep. Q.B. 176; Law Rep. 3 Q.B. 584.

(2) 39 Law J. Rep. Exch. 93; Law Rep. 5 Exch. 111.

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

in fact, take upon themselves the duty of making enquiries when a transfer was brought to them for registration, the loss, as between themselves and Burge & Co., both innocent parties, must fall upon the company. He therefore gave, in the first action, judgment for the plaintiffs for the value of the stock at the time when the Telegraph Company denied the plaintiffs' title, and in the second action judgment for the defendants.

The telegraph company appealed from the judgment in each action.

Watkin Williams and H. Davey (Finlay with them), for the telegraph company.—It is conceded that, as respects the first action, so long as the loan from the National Bank to Burge & Co. was not paid off, the telegraph company was estopped from denying the title of the plaintiffs as representing the bank. But the estoppel ceased when the loan was paid off. Simm and Ingelow then became bare trustees for Burge & Co., who are the real plaintiffs. An estoppel cannot give a good title to property which in fact belongs to another. The stock has remained the property of Coates. The phrase "good title by estoppel" must be meant in the sense that the rights of the plaintiffs ought to be considered as though they had a good title as against the telegraph company. Lindley, J.'s judgment is founded upon a misapprehension of the distinction between an estoppel by deed, and "*in pais*." In the former case an estoppel may change the title to property where there is a person capable of giving a good title either at the time he represents that he has passed the property or subsequently. Estoppel "*in pais*" does not arise until an action is brought—*Burkinshaw v. Nicholls* (3), *per* Lord Blackburn. Where there is no loss there is no right of action, and the estoppel goes. Burge & Co. being admittedly the real plaintiffs here there is no estoppel in their favour against the telegraph company. There has been no untrue representation by the company to Burge & Co. acted upon by them. On the contrary,

Burge & Co. by presenting the forged transfer for registration, represented to the company that a good transfer of the stock had been made from Coates to them. The cases of *In re The Bahia and San Francisco Railway Company* (1) and *Hart v. The Frontino, &c., Gold Mining Company* (2), on which the judgment of Lindley, J., was founded, are not in point. In the first of these cases there was an untrue representation by the company upon which the transferees of shares had acted, and had suffered loss in consequence. The second case is only a slight extension of the principle of the first, and in neither of them was there any untrue representation made by the person seeking to recover as there is here. If there was any representation by, and estoppel against the telegraph company, the measure of damages would be the loss actually sustained—*In re The Bahia and San Francisco Railway Company* (1). In trover the measure of damages is not necessarily the value of the goods, it is the loss actually sustained through the defendant's wrongful act—*Johnson v. Stear* (4), *Ohinnery v. Vial* (5). From the date of the registration of Spurling and Skinner up to the present time, Burge & Co. have suffered no loss, but on the contrary, they have gained a benefit by obtaining advances from the bank.

Benjamin and Bush Cooper, for all the plaintiffs in the first action.—A transfer is lodged with the company for enquiry as well as registration, and a duty is cast upon the company to tell the transferee if they ascertain that the transfer is not genuine. That is shewn by the rules of the Stock Exchange. The fact that an enquiry is made by the company shews that they do not depend upon any warrant by the sender of the transfer that it is genuine. There was, therefore, no representation of the validity of the transfer by Spurling and Skinner acting for Burge & Co. The authorities shew that a presentation of a transfer is no warranty of its validity—*In re The Bahia and San Fran-*

(4) 15 Com. B. Rep. N.S. 330; 33 Law J. Rep. C.P. 130.

(5) 5 Hurl. & N. 288; 29 Law J. Rep. Exch. 180.

(3) 48 Law J. Rep. Chanc. 179; Law Rep. 3 App. Cas. 1004.

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

San Francisco Railway Company (1), *Robinson v. Reynolds* (6), *Leather v. Simpson* (7). The nature of the estoppel relied on by the plaintiffs must next be considered. An estoppel may be created after the payment of money, by conduct which induces the person raising the estoppel not to take measures for his own protection—*Cocks v. Masterman* (8). In the present case the certificate is absolute in form; it is more than a mere representation. Whether or not the stock exists as part of the capital of the company is immaterial. The rights of the plaintiffs in relation to the company must be dealt with as if it did exist. By issuing their certificate the company induced the plaintiffs to rest on their title without further enquiry. The case, therefore, is within *Knights v. Wiffen* (9) and *Cocks v. Masterman* (8). The only distinction between this case and *In re The Bahia and San Francisco Railway Company* (1) is one of fact and not of principle. Here we rested on our title instead of selling the stock on the certificate, as was done in *In re The Bahia and San Francisco Railway Company* (1). It is said that the plaintiffs have not been damaged by the representation of the company. They have lost the remedy against the broker provided by the rules of the Stock Exchange. There was a duty upon the company to ascertain whether the transfer was valid—*Ashby v. Blackwell* (10). *Simm and Ingelow* were purchasers of the stock for value. They had a beneficial interest and a good legal title by estoppel. When their beneficial interest went, their legal title remained, and they have not been divested of it, but hold it for the benefit of those who claim through them.

Watkin Williams in reply.—*Ashby v. Blackwell* (10) is not in point. There the company by their secretary were guilty of negligence in accepting the forged instrument. They omitted to take

the precautions required by their own articles of association. If the plaintiffs ever had a remedy under the rules of the Stock Exchange they have it still. He also referred to *Hillyar v. The South Sea Company* (11) and *Price v. Neal* (12).

Day and A. M. Channell appeared for *Spurling and Skinner*, the defendants in the second action, but did not argue the questions involved in it, as the judgment of the Court of Appeal made it unnecessary to do so.

BRAMWELL, L.J.—I have come to the conclusion that the judgment of *Lindley, J.*, in the first case cannot be supported, and that our judgment must be for the company.

Burge & Co. are now plaintiffs in the action. *Simm and Ingelow* continue to be plaintiffs, but they have no beneficial interest in the subject matter. They are bare trustees for *Burge & Co.* It is manifest, therefore, that the case must be dealt with as if *Burge & Co.* were sole plaintiffs.

The next position which I think is almost equally well established as a matter of demonstrative reasoning is that *Burge & Co.* cannot have any greater right or better title against the company, because they procured the transfer to be made to *Spurling and Skinner*, and procured *Spurling and Skinner* to register the stock, and to transfer it to *Simm and Ingelow*, so that now the stock stands in the names of the latter. *Burge & Co.* had no better title to the stock or right against the company than if they themselves had taken to the company the document purporting to be a transfer signed by *Coates*, and the company had registered *Burge & Co.* as owners, and had issued to them certificates that they were stockholders. In that case would *Burge & Co.* have had the right against the telegraph company which they now claim? They would have had no true title, because the transfer purporting to be executed by *Coates* was a forgery; that is beyond doubt. Then, would they have had a title, or, if that word is inaccurate, a

(6) 2 Q.B. Rep. 198.

(7) 40 Law J. Rep. Chanc. 177; Law Rep. 11 Eq. 398.

(8) 9 B. & C. 902.

(9) 40 Law J. Rep. Q.B. 51; Law Rep. 5 Q.B. 660.

(10) Amb. 502,

(11) 2 P. Wms. 70.

(12) 1 Wm. Black. 390,

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

right by estoppel? That is to say, would the company have been estopped from saying to Burge & Co., "You are not the holders of this stock, and you have no right to call upon us to indemnify you in respect of it." I do not wish to say a word against the doctrine of estoppel. It may be very usefully applied in some cases. But an estoppel exists where the truth is one way, and a person is compelled to act as if it was not the truth but something else was. If the company are estopped from denying that Burge and Co. are the stockholders, it must be because they are estopped from setting up the facts which would shew that Burge & Co. are not the stockholders. What are those facts? For a man to have a true title as the transferee of stock his transferor must have had the stock, and must have executed an instrument of transfer, and the transferee must have accepted that instrument. It is said that the company are estopped from denying that Burge & Co. had a good title, and that Coates did execute a transfer to Burge & Co. I think they would be estopped from denying that Coates was the holder of the stock with their authority, but why are they estopped from denying that he transferred it? I desire to avoid using an expression which may give rise to controversy and I do not wish to say that Burge & Co., by their conduct represented that Coates was a stockholder; but Burge & Co. sent to the company this instrument purporting to be a transfer from Coates, and in effect demanded to be registered as transferees of the stock; to this demand the company assented. How can there be an estoppel against the company as respects Burge & Co.? What more have the company done than accept the invitation of Burge & Co.? Let us look at the question from another point of view. Suppose the company were desirous to make Burge & Co. responsible, and said, "You have so conducted yourselves that you have no right to set up the truth in this matter, and we have a right to affirm as against you that which is not the truth;" why could they not say so with as much reason as Burge & Co.? Mr. Benjamin argued that the company

were estopped because it was their duty to make enquiries, and because it must be taken against them that they were satisfied with the enquiries which they had made, and that by registering the transfer from Coates to Burge's nominees, they affirmed to Burge & Co. not merely that Coates had been the holder of the stock, but also that he had executed the transfer. I dissent from that argument entirely. I believe that this system of enquiry by companies before registering transfers is a modern one. It is a reasonable and proper one, but it is a practice they have recourse to for their own benefit only, and it is done in order to keep them out of trouble with a subsequent transferee, against whom they would be estopped.

The existence of this practice does not help the case for Burge & Co. I cannot see why the company are precluded from saying to Burge & Co., "You brought us a forged transfer; we believed it to be genuine, and we have registered you as stockholders; but we are not precluded from saying that the transfer was forged, and that you had not a real title." That decision is founded on principle. Is there any authority to the contrary? I think not. In *Knights v. Wiffen* (9) the Court of Queen's Bench held that the defendant had affirmed to the plaintiff that he held sixty quarters of barley separated from the rest at the plaintiff's disposition. The plaintiff had not told any untruth, nor had he, by any conduct on his part, offered any inducement to the defendant to make that statement. That case, therefore, is not like the present, where Burge & Co., however innocently, caused to be presented to the company a false and fraudulent instrument as genuine. The next case is *In re The Bahia and San Francisco Railway Company* (1). From the facts in that case it appears that the transferees had acted upon the certificates issued by the company to former shareholders, or at least to supposed former shareholders, and the Court of Queen's Bench held that, inasmuch as the company had issued those certificates for the purpose of being acted upon, so that the shares might be sold or be used as

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

a security for a loan, they were upon the principle of *Pickard v. Sears* (13), and cases of a similar kind, bound to indemnify those who had acted upon the faith of those certificates. That state of facts does not exist here: the company have made no untrue representation; they issued certificates to Burge & Co., but this they were induced to do by the conduct of that firm. In *Hart v. The Frontino, &c., Gold Mining Company* (2) also the plaintiff had made no untrue representation; he had taken to the defendants a transfer executed by the person who purported to execute it, and they admitted him as a partner, and he was induced to pay a call, and it was held, rightly or wrongly, that they were estopped from denying they were liable to indemnify him. That case, therefore, is wholly dissimilar from this. I wish to say a few words as to my own judgment in *Hart v. The Frontino, &c., Gold Mining Company* (2). I am afraid that I did not perceive the effect of the certificates which had been issued, and did not appreciate the judgment in *In re The Bahia and San Francisco Railway Company* (1). I can see now that the form of the certificates was important, and perhaps the case in the Queen's Bench did not govern that in the Exchequer. If the decision in *Hart v. The Frontino, &c., Gold Mining Company* (2) was wrong, it will be competent to this Court at a proper moment to overrule it. I think, however, that it was not wrong, but that it does not apply to the present case.

In the view which I take it is unnecessary to consider whether, in order to support the suggested estoppel, it is imperative that any damage should have accrued to Burge & Co., and whether in point of fact they have suffered any damage. I frankly own that even if Burge & Co. could be shewn to have missed a benefit, or incurred a loss by the conduct of the company, the legal result would be the same; the misfortune of Burge & Co. arose from their having accepted a forged transfer.

I wish most carefully to avoid expressing any opinion whether the second ac-

tion would have been maintainable if any damage had accrued to the company. Cogent arguments, no doubt, may be adduced in favour of either view; but the company are willing to pay the costs of the action brought by them rather than have a doubtful question discussed, and they are content that judgment be recorded against them, although technically they do not consent to it so as to preclude themselves from appealing, if it is wished to take the opinion of a higher tribunal. The result is, that in each action judgment will be entered for the defendants.

BRETT, L.J.—In the first of these actions it seems to me that two questions arise, first, whether the judgment of Lindley, J., can be supported on the grounds upon which it is founded; and secondly, whether it can be upheld for other reasons. With great deference to him, I have clearly come to the conclusion that the judgment cannot be supported for the reasons upon which it is founded. Those reasons are that Burge & Co., supposing themselves to have become transferees of the stock, which really belonged to Coates, mortgaged it to Simm and Ingelow representing the National Bank, and that a certificate was issued by the company which asserted that Sims and Ingelow were the holders of the stock, and that therefore there was an estoppel against the company in favour of Simm and Ingelow or the National Bank. I think it is undoubted, upon the authority of *In re The Bahia and San Francisco Railway Company* (1), that the certificate issued by the company did raise an estoppel between them and Simm and Ingelow. Lindley, J., however, held that, inasmuch as this estoppel existed in favour of Simm and Ingelow as against the company, there was a legal title by estoppel to the stock, and that when Simm and Ingelow ceased to be mortgagees upon the advance being paid off, they became trustees of the stock for Burge & Co., who may rest upon the title passing to them as *cestui que trusts* of Simm and Ingelow. With great deference, it seems to me that Lindley, J., has given a wrong interpretation to

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

the phrase, "legal title by estoppel." The real meaning of the phrase, "legal title by estoppel," as used in the older cases, is that the doctrine of estoppel was recognised in the Courts of Common Law just as much as it was in the Courts of Equity. An estoppel gives no real title to that which is the subject-matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying; it has no effect whatever upon the reality of the circumstances. I speak not of estoppels under deeds. I incline to think that when the word "estoppel" is used with reference to deeds of conveyance or of a similar nature, it is merely a phrase indicating that they must be truly interpreted. I am speaking now of the estoppels which arise upon transactions in business or in daily life, and, as it seems to me, these estoppels have no effect on the reality of the transaction. It may be that under some circumstances an estoppel will prevent a person from dealing in a particular manner with goods; for instance, if a person is estopped from denying that he has made a contract to deliver goods, and if the goods are still in his possession, he may be obliged to hand over the goods, although there was no contract. But suppose that, although a person is estopped from denying that he has made a contract to deliver goods, he has parted with the goods and has sold them to somebody else; he is not estopped from saying that he has so parted with the goods; he cannot deny the contract, but he cannot fulfil it by delivering another person's goods. The only remedy against him would be damages for the non-delivery of goods which it was impossible for him to deliver.

Apply these principles to the present case. For a time an estoppel existed in favour of Simm and Ingelow, representing the National Bank, arising from the company having issued a certificate that the stock was at that time the property of Simm and Ingelow. In my opinion, if Simm and Ingelow could have shewn that damage had accrued to the bank by reason of the act of the defendants,

they might have maintained an action against them; but so soon as Burge & Co. had paid off the advance made to them by the National Bank, the latter were no longer in a position to suffer damage from the issuing of the certificate, and no action upon the ground of estoppel could be maintained for their benefit. The only persons who could have availed themselves of the estoppel were Simm and Ingelow, and that estoppel did not give them any legal title to the stock, as Lindley, J., has supposed; it only gave them for a time a right of action against the telegraph company, and when they themselves could not maintain an action, they could not transmit a right of action to Burge & Co. The latter cannot maintain this suit upon the ground that the company were at one time estopped as against Simm and Ingelow, when at the time of bringing the action no estoppel existed between the company and Simm and Ingelow. I cannot, therefore, agree with the judgment on the grounds upon which it was founded.

It may be argued, however, that the judgment can be supported, so far as the result goes, on other grounds. If Burge & Co. are to be considered as the only plaintiffs, I come to the conclusion, upon two grounds, that no estoppel exists in their favour against the telegraph company; first, because in point of fact no representation sufficient to raise an estoppel was made by the company to Burge & Co.; and secondly, because even if a representation upon which an estoppel might be founded was made, there was no estoppel, because that representation caused no substantial alteration in the position of Burge & Co.

As to the first ground, Burge & Co. supposed that they had bought the stock through a broker upon the Stock Exchange; they received a transfer supposed to be signed by Coates, and a certificate from the company that Coates was the holder of the stock. They sent the transfer to the company, in order that the names of their nominees might be put upon the register, and then the company did that which is said to be the ordinary course, namely, they sent a

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

letter to Coates, requesting to know whether he had authorised the transfer of the stock. That letter was intercepted by a fraudulent clerk, so that the company received no answer to it, and they therefore supposed that Coates had executed the transfer, and upon that they registered Skinner and Spurling as the holders, and subsequently issued their certificate to Simm and Ingelow, stating that they were the registered holders. The only fact relied upon as raising an estoppel is the issue of that certificate. It is said that it amounts to a representation, although no representation was made in words on behalf of the company. At the time Burge & Co. bought the stock on the Stock Exchange they did not rely upon anything said or done by the company; they trusted wholly to the broker through whom they purchased, and that broker is personally liable to them by reason of the course of business, and perhaps by the rules of the Stock Exchange; they paid the price to him upon the faith of a transfer which he alleged that he had obtained from Coates, and not upon the faith of anything done by the company. If Burge & Co. paid the price upon the faith of the former certificate issued to Coates, that certificate is perfectly true, and in it no false representation was made by the company. Nothing in that transaction can raise an estoppel in favour of Burge & Co. against the defendants. But after they had paid the money, they sent the transfer to the company, in order that they might induce the company to put the names of their nominees upon the register, and thus complete their title. True, it is the course of business for the company then to make enquiry of the person whose name is upon the register, the supposed transferor; but it seems to me that they are under no obligation to the person who sends the transfer to make that enquiry; it is obvious that they make it entirely for their own protection. I can see no duty upon them to make that enquiry on behalf of the alleged transferees; in truth, the transferees, if they distrust the transaction, can require to be informed of the name of the supposed transferor, and en-

quire of him whether he has really agreed to transfer the stock.

It seems to me that all the facts which entitle the transferee to be put upon the register of the company, and to obtain a certificate, are as much within his knowledge as within that of the company: he has the same power to make enquiries as the company, and indeed some of the facts are more known to him than the company; as, for instance, it was Burge & Co. who knew what the amount of the contract was with them, and whether it was a contract to transfer. Under this state of facts the company did that which, if the transfer had been valid, would have made Burge & Co. stockholders—in other words, the company accepted their nominees as fit to be put upon the register: this, however, was done mainly upon the statement by Burge & Co. that their nominees had received a transfer from Coates. The certificate which the company issued to Simm and Ingelow did not contain a statement of anything which Burge & Co. did not know: it did not contain a statement of a transaction or of facts which must be known to the company, but were not known to Burge & Co., and with regard to which any statement of the company was to have an effect upon their conduct: the contract had been concluded before the certificate was issued, upon which alone the estoppel is alleged to arise. As I have already intimated, the certificate declaring Simm and Ingelow to be stockholders was issued not for any purposes of the company: it is obvious that the only use of the certificate in the hands of Simm and Ingelow was to empower them to transfer the stock, or to enable them by producing it to shew to an intending buyer that they had been admitted as members of the company—in other words, that certificate declaring Simm and Ingelow to be upon the registrar was issued in order that they might hand over the stock to a subsequent purchaser. That certificate would raise an estoppel against the company in favour of a subsequent purchaser from Simm and Ingelow acting for Burge & Co., because by that certificate the company have made a statement of facts

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

which must be taken to be known to them, and cannot be known to a subsequent purchaser, and because the certificate was issued in order that a subsequent purchaser might act upon it. These facts fall within the well-known principles of estoppel. To my mind, however, a person buying from Burge & Co. would have no title to any stock: he would not be a stockholder in the company: he would not be entitled to have stock delivered to him by the company: his only remedy would be in damages. And, whatever may be the rights of a purchaser from Burge & Co., no representation was made by the company to Burge & Co. upon which the latter acted. It is not necessary to consider it, but I doubt whether any representation was made by Burge & Co. to the company which could raise an estoppel; for it seems to me that neither of them made any representation in order that it might be acted upon by the other.

As to the second ground, I think it right to say that, even if there was a representation by the company to Burge & Co., their substantial and legal position has not been altered by that representation, and therefore there can be no estoppel against the company. It seems to me that if an untrue representation was made by the broker who sold to Burge & Co., they had a right of action against him, and that remedy exists just as much at this moment as at the time when the representation was made. It is possible that Burge & Co. might have had some remedy under the rules of the Stock Exchange. If the remedy created by the law remained intact (and by supposition of law that is a perfect remedy), I doubt very much whether the loss of the remedy under the rules of the Stock Exchange would be sufficient to raise an estoppel; but it seems to me that Burge & Co. now have the same remedy under the rules of the Stock Exchange as they had at the moment of the company registering Spurling and Skinner, and therefore that the position and the legal rights of Burge & Co. are not in any way altered. They have their right of action for breach of contract against the

broker who sold to them; they have the same remedy against that broker under the rules of the Stock Exchange which they had before, and if nothing could have hindered them from availing themselves of that remedy upon discovering at the time the nature of the transaction, nothing prevents them from availing themselves of it now. It has been argued that Burge & Co. have been put to rest as to their remedy under the rules of the Stock Exchange. Possibly they have been put to rest, but it seems to me that that is not sufficient: it must be shewn also that they have been damaged by being put to rest. I can understand that there may be facts which shew that a person has been put to rest by a representation causing him to delay after the representation is made, and if in consequence he suffers damage and alters his position, then he has the same rights as if his position had been altered at the time of the representation; for instance, if a representation had been made by the company, and if Burge & Co. had been put to rest as against the broker who sold to them, and if between the time of the representation being made and the time when they resolved to act the broker had become insolvent, they would have suffered damage, and the case would have fallen within *Knights v. Wiffen* (9). It is not necessary to decide that here. At present I do not venture to differ from *Knights v. Wiffen* (9); I understand that the learned Judges construed a certain statement as having not merely its natural but also a mercantile meaning, and they were of opinion that the mercantile meaning of the statement was that the defendant had sold the goods separated from other goods and held them for the benefit of the plaintiff. I confess it seems to me that in that case two well-known doctrines were mixed up, the doctrine of estoppel, and the doctrine of attornment by a warehouseman who has goods in his hands. But in any point of view *Knights v. Wiffen* (9) does not govern this case, even if the company did make a representation, and even if the doctrine as to putting another person to rest be true; for in the present case there is no

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

evidence that Burge & Co. sustained damage by being put to rest.

I have stated my views at length, but the case is important, and I have thought it right to point out what are the reasons which have convinced me that the judgment of Lindley, J., cannot be supported either on the grounds assigned by him or on any other grounds. In my opinion there was no estoppel between Burge & Co. and the telegraph company, and our judgment ought, therefore, to be for the company.

It is unnecessary to say anything as to the action brought by the telegraph company.

COTTON, L.J.—In this case we have the misfortune to differ from Lindley, J., and I think it right to say at starting that he appears to have delivered not a considered judgment, but a judgment immediately after the case had been heard in order to prevent delay. The first action is founded upon the supposition that as against the company the plaintiffs are entitled to be treated as stockholders, and it is brought on the ground that the company have denied to them the rights of stockholders. When the real facts are ascertained, it is clear if there is no right of action founded on an estoppel, the action cannot be maintained; for the title of *Simm and Ingelow* has its origin in the forged transfer from Coates. The stock which the plaintiffs claim is still at law and in equity vested in Coates, and he alone is entitled to be registered as the holder of it. But it has been urged that by the doctrine of estoppel the plaintiffs are to be deemed the holders, and could maintain the action. The question has been argued as if Burge & Co. were the only plaintiffs; I will, therefore, deal with the case upon that footing. I will first consider what is the meaning of the words "title by estoppel," or if that phrase be objected to, "right by estoppel." I think that the phrase "right by estoppel" means that where one person makes to another a statement which is afterwards acted upon, in any action afterwards brought upon the faith of that statement by the person to whom it was made, the person making it is not allowed to deny

that the facts were what he represented them to be, although in truth they were different. It has been contended that this doctrine applies so as to give Burge & Co. a right of action against the company, and reliance has been placed upon *In re Bahia and The San Francisco Railway Company* (1), and *Hart v. The Frontino, &c., Mining Company* (2), which were really very different cases. In the present case certain persons on behalf of Burge & Co. took to the company a transfer purporting to be executed by Coates: he was in fact a stockholder, but the transfer was a forgery, and the question is whether the company by issuing a certificate of registration to *Simm and Ingelow*, the transferees of Burge & Co., made a representation which estops them from now saying that *Simm and Ingelow* are not the owners of the stock. I need only refer to the first of the two cases which I have mentioned, in order to shew how different they are from this: there the persons making the application were not in the position of Burge & Co., but in the position of persons who might have bought the stock in open market from the nominees of Burge & Co., and might have paid the price upon the faith of the certificate of registration issued by the company. That certificate would be a representation that the sellers were entitled to the stock, and any one who acted upon it without knowing the real facts might maintain an action against the company, not as the real owner of the stock, but as a person whom the company were bound to treat as the real owner, because they had stated to him that the sellers to him were the real owners and that the transfer was valid. But the facts here are very different. Burge & Co. are driven to admit that Coates was the registered owner, and that he did not execute a transfer of the stock to them; but they contend that the company is estopped from denying that Coates did transfer the stock to them. Why ought the company to be estopped? A transfer purporting to be executed by Coates was brought to the company's office: Burge & Co. had at least equal means with the company of knowing whether it was genuine. The argument

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

really depends upon whether or not the company are bound to ascertain whether a transfer brought to them is a forgery. It is said that the duty which the company have, to keep a register, implies a duty also to ascertain whether a transfer brought to them for registration is a forgery or not. If this duty exists, is it a duty to Burge & Co.? because if it does not exist towards them, I cannot think that the fact of there being the duty towards someone else, makes the acceptance of the transfer brought by Burge & Co., a representation to them by the company that it was a genuine document. In fact the use of the word "duty," is an indirect mode of saying that if the company accepts a forged transfer they will be liable to a person innocently bringing it, and it is clear that they would be equally liable according to that view whether or not they did make inquiries. Their duty, if any, is not to act upon a forged transfer. That is not a duty to the plaintiffs, but rather a duty to the directors and shareholders of the company. It is only a duty in this sense, that unless the company act upon a genuine transfer they may be liable to the real stockholder. Therefore there being in my opinion no duty between Burge & Co. and the company to make enquiries, I think that there was no averment by the company to Burge & Co. that the transfer was genuine. The right by estoppel therefore fails, and the plaintiffs are not entitled to recover upon that ground. It is unnecessary to determine whether, if any representation had been made, Burge & Co. could be considered to have acted upon it.

Lindley, J., seems to have chiefly based his judgment upon the view that Burge & Co., being the parties beneficially entitled to the stock, and Simm and Ingelow once having had a good title by estoppel, it still remains, because it is impossible to say at what time that title by estoppel came to an end. Simm and Ingelow were purchasers for value; and no doubt while their interest remained they had a right of action against the company, who were estopped as against them from saying that their transferors, Spurling and Skinner, were not stockholders. But the

learned Judge appears to have considered, and it has been argued before us, that a real title by estoppel existed in Simm and Ingelow, and that that title could be transmitted to Burge & Co., or at least be held for the benefit of Burge & Co., the persons actually interested. But Simm and Ingelow have been paid off; they have suffered no prejudice from the representation made to them by the company. Have they any real title to the stock? Some confusion seems to have existed with respect to the expression a "real title by estoppel." A real title by estoppel may exist in some cases, as where a man grants a lease of property in which he has no interest, if he afterwards acquires a sufficient interest to support the lease, the lessee has a good title by estoppel to the subject-matter of devise. As also in the case of goods: if an action is brought upon the ground that the property in goods has passed from the vendor to the plaintiff, then, if there is any admission by the vendor that he has set apart particular goods, as owner, and appropriated them to the contract, that would be effectual as against him to pass the property in the goods. Here we are dealing with stock, which can only be passed in a particular way, and to which the company cannot give an actual title by any admission of their own. If stock is sold, the buyer can only gain title to it by a particular instrument. The only right by estoppel which can be gained against the company is a right of action founded upon statements by the company, which if true would have entitled the plaintiff to be registered as stockholder. In that way Simm and Ingelow could, if, producing their certificate of registration, they had sold the stock to a person ignorant of the facts as regards the forgery, give him a right of action against the company, because he would have acted upon the faith of their representation made by issuing the certificate. But he would gain a right of action merely and not a transmitted title. Here, however, Simm and Ingelow did not sell the shares, and Burge & Co. are thrown back to their original claim against the company. In my opinion there was no representation to Burge & Co., such as to

Simm v. Anglo-American Telegraph Co. (App.), Q.B.

give them any right under the doctrine of estoppel, nor was there any such right in Simm and Ingelow after their interest ceased.

As regards the second action, it is to be understood that no opinion is expressed in favour of either party.

Judgment reversed in Simm and Others v. The Anglo-American Telegraph Company. Judgment affirmed in The Anglo-American Telegraph Company v. Spurling and Others.

Solicitors—Bircham & Co., for the Anglo-American Telegraph Company; William Tatham & Sons, for Burge, Brown & Dennis, and for Simm and Ingelow; Vandercom, Law & Hardy, for Spurling and Skinner.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1879.

Dec. 20.

1880.

March 13.

THE TUNBRIDGE WELLS LOCAL BOARD v. AKROYD.*

Union & Government Act 1878

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257—Repair of Road by Frontagers—Repair by Local Authority in case of Default—Apportionment by Surveyor of Expense—Reference to Arbitration in case of Dispute—Liability under Award of non-disputing Frontager not a Party to Reference.

The Public Health Act, 1875, provides by section 150 that in certain cases a local authority may by notice require owners of premises adjoining certain roads to pave such roads, and empowers the local authority, on default by the owners, to do it themselves, and to recover from the owners the expenses incurred, in such proportion as shall be settled by the surveyor, and in case of dispute by arbitration in the manner provided by the Act. Section 257 provides that the apportionment of the surveyor is to

be binding and conclusive on the owner unless disputed within three months. Section 180 makes the award of the arbitrator final on all parties to the reference.

The plaintiffs, a local authority, required the defendant and other owners of land adjoining a road within the above section to pave that road, and on their failing to do so, executed the work themselves, had the amount apportioned, and claimed and received from the defendant, who did not dispute the apportionment, his share of the expenses so incurred. Certain of the other owners disputed the apportionment, and an arbitration was held of which the defendant had no notice, and to which he was no party. The arbitrator re-apportioned the whole sum expended amongst all the owners, including the defendant, and fixed the amount to be paid by the defendant at a higher sum than had been fixed by the surveyor. In an action to recover the additional amount so charged to the defendant,—

Held, that the plaintiffs could not recover the sum claimed on the footing of the assessment made by the arbitrator, and that the award was not binding on the defendant.

Appeal from the Exchequer Division.

Action by the Tunbridge Wells Local Board to recover the sum of 10*l.* 5*s.* 4*d.*, the amount claimed from the defendant by the plaintiffs in respect of the sewerage, levelling, metalling, paving and channelling a street called "Broadwater Down Road," being a road within the plaintiffs' district, and not being a street or highway repairable by the inhabitants at large.

The plaintiffs are the urban sanitary authority under the Public Health Act, 1875, for the district of Tunbridge Wells, and the defendant is the owner, within the meaning of that Act, of premises abutting on Broadwater Down Road. The plaintiffs as such urban authority served the defendant and other frontagers with a notice under section 150 (1) of the Public

(1) 38 & 39 Vict. c. 55. s. 150, provides that "where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . is not sewered, levelled, paved, metalled, flagged, channelled and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice ad-

* *Coram* Bramwell, L.J.; Cotton, L.J.; and Theisner, L.J.

Tunbridge Wells Local Board v. Akroyd (App.), Exch.

Health Act, 1875, requiring them to pave, &c., that street or highway in the manner specified in the notice. The defendant and other owners of premises abutting on the highway, did not pave, &c., the road according to the notice, and the plaintiffs accordingly after the expiration of the proper time, executed the work themselves and expended thereon the sum of 4,036*l.* 15*s.* 11*d.*

An apportionment was made upon the frontagers, and by such apportionment the defendant was called on to pay the sum of 80*l.* 12*s.* 6*d.* as his share.

Notice in writing of the apportionment was duly served upon the defendant, stating that the amount would be binding on him unless he disputed it within three months. The defendant did not dispute the amount and paid the sum claimed; but certain of the frontagers gave notice to the plaintiffs of their intention to dispute the apportionment, and thereupon the plaintiffs and such owners agreed, in pursuance of the Public Health Act, 1875, to refer the question to arbitration. The arbitrator made his award re-apportioning the amount of 4,036*l.* 15*s.* 11*d.* amongst all the frontagers, including the defendant, and apportioned the sum of 90*l.* 17*s.* 10*d.* as the amount to be paid by the defendant.

The defendant had no notice of the agreement to refer to arbitration, nor of the proceedings before the arbitrator, nor was he party to or represented at the arbitration; the notice of the claim by the plaintiffs for the sum of 10*l.* 5*s.* 4*d.*, being the difference between the amount

dressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled," &c. "require them to sewer," &c. "the same within a time to be specified in such notice."

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses."

apportioned to him by the surveyor and that apportioned by the arbitrator, was the first notice given to the plaintiffs of the proceedings with respect to arbitration.

The County Court Judge gave judgment for the plaintiffs, and stated a case for the opinion of the Court, of which the material part is set out above.

The Exchequer Division was divided in opinion, Kelly, C.B., holding that the defendant was not liable, Huddleston, B., affirming the decision of the County Court Judge, which therefore stood.

The defendant appealed.

Cave (with him *Hannen*), for the defendant.—The surveyor of the plaintiffs rightly executed the works on this road under section 150 of the Public Health Act, 1875 (1) and the defendant was bound to pay the amount apportioned by the surveyor, as by section 257 (2) of the same Act the apportionment by the surveyor of the board is made binding on a frontager, such as the defendant is, unless disputed within three months. It is contended that it is also binding on the board, and this view is strengthened by reference to section 180, sub-section 15 (3), for the defendant was no party to the reference, and he cannot therefore be

(2) Section 257 provides, "Where any local authority have incurred expenses for the repayment, whereof the owner of the premises for or in respect of which the same are incurred, is made liable under this Act" and "Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner he shall by written notice dispute the same."

(3) Section 179. "In case of dispute as to the amount of any compensation to be made under the provisions of this Act . . . and in case of any matter which by this Act is authorised or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred."

Section 180, sub-section 15: "The award of arbitrators or of an umpire under this Act shall be final and binding on all parties to the reference."

Twbridge Wells Local Board v. Akroyd (App.), Exch.

bound by it. The Act contains no provisions giving the board power to set aside the apportionment made by their own surveyor, it only enacts that the defendant shall pay what an arbitrator may award if he dispute the original apportionment. The provisions as to arbitration only apply to those who dispute the apportionment, and only apply to the disputes between each individual objector and the board. The fact that one frontager disputes the surveyor's apportionment does not set aside the whole of that apportionment, it only re-opens the question as between him and the board. The defendant having paid the sum originally claimed, cannot be liable for the further assessment made by the arbitrator.

Webster (E. Pollock with him), for the plaintiffs.—The arbitrator who is appointed to decide a dispute arising under section 150 (1) is not appointed to inquire into the correctness of a particular sum charged on a particular individual; but he has to deal with the question of apportionment generally, so that a dispute as to the amount by one frontager re-opens the whole question of apportionment, and alters the amount to be paid by the rest—*Hesketh v. The Atherton Local Board* (4). The arbitration and the new assessment bind the board, they must adopt it, and it is not unreasonable that it should also bind all the frontagers. The apportionment of the surveyor is, in fact, abolished by an objection to the amount apportioned taken by one frontager. A frontager has no right to appear before the surveyor, and he does not know until he receives the notice of the amount apportioned that an apportionment is being made; it is therefore quite consistent that when an arbitration takes place, by which the apportionment is re-opened, it should bind him, even though he is no party to it; the arbitration moreover is a statutory arbitration, and is therefore not analogous to an ordinary arbitration entered into by agreement. If the surveyor were to make a mistake in the original apportionment the frontagers would be bound, unless they

appealed to the Local Government Board under section 168—*Bailey v. Wilkinson* (5); *Cook v. The Ipswich Local Board* (6).

Cur. adv. vult.

THE SIGNER, L.J. (on March 13) read the judgment of the Court.

We are of opinion that this appeal must be allowed.

The only question raised by it is whether an award in an arbitration under the Public Health Act, 1875, between one of several frontagers called upon to pay the expenses of paving a street, and an urban sanitary authority, by which award the arbitrator has altered not merely the assessment upon the particular frontager, but the assessment in regard to all the frontagers, is binding upon any frontager not a party to the arbitration so as to entitle the sanitary authority to recover from him the sum which would be due from him on the footing of the altered assessment.

We say that this is the only question, because as appears from the case and the documents referred to in it, the respondents (the sanitary authority) did not upon this award being made, even assuming that they could do so, take upon themselves to make a new assessment upon the lines of and in the proportions settled by the award, and thus to give each of the frontagers who had not disputed the original assessment upon them, an opportunity if so minded of disputing in the manner provided by the Act the new assessment; but treated the award as absolutely binding, and as settling without further opportunity of dispute the proportions in which all the frontagers were to pay.

The particular frontager now appealing had, before the award in question was made, paid to the respondents his proportion of the original assessment, but the learned County Court Judge before whom the matter was tried decided that he was liable to pay the additional sum claimed by the respondents on the footing of the

(5) 16 Com. B. Rep. N.S. 161; 33 Law J. Rep. M.C. 161.

(6) 40 Law J. Rep. M.C. 169; Law Rep. 6 Q.B. 451.

(4) 43 Law J. Rep. M.C. 37; Law Rep. 9 Q.B. 4.

Turnbridge Wells Local Board v. Akroyd (App.), Exch.

award; and upon appeal to the Exchequer Division, the Court being equally divided, the decision stood. It is contended on behalf of the respondents that upon the true interpretation of the Public Health Act, 1875, the decision is right.

The sections of the Act upon which the question mainly turns are sections 150 (1), 179, 180 (3), and 257 (2). Section 150 (1) is that from which the powers of the urban sanitary authority in the particular matter are derived. By virtue of its provisions they may in the case of a street within their district, not being a highway repairable by the inhabitants at large, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining or abutting, on such parts thereof as may require to be paved, require them to pave, &c., within a time specified in such notice, and the section further provides that "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act."

Pausing for a moment upon these last words it appears to us that the section has in view, not a dispute between the frontagers generally on the one side and the urban authority on the other; but a dispute in which the owner of a particular set of premises complains of the apportionment as regards himself personally. The meaning, however, of the section, and the machinery by which it is to be worked, are more fully explained by section 257 (2). From that section it appears that the surveyor having settled and apportioned the expenses of executing particular works, including works referred to in section 150 (1), for the repayment of which the owner of any premises is made liable, a notice of the amount settled by the surveyor to be due from such owner is to be served upon him, and a period of three months is given him within which he may by written notice

dispute the apportionment. In the event of that period elapsing without the apportionment being disputed, it becomes binding and conclusive upon such owner.

This section is, it is true, one which relates not merely to expenses incurred under section 150 (1), but also to other expenses, some of which would be incurred in reference to a single set of premises; but after making allowance for this fact we cannot but look upon the section as fortifying the view that the dispute referred to in section 150 is a dispute between a particular owner and the urban authority, and not one in which the frontagers generally would be interested; and the most natural as well as reasonable interpretation, if both sections are read together, would be that *quoad* any owner not disputing the apportionment of the surveyor within the prescribed period, it became binding and conclusive, although another owner may have within the period disputed it.

Sections 179 and 180 (3), which regulate arbitrations, still further confirm this view. The former section provides that "in case of any matter which by this Act is authorised or directed to be settled by arbitration, then unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred." This section again is a section referring to arbitrations generally, and not merely to arbitrations in respect of disputes referred to in section 150; but if the arbitrations under that section had been intended to be, as it has been contended by the respondents' counsel they are, arbitrations in which the arbitrators succeed to all the duties of the surveyor in the matter of the apportionments, and are bound to make an entirely fresh apportionment, binding when made upon all owners of premises liable to pay their proportion of the expenses of the work done, we cannot but think that the Act would have said so in plain terms, and would further have made some provision for giving the non-disputing owners notice of the arbitration, and an opportunity of protecting their interests in it.

But when section 180 (1) is looked at, it is plain that its provisions are only

Tunbridge Wells Local Board v. Akroyd (App.), Exch.

calculated to protect the interests of the parties to a specific dispute made the subject of the arbitration set on foot under section 179 (3), and the last sub-section of section 180 (1) when providing for the effect of the award merely enacts that the award of arbitrators or of an umpire under this Act shall be final and binding on all parties to the reference.

It is said by the respondents' counsel that the urban sanitary authority themselves represent the non-disputing owners, and can protect their interests, but practically this is impossible.

Many an owner may have objections to a surveyor's apportionment, although he may be willing to pass them by *sub silentio*, looking to the small proportion of the expenses which he is called upon to bear; but if that proportion were proposed to be altered, and he were to be called on to pay more, he might well determine to bring forward his objections; but how is he to exercise this option, when he is *ex concessio* unaware that the apportionment is proposed to be altered, until it is done so by the award absolutely binding on him? And how is the urban sanitary authority to represent and protect him in reference to objections arising from their own officer's apportionment, which he and they would naturally presume to be correct, except in the particular matter made the subject of dispute.

It appears to be admitted that every disputing owner may and must appoint an arbitrator, and that there must be as many separate arbitrators as there are disputing owners; and indeed, in the present case there were in force four separate arbitrations and four separate awards, although made by the same umpire.

But if so, which of these separate arbitrations and separate awards is to bind the non-disputing owners? And suppose, as might in theory at least be the case, awards given by different umpires and setting up different apportionments, what is to be done then? It is really no answer to this question to say that the umpire would in practice always be the same. The sections of the Act must be looked at and interpreted with reference

to legal possibilities. Another difficulty in the way of the respondents' contention occurs to us. Suppose that the day after the notice of the surveyor's apportionment is served, one of the owners charged disputes the apportionment, and he and the urban sanitary authority at once agree upon a single arbitrator. That arbitrator must, under the provisions of section 180, make his award within two months. When, then, his award is made, the period of three months within which owners may dispute the surveyor's apportionment is still running; but according to the respondents' contention the award is binding upon all owners, and consequently owners who intended perhaps to bring forward special objections of their own to the surveyor's apportionment, and objections which would equally apply to the arbitrator's apportionment, would, notwithstanding the currency of the period of three months, be shut out of any objections at all by virtue of an arbitration and award of which they had no notice.

The difficulties indeed in the way of the respondents' contention appear insurmountable. Running counter as it does to well-established principles of law, it is at least to be required, before any Court should adopt it, that the language of the Act of Parliament upon which reliance is placed be clear and express upon the point; but it is impossible to say that such is the case here, and we prefer under these circumstances to follow the general law rather than to interpret the language of the Act of Parliament in a manner contrary to the general law in order to provide for a particular case which it is quite possible may have escaped the attention of those who framed and those who passed the Act.

It is unnecessary for us to decide what is the exact position of the sanitary authority in cases where the surveyor's apportionment is deranged by the action of one of the frontagers, or whether in such cases, and by a different mode of proceeding to that adopted in the present case, the sanitary authority can obtain from the frontagers generally, whether they may have paid or not the proportion originally assessed on them, such pay-

Tunbridge Wells Local Board v. Akroyd (App.), Exch.

ments as the alteration of the proportion in the case of a particular frontager might be supposed to render necessary in the case of all.

It is sufficient to say that the appellant is not bound by an award to which he was not a party, and of which he had not even notice, and consequently that the claim of the respondents based upon that award fails.

Judgment for defendant.

Solicitors—Sole, Turner & Knight, agents for Cripps & Son, Tunbridge Wells, for plaintiffs; Collyer-Bristow & Co., agents for Stone & Simpson, Tunbridge Wells, for defendant.

[IN THE COURT OF APPEAL.]

1880. { DIXON v. WHITWORTH.
March 6. { THE SAME v. THE SEA INSURANCE COMPANY.

Marine Insurance—Total Loss—Salvage and Costs—Refitting—Insurable Interest.

Appeal of defendants from a judgment of Lindley, J., upon further consideration after trial without a jury, reported 48 Law J. Rep. C.P. 538.

O. Russell and J. O. Mathev, for the defendants.

Butt, Gainsford Bruce and Hollams, for the plaintiff.

The plaintiff's counsel admitted that the case was covered by the decision of the House of Lords in *Lohre v. Aitcheson* (1) which had been given since the judgment of Lindley, J., appealed against in the present case, and which reversed the judgment of the Court of Appeal.

The appeal was therefore allowed without argument.

Judgment reversed.

Solicitors—Argles, Rand, Bailey & Argles, for plaintiff; Robinson & Co., agents for Bateson & Co., Liverpool, for defendant Whitworth; Gregory, & Co., agents for Stone & Fletcher, Liverpool, for defendants, the Sea Insurance Company.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880. }
March 19. } BABCOCK v. LAWSON.*

Conversion—Pledge—Re-delivery obtained by Fraud—Right of Pledges against Innocent Transferee for value.

D. & Sons pledged, in return for advances, certain goods to the plaintiffs. The plaintiffs agreed to deliver the goods to them or their order as sold on condition of *D. & Sons* paying over to the plaintiffs the proceeds of any sale of those goods. *D. & Sons* afterwards obtained advances on a pledge of the same goods from the defendants, who were unaware of the dealings between *D. & Sons* and the plaintiffs. *D. & Sons* then told the plaintiffs that they had obtained a purchaser, and would hand over the price received, and thus induced the plaintiffs to transfer the goods to them. The advances made by the defendants not having been repaid they sold the goods.

In an action by the plaintiffs against the defendants for conversion,—

Held (affirming the judgment of the Queen's Bench Division), that the plaintiffs could not recover, that they had parted with the property in the goods and could not maintain an action against the bona fide transferees for value.

Appeal from the Queen's Bench Division. The case is reported 48 Law J. Rep. Q.B. 524.

Action for wrongful conversion of a quantity of flour.

It appeared from the special case that the plaintiffs had lent to the firm of Denis Daly & Sons their acceptances for 11,500l. on the security of a certain quantity of flour. Denis Daly & Sons signed and gave to the plaintiffs a memorandum to the following effect: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us or our order said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt."

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

Babcock v. Lawson (App.), Q.B.

The flour was accordingly warehoused in the plaintiff's name. One of the firm of Denis Daly & Sons afterwards applied to the defendants to advance them money on the security of part of the flour thus deposited, but without giving the defendants any information as to the arrangement made between the plaintiffs and themselves as to this flour; and the defendants believing Daly & Sons to be unencumbered owners of the flour agreed to make an advance on the terms that they were to have absolute possession of the flour, to warehouse it in their own name, and to have power to sell it. For the fraudulent purpose of obtaining possession of the flour, one of the firm of Daly & Sons brought to the plaintiffs, but unknown to the defendants, a memorandum stating that they had sold the flour to the defendants, and that they would pay the price to the plaintiffs when received.

The plaintiffs were thus induced to part with the possession of the flour, and gave as requested a delivery order to Daly & Sons, and the flour was transferred to the defendants, who then made the agreed advance to Daly & Sons.

The defendants afterwards sold the flour.

The plaintiffs having sued them for conversion, the Queen's Bench Division gave judgment for the defendants.

The plaintiffs appealed.

Chalmers (with him Herschell), for the appellants.—The question is, what are the rights of the plaintiffs who are the first *bona fide* pledgees? They have been induced by fraud to believe that they were parting with the goods for a special purpose only. The plaintiffs had a special property in the goods, and Daly & Sons had no right to the possession of the goods. The plaintiffs have not parted with the goods which the defendants have dealt with; for they only intended to part with goods which had been, as represented by Daly & Sons, sold to the defendants; but these goods had not been sold, and so the plaintiffs passed no property at all, or if they did pass any property, it was to a vendee of Daly & Sons, and as there was no such vendee, no

property passed, as it could not pass to a person who did not exist. There was no contract because the parties never were *ul idem*. The plaintiffs believed that the defendants stood in a quite different position from that in which they in fact were. The case is within the principle of *Hollins v. Fowler* (1). *Cooper v. Willomatt* (2); and *Lindsay v. Cundy* (3) were also referred to.

Warr (with him Cohen), for the defendants, was not called on.

BRAMWELL, L.J.—I am of opinion that we need not hear any further argument on this matter. The case is in truth a very plain one. It cannot be denied that this action is only maintainable in respect of property in these goods. There was, as is confessed, no contract between these parties, and the action is therefore only to be based upon property in the goods. What was the property that these appellants had? It was not a general property, it was only a special property in the goods, as pledgees.

It is true that the plaintiffs gave up their property under a mistake induced by fraud. If in such case they had parted with the property to the pledgor they could resume it, and could then say to the pledgor, "You got these goods tortiously, and therefore as between you and us, what has been done is voidable, and our special property remains;" but this cannot be urged against a *bona fide* person who has acquired title and possession.

The analogous case also tells against the plaintiffs. That is the case of a contract induced by fraud which is voidable or defeasible at the instance of the person who has been defrauded; but where before he has discovered the fraud the person who has obtained the property has parted with the property, the subject of the contract, to a *bona fide* purchaser, in such a case the purchaser can hold the property against the person who has been defrauded. On both these grounds I

(1) 44 Law J. Rep. Q.B. 169; Law Rep. 7 E. & L. App. 447, 757.

(2) 1 Com. B. Rep. 673; 14 Law J. Rep. C.P. 219.

(3) 47 Law J. Rep. Q.B. 481; Law Rep. 3 App. Cas. 452.

Babcock v. Lawson (App.), Q.B.

think that this case must be decided against the appellants; but especially because this action is only maintainable in respect of property.

BAGGALLAY, L.J.—I am of the same opinion, and I am inclined to go farther, and to say with the Lord Chief Justice, that "it may be doubted whether the right of the pledgees was not limited to the possession and custody of the goods so as to secure to them the knowledge of any sale which the owners might be able to make, and so to afford them the opportunity of insisting on the price being handed over to them as soon as paid."

THESIGER, L.J.—I am of the same opinion.

Judgment affirmed.

Solicitors—Gregory & Rowcliffes & Co., agents for Stone & Fletcher, Liverpool, for plaintiffs; Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for defendants.

Decided 19 May 1880. Appeal allowed. 146 57 & 58 581.

[IN THE COMMON PLEAS DIVISION.]

1880. }
Feb. 27. } SMITH v. MORGAN.

Administration—Judgment Creditor—Priority—Judicature Act, 1875, s. 10.

The rule by which a judgment creditor of a testator is entitled to priority over simple contract creditors in the administration of the assets of the testator under an administration decree is not affected by section 10 of the Judicature Act, 1875, which provides that in such administration of assets the same rules shall prevail as to the respective rights of secured and unsecured creditors as may be in force under the law of bankruptcy with respect to bankrupts' estates.

The plaintiff filed a plaint in the County Court of Glamorganshire, holden at Merthyr Tydfil, against the defendant, the executor of the will of Rees Morgan, deceased, for the administration of the

estate of the said testator under the direction of the Court, and on the 12th of December, 1876, a decree for the administration was made. Before that date, namely, on the 6th of December, 1876, one John Mathew Thomas obtained a judgment for 38*l.* 14*s.* against the defendant as such executor, for a debt due to him from the testator. Such judgment had not been registered nor had execution issued thereon, the assets of the estate being in the hands of a receiver of the County Court, appointed on the 15th of November, 1876. On the 22nd of July, 1879, the Judge of the County Court, upon the application of the said J. M. Thomas, made an order that he was entitled to the said judgment sum of 38*l.* 14*s.*, and ordered the same to be paid to him out of the fund in Court. The defendant thereupon came to this Division of the High Court and obtained a rule calling upon the plaintiff to shew cause why the said order of the County Court Judge should not be set aside on the ground that J. M. Thomas had no priority and was not a secured creditor. Against the rule

Finlay now shewed cause.—Before the Judicature Acts, 1873 and 1875, priority was given to a judgment creditor over the other creditors of an intestate in the administration of the assets if such creditor had obtained his judgment as he did here before the decree was made for the administration—*Jennings v. Rigby* (1) and *Williams v. Williams* (2). Then has that been altered by the Judicature Acts? Section 25, sub-section 1, of the Judicature Act, 1853, provided for the administration of the assets of insolvent estates. That sub-section was repealed by section 10 of the Judicature Act, 1875, which enacts that in the administration by the Court of such assets "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities," &c., "as may be in force for

(1) 33 Beav. 198; 33 Law J. Rep. Chanc. 149.

(2) 42 Law J. Rep. Chanc. 168; Law Rep. 15 Eq. 270.

Smith v. Morgan, C.P.

the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." There is nothing in that provision to affect the rule previously prevailing as to the right of priority. The judgment creditor is not a secured creditor but he is a preferred creditor.

He was then stopped, and the Court called on

James P. Aspinall to support the rule. —It is now admitted that a judgment creditor is not a secured creditor. Then the effect of section 10 of the Judicature Act, 1875, is to do away with any priority except in the case of a creditor who is a secured creditor within the meaning of that section. The section expressly states that it is to apply not only to the administration of the assets of deceased persons, but to the winding up of insolvent companies under the Companies Acts, and the case of *Re Stanhope Silkstone Collieries Company* (3) shews that if a creditor has not obtained anything more than a judgment against the company he has no privilege in the winding up of the company, and must take his share only with the other creditors. The case of *In re Watt; ex parte Joselyne* (4) is one in which the judgment creditor obtained a garnishee order and so became a secured creditor.

PER CURIAM (5).—The rule of law as to the priority of a judgment creditor exists as it did before the Judicature Act, 1875, and the County Court Judge was right in holding that the judgment creditor in this case had priority.

Rule discharged.

Solicitors—Hacon & Turner, for plaintiff; Ullithorne, Currey & Co., agents for Simons & Pews, Merthyr Tydvil, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. } HENNETT v. LORD BURY AND
Feb. 23. } OTHERS.

Practice—Test Action—Staying several Actions on the application of the Plaintiff until one has been tried.

Where several plaintiffs have brought separate actions against the same defendant raising a point in dispute common to all the actions, it is competent for a Court or Judge on the application of one of such plaintiffs to order a stay of proceedings in all such actions but one until such one has been tried, upon the plaintiffs in all the actions undertaking that the action so allowed to proceed shall be treated as a test action. The making of such order and the terms in which it is made are in the discretion of such Court or Judge.

This was one of thirty-eight actions brought by various plaintiffs, who were persons who had deposited moneys for investment by a company called the "Colonial Trusts Corporation, Limited," of which the defendants were directors. The writ in each of these actions was indorsed for a claim for the sum therein specified as money received by the defendants to the use of the plaintiffs. In one of these actions, namely, the action of *Hull v. Bury and Others*, a statement of claim had been delivered. In that statement the plaintiff alleged that the defendants were directors of the Colonial Trusts Corporation, Limited, a company incorporated under the Companies Act, 1862, for the purpose *inter alia* of the investment of money on account of and as trustees and agents for the persons investing money through the agency of the said corporation; that during and since 1859 the said corporation received from the plaintiff sums of money, which were handed by the plaintiff to the defendants and others as directors of the said corporation and agents and trustees for the plaintiff for investment upon the plaintiff's account, and upon the terms that the moneys so invested, which should be repaid, should be invested on similar securities or accounted for and paid to the plaintiff; that the said moneys were invested by the said corporation on ac-

(3) 48 Law J. Rep. Chanc. 409; Law Rep. 11 Ch. D. 160.

(4) 47 Law J. Rep. Bankr. 91; Law Rep. 8 Ch. D. 327.

(5) Lord Coleridge, C.J.; and Lindley, J.

Bennett v. Bury, C.P.

count of the plaintiff, and that out of the said moneys or the moneys received by the said corporation, on repayment of the investments, or some of them, the said corporation, as the agents and trustees of the plaintiff, during the years therein specified, advanced divers sums on mortgage and *inter alia* sums, amounting to 6,946l. 0s. 3d., on mortgage of certain lands specified in seventeen different deeds of mortgage. The statement of claim set out the particulars of each of these mortgages, and it alleged that in the case of several of these mortgages the defendants applied to the mortgagors for repayment of the principal money before such repayment had become due, and that in the case of the other mortgages the defendants also applied to the mortgagors for repayment of the principal sums, and that in both cases the principal sums were, on the faith of representations stated to have been made by the defendants that they were agents of the plaintiff to receive such sums on account of the plaintiff, and in the belief on the part of the mortgagors that the defendants had the plaintiff's authority to receive such payment, paid by the said mortgagors to the defendants. The statement negatived the authority from the plaintiff to the defendants to receive such payment, and it alleged that the defendants having so obtained possession of the said moneys concealed this from the plaintiff, and did not pay or account for the same or any part thereof to the plaintiff, and retained and appropriated the said moneys to their own use, and permitted them to be employed for the purposes of private trade and speculation without the knowledge or sanction of the plaintiff.

On the 9th of February, 1880, Field, J., on the application of the plaintiff, made an order, ordering that all further proceedings in this action, namely, *Bennett v. Bury and Others*, and in all the other thirty-six actions, should be stayed until after the trial of the said action of *Hull v. Bury and Others*. The rest of the said order was as follows: "And I further order that the time for delivering the statements of claim shall be enlarged until after judgment shall have been given in the action of *Hull v. Bury and Others*,

the plaintiffs in all the actions respectively undertaking that the action of *Hull v. Bury and Others* be treated as a test action and decisive of their respective rights, unless it should appear to the Court that the said test action had failed to be a real trial of the matter in issue therein, in which case the plaintiffs undertake to be bound by any order that the Court may think fit to make. The defendants to be at liberty to require the plaintiffs to proceed with their respective actions if dissatisfied with the result of the test action. The plaintiffs respectively to deliver within ten days particulars of their claim, and of the mode in which the amounts sought to be recovered are alleged to have been employed by the defendants. The defendants to be at liberty to apply for an order that any of the said actions shall be forthwith proceeded with upon satisfying the Court or a Judge that there is a special ground of defence not raised in the test action." From this order Lord Bury and Hugh Edmonstone Montgomerie, who were two of the defendants in all the actions, appealed.

Herschell and *Reginald Brown*, argued for the defendant Montgomerie, and

Lumley Smith, for the defendant Lord Bury.

They contended that the said order should be set aside or varied—that such an order like this had only been made on the application of the defendants, but never on the application of the plaintiffs, except in the case of *Amos v. Chadwick* (1), which was a different case from the present, as there one action would decide the others, and might, therefore, properly be a test action, whereas here the question in all the actions would not be the same; also that the plaintiffs had no right to keep a number of actions suspended over the defendants for an indefinite time without the consent of the defendants, and that, at all events, no such order should be made until the pleadings had been completed in all the actions.

(1) Law Rep. 4 Chanc. Div. 869; and on appeal, 47 Law J. Rep. Chanc. 871; Law Rep. 9 Ch. D. 459.

Bennett v. Bury, C.P.

Butt and *J. C. Mathew* appeared for the plaintiff, but were not heard.

LOED COLERIDGE, C.J.—I am of opinion that this order of my brother Field is correct, and should be affirmed. The application is an application on the part of certain defendants to rescind an order of my brother Field to stay the proceedings in thirty-seven actions against these defendants under these circumstances. There are thirty-eight plaintiffs, who are persons who deposited with the corporation, of whom the defendants are directors, certain sums of money, to be invested by the corporation in colonial or other securities, and the charge against the defendants, as I understand it, is, that they being directors of the company, received from these depositors various sums of money, and have, in the first instance, invested them on mortgage, and then, by demand from the mortgagors, received the money from the mortgagors and applied the sums so got not in a manner in which, as directors, they should have applied them, for the purposes of the corporation, nor according to the terms arrived at between the depositors and the corporation, but have, in plain terms, put such money into their pockets, and used it for their own benefit. I say not for a moment whether that charge is capable of being made out in any one of the instances, but that is the charge, and it is manifest that that charge is the same charge in the thirty-eight actions. It is quite true, as Mr. Herschell properly observed, that it is very likely the incidents of proof and the details of the evidence in the several cases, will vary to some extent. To some extent they must vary, because the plaintiffs are different, and the sums of money sought to be recovered are not identical. But the gist of the actions is the same in all cases, and the conduct and fraud charged in all the actions are the same. Then, what is suggested here is this, the defendants having the thirty-eight actions brought against them at the suit of thirty-eight plaintiffs, who say they have been defrauded, are entitled in effect to have the thirty-eight actions all tried together, because it is said a defendant is

not against his will to have the trial of thirty-seven actions postponed indefinitely, while one is being tried. Now the order of my brother Field is an order staying all the actions until one of them is tried, if the plaintiffs, not the defendants, agreed that the action so allowed to proceed be treated as a test action, and if on the trial of the case in any of the other actions it should appear that the issues were different, or that the points decided and determined by the action then proceeding were not test points in the other actions, the defendants should have liberty to defend and to treat the action as not a test action.

Two objections have been made to this order. First, it is said that this is a perfectly new order, and is in effect an attempt to consolidate at the suit of the plaintiff and not at the suit of the defendants, and that there is no power to do this. That objection seems to be answered by the case of *Amos v. Chadwick* (1), in which, under circumstances though not precisely the same yet not very unlike the present, Malins, V.C., made an order suspending seventy-seven actions while one action was tried. In that case the Vice-Chancellor does not say that the seventy-seven writs should not have been issued, but he seems to say that they should not have been issued without an offer to try one of the actions as a test action. If that offer had been accepted by the other side, Malins, V.C., seems to have thought that that would have been a shorter and less expensive process. It is not suggested that that ought to have been done here, but the argument is that none of these actions ought to be treated as a test action.

The decision of the Vice-Chancellor clearly shews that he was of opinion that by the general power that the Court has to prevent its procedure from being abused and made oppressive instead of being conducted in the interests and for the convenience of the suitors, he had power to make the order, and he accordingly made it.

The plaintiff in that case who was allowed to proceed in the one action never proceeded with it, and there was then an application to the Vice-Chancellor to

Bennett v. Bury, C.P.

allow another plaintiff to go on, because the object of the order had failed since the action had never been tried as a test action, and the Vice-Chancellor made the order asked for, and that second order came on appeal before the Court of Appeal; and the Court of Appeal, consisting of the Master of the Rolls, Lord Justice Brett and Lord Justice Cotton, affirmed the order of Vice-Chancellor Malins. Not only did the Court of Appeal not doubt the Vice-Chancellor's power to make the order, but it expressly approved of the order which had been made. It is quite plain therefore that there is power to make the order, and the question is only one of discretion; and if ever there was a case in which it was right and proper as a matter of discretion that the power should be exercised it is this case, in which there are a great number of persons who have been treated substantially in the same way.

Then there is this further point. It is said by Mr. Herschell that the defendants have a right to have all the actions going on. He is not correct about that, because Order XXIX. deals with this very sort of case, and the first rule of that Order in express terms does not give the defendant a right to force a plaintiff on, but gives him a right to go to a Judge and ask a Judge to dismiss the action for want of prosecution if after the time limited for the delivery of the statement of claim the plaintiff does not deliver the statement of claim. Now, does anybody suggest, under the circumstances of this case, that any Judge at chambers would dismiss for want of prosecution thirty-seven actions while one of those actions was going on honestly to be tried to the end? I cannot conceive that any Judge at chambers would listen to such an application for a moment. If that is so, that disposes of the only point there is in Mr. Herschell's favour, because if the defendants would not get that, how are they hurt by the order of my brother Field? I think, therefore, upon the reason of the thing, and upon the authority of *Amos v. Chadwick* (1), that the order of my brother Field is perfectly proper, and that it ought to be affirmed. Then the only other matter as to which I have

doubted is whether the action, before being stopped, should go on so far as pleading is concerned; but it seems to me, however, that substantially my brother Field has ordered all that need be in the matter. He has ordered that in the thirty-seven actions the plaintiffs should give particulars of their claims, and more than that, for he has ordered particulars of "the mode in which the amounts sought to be recovered are alleged to have been employed by the defendants." Therefore it seems to me that my brother Field's order provides substantially for all that which otherwise the defendants might complain of; and I think therefore that the appeal should be dismissed, and with costs.

LINDLEY, J.—I am of the same opinion. The first thing that strikes one is this, whether there has been on the part of the plaintiffs an abuse of the procedure of the Court in instituting a number of actions for an object which is more or less a common object. If one could see that there had been an abuse of the procedure, one would easily see one's way to stop it in one way or the other. But I do not think that that can be said to be the case here. The obvious reasons for having a multiplicity of these actions are two: one is to save any question about the Statute of Limitations, and the other would be to save an equally nice question as to whether an action by one on behalf of himself and others would lie in an action of this description. I know the authorities on that point are rather fine, and it is in order to avoid any difficulty as to that that these several plaintiffs have commenced separate actions. That exposes the defendants to an enormous amount of costs if all the actions were pressed on against them. That would be very oppressive. But the defendants who are appealing against the order of my brother Field do not object to their being pressed on; they rather wish that they should be, and they are appealing from an order which prevents that oppression. Then in what respect are they hurt, or does the order which has been made grieve them? No hurt is suggested except that they have these thirty-seven actions hanging over their heads. But how can they prevent that?

Bennett v. Bury, C.P.

They can only prevent it by going to a Judge at chambers and getting the actions dismissed for want of prosecution; but, as my Lord has pointed out, one cannot believe that any Judge at chambers in a case of this kind would drive all the plaintiffs to go on with their actions. The defendants practically therefore cannot get rid of the thirty-seven actions, and in that respect therefore they are no worse off.

Then as regards the power to make this order, the case of *Amos v. Chadwick* (1) would shew that the Court possesses it; and I should have thought, apart from that authority, that it would follow from the general principle enabling the Court to prevent abuse of its procedure that the Court would have had such power. But we need not discuss it, because Vice-Chancellor Malins has acted on the supposition that there is the power, and the Court of Appeal has affirmed what he did. It comes therefore to a matter of discretion on the part of the Judge in making the order, and it seems to me that my brother Field exercised the discretion properly in this case, and that therefore this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors—Markby, Stewart & Co., for plaintiff;
White, Borrett & White, and Linklater & Co.,
for defendant.

[IN THE COMMON PLEAS DIVISION.]

1879. { *KENRICK (appellant) v. THE*
Nov. 27. { *CHURCHWARDENS AND OVER-*
 { *SEES OF THE PARISH OF*
 { *GUILDFIELD (respondents).*

*Rating—Sporting Rights—Severed from
the Occupation of the Land—37 & 38 Vict.
c. 54. s. 6. sub-sect. 2.*

[For the report of the above case, see
49 Law J. Rep. M.C. 27.]

[IN THE COMMON PLEAS DIVISION.]

1880. }
March 4. } *LUCAS v. DICKER.*

*Bankruptcy — Bankruptcy Act, 1869
(32 & 33 Vict. c. 71), s. 95—Execution
Creditor—Title of Trustee—Notice of Act
of Bankruptcy.*

*Notice that a petition in bankruptcy has
been filed is notice of an act of bankruptcy,
since such petition must be founded on an
act of bankruptcy.*

*On the 7th of May, 1879, after seizure
under an execution by a judgment credi-
tor, but before sale, such creditor received a
letter from the solicitor for the execution
debtor, giving him notice that a petition in
bankruptcy had on the 1st of May in the
same year been filed in a certain County
Court by A. B. against the execution debtor.
The debtor having been afterwards adjudged
bankrupt on such petition:—*

*Held, that this letter was sufficient notice
of an act of bankruptcy committed by the
bankrupt within the meaning of section 95
of the Bankruptcy Act, 1869 (32 & 33
Vict. c. 71), to deprive the execution credi-
tor of the protection of that section.*

This was a Special Case, in which the question was, whether the defendant, who was the execution creditor of one Lord Charles John Innes Ker, a bankrupt, of whom the plaintiff was trustee in bankruptcy, had had notice of an act of bankruptcy committed by the said execution debtor before the sale under such execution. The following are the material facts:—

On the 31st of March, 1879, the said Lord Charles John Innes Ker committed an act of bankruptcy by having neglected to pay or secure the sum mentioned in a debtor's summons issued out of the County Court of Berks, holden at Windsor, at the suit of two of his creditors, Walter Thornhill and Henry Nimrod Whitaker.

On the 1st of March, 1879, the defendant brought his action against the said Lord Charles John Innes Ker, to recover the sum of 988l. 4s. 5d., due on a promissory note, and on the 16th of April in that year judgment was signed in such action, and a writ of *fi fa.* was

Lucas v. Dicker, C.P.

issued and lodged with the sheriff of Berks, to levy the amount of the debt, and on the next day the sheriff seized certain horses and other property of the said execution debtor. A claim was made to what had been so seized by one Hudson, on which the sheriff issued an interpleader summons, and after several adjournments at the instance of the claimant, the Master made an order on the 2nd of May, 1879, barring the claim with costs. The claimant served a summons, appealing from such order, and this appeal summons was dismissed on the 5th of May.

On the 1st of May the said Walter Thornhill and Henry Nimrod Whitaker filed a petition in bankruptcy against the said execution debtor, the act of bankruptcy alleged being that which the said debtor had committed on the preceding 31st of March, as above mentioned.

On the 6th of May, 1879, Mr. Powell, the solicitor for the said execution debtor, posted to the defendant, the execution creditor, and to the said sheriff and his officer, a notice, which was received by them respectively on the next day, and of which the following is a copy :—

"18 Old Burlington Street,
London, W., 6th May, 1879.

"In the High Court of Justice.

"Common Pleas Division.

"*Dicker v. Lord C. J. Innes Ker.*

"Take notice, that a petition in bankruptcy was, on the 23rd of April last, filed in the County Court of Berks, holden at Windsor, by John Rigby and Thomas Gullick, against the above-named debtor, and the hearing thereof is fixed for the 10th of May instant, at 11 a.m. And take notice, that a second petition in bankruptcy was, on the 1st day of May instant, also filed in the last-mentioned Court, by Walter Thornhill and Henry Nimrod Whitaker, and that the hearing thereof is appointed for the 17th of May instant, at 11, also at the said County Court at Windsor.

"Yours, &c.,

"Thos. A. G. Powell,

"Solicitor for the said Lord
Charles J. I. Ker."

After the receipt of this notice, the

said sheriff, by the direction of the said execution creditor, caused the property he had so seized to be sold; but in consequence of such notice, the said sheriff refused to part with the proceeds of the sale until it should be determined who was entitled thereto. The said execution debtor, up to the date of the service of the said notice, had no notice or knowledge whatever of any act of bankruptcy having been committed by the said execution debtor, and he never at any time after that date and previously to the said sale had any notice of any act of bankruptcy by the said debtor, save in so far as he was affected with notice by the receipt of the said notice of the 6th of May, 1879.

On the 21st of June, 1879, the said execution debtor was adjudicated bankrupt on the said petition of the said Walter Thornhill and Henry Nimrod Whitaker, and on the 12th of July the plaintiff was duly appointed trustee in bankruptcy.

Afterwards the balance of the proceeds of the sale by the sheriff, after deducting possession money and costs of interpleader, was paid into Court, pursuant to an order of Field, J., to abide the event of a Special Case, in which the question for the Court was, whether, under the above circumstances, the plaintiff as such trustee or the defendant as such execution creditor, was entitled to the money so paid into Court.

Graham, for the plaintiff.—The plaintiff, as trustee in bankruptcy of the said Lord Charles Ker, is entitled to this money. The act of bankruptcy being on the 31st of March, 1879, was prior to the sale under the execution, and therefore the plaintiff is clearly entitled, unless the sale be a protected transaction within the meaning of sub-section 3 of section 95 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which protects "any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale, notice of

Lucas v. Dicker, C.P.

any act of bankruptcy committed by the bankrupt, and available against him for adjudication." The question, therefore, is, whether the letter of the 6th of May from the solicitor for the said Lord Charles Ker to the defendant was a notice of an act of bankruptcy within the meaning of this enactment. It gave him notice that a petition in bankruptcy had been filed by Thornhill and Whitaker in the Windsor County Court against the said Lord Charles Ker, and it was upon that petition the said debtor was afterwards adjudged bankrupt. That petition, if inspected, would have given the present defendant full information of the act of bankruptcy which the debtor had committed. The notice was therefore notice of such act of bankruptcy, and took the case out of the protection clause of the Bankruptcy Act. It has been held that any communication, which brings to the knowledge of a person the fact that an act of bankruptcy has been committed, is sufficient, and that the notice need not specify any particular act of bankruptcy; but may state generally that an act of bankruptcy has been committed—*Williams on Bankruptcy*, 2nd edit. p. 275, *Hope v. Meek* (1), *Bird v. Bass* (2), *Turner v. Harcastle* (3), *Udal v. Walton* (4). The case of *Hocking v. Acraman* (5) will probably be cited on behalf of the defendant, because it was there held that notice that a docket was struck was not sufficient; but that case was referred to in *Udal v. Walton* (4), and Pollock, C.B., in the course of his judgment in that last case, said, "The case of *Hocking v. Acraman* (5) is not at all opposed to this view of the case. Notice of a docket having been struck merely informs the party that another person has taken a certain step which is adverse to the debtor. The commercial world gather nothing from that fact, ex-

cept that some person has made a certain affidavit." There is another case—*Evans v. Hallam* (6), which may also be cited on behalf of the defendant. There the letter stated to the execution creditor that the debtor "had made an assignment of what goods he had, and it was arranged that his daughter should raise the money, but this we find was never finally arrived at;" and it was held that such letter did not amount to a notice that the debtor had committed an act of bankruptcy. That letter was at least equivocal in its meaning. "It refers," says Cockburn, C.J., "to an arrangement which had been made that his daughter should raise money. It might be that the assignment was to the daughter as a security for the advance of money to her, or it might be that it was for the benefit of Bennett; but the letter is quite consistent with the first of these two views, and a stranger would so understand it;" and Lush, J., says, "It does not carry the impression that the assignment which had been made was for the benefit of creditors. A stranger would rather understand that it had been made to the daughter, who, according to the arrangement, was to raise the money which was required." But telling the defendant, as he was told by the letter of the 6th of May, 1879, that a petition in bankruptcy had been filed, was notice of an act of bankruptcy, since such petition could only be founded on an act of bankruptcy. Moreover, the sale by the defendant after the notice he had received, was not executing the execution in good faith within the meaning of the statute.

Pitt Lewis, for the defendant.—The letter relied on by the plaintiff was not such notice of an act of bankruptcy as would deprive the execution creditor of the protection given by section 95 of the Bankruptcy Act, 1869. The act of bankruptcy must precede the seizure to deprive the execution creditor of his right to the proceeds—*Ex parte Todhunter* (7),

(1) 10 Exch. Rep. 829; 25 Law J. Rep. Exch. 11.

(2) 6 M. & G. 143.

(3) 11 Com. B. Rep. N.S. 683; 31 Law J. Rep. C.P. 193.

(4) 14 Mee. & W. 254; 14 Law J. Rep. Exch. 262.

(5) 12 Mee. & W. 170; 13 Law J. Rep. Exch. 34.

(6) 40 Law J. Rep. Q.B. 229; Law Rep. 6 Q.B. 713.

(7) 39 Law J. Rep. Bankr. 17; Law Rep. 10 Eq. 425.

Lucas v. Dickson, C.P.

Ex parte Schulte (8), and *Edwards v. Scarsbrook* (9). In the present case the seizure was on the 17th of April, 1879, and the letter containing the notice was not received until the 7th of May, 1879, long after the seizure, and the notice was such that it might well be that the act of bankruptcy was only committed the day before, or at all events some time after, the seizure. The 95th section of the Bankruptcy Act, 1869, says that the execution shall be good unless the execution creditor had, "at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication." Notice of a petition in bankruptcy is not notice of an act of bankruptcy, and cannot be substituted for it. As said by Lord Abinger in *Hocking v. Acraman* (5), "we are to consider whether we shall adhere to the words of the Act of Parliament, and construe it that notice of an act of bankruptcy is the thing to be shewn, or whether we shall deviate from those words, and substitute for them notice of a docket having been struck. I think it better to adhere to the precise words of the Act than to substitute something else in lieu of that which the statute requires." In the case of a judgment debtor who is a trader, the 87th section of the Bankruptcy Act, 1869, makes notice of a bankruptcy petition instead of notice of an act of bankruptcy the thing which is to defeat the execution, which shews that the Legislature intended to draw a distinction in these two sections between notice of a bankruptcy petition and notice of an act of bankruptcy. The case of *Conway v. Nall* (10) also shews that it is not sufficient to give notice of what may probably result in an act of bankruptcy. "It is important," said Erle, J., in that case, "that the creditor should have such information as will enable him to determine on his right at the time." The notice, as shewn by *Evans v. Hallam* (6), should be construed

strictly against the person giving it, and what is only at best an equivocal notice will not do.

Graham, in reply.—It is not necessary that the notice should state more than that the execution debtor had committed an act of bankruptcy, and it is not necessary that it should say when such act was committed. If it should afterwards turn out that the act of bankruptcy was not prior to the seizure in execution it will not of course affect the title of the execution creditor, and in that case the notice will have no effect.

LINDLEY, J.—I am of opinion that our judgment should be for the trustee in bankruptcy, who is the plaintiff in this case. The position of the parties is this. The title of the trustee relates back to a date which is anterior to that of the defendant, the execution creditor, for the title of the trustee relates back to the 31st of March, 1879, the date of the act of bankruptcy, whilst the title of the execution creditor relates back only to the 17th of April, 1879, the date of the seizure. *Prima facie*, therefore, the trustee is entitled, and it lies on the execution creditor to displace the right of the trustee, and to do so he must, in the words of section 95, sub-sec. 3 of the Bankruptcy Act, 1869, shew that his execution was executed in good faith by seizure and sale before the date of the order of adjudication, and that he had not, at the time of such seizure and sale, "notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication." Now as regards the first point, whether the execution was executed in good faith, it appears to me that the defendant, the execution creditor, was acting in good faith by seizure and sale within the meaning of that section, for he was not acting in collusion with the execution debtor, and all that can be said as to what he did was that he was trying to exercise the right the law allows to an execution creditor in the best way he could. The real question in this case turns on the point whether the execution creditor had, before sale, notice of an act of bankruptcy which was available

(8) Law Rep. 9 Chanc. App. 409.

(9) 32 Law J. Rep. Q.B. 45.

(10) 1 Com. B. Rep. 645; 14 Law J. Rep. C.P. 165.

Lucas v. Dicker, C.P.

for adjudication against the execution debtor. Now before the sale the execution creditor had received notice that a petition in bankruptcy had been filed against the debtor by John Rigby and Thomas Gullick, and also that another petition in bankruptcy had been filed against the debtor by Walter Thornhill and Henry Nimrod Whitaker. It has been said that such notice was not notice of an act of bankruptcy. It is true that a petition in bankruptcy is not of itself an act of bankruptcy, but it would be altogether worthless without an act of bankruptcy to support it, and in my opinion notice that such a petition has been filed is notice of an act of bankruptcy, for it is a notice of that which necessarily involves that an act of bankruptcy has been committed. Mr. Lewis has urged that the notice ought to be a notice of such an act of bankruptcy as would defeat the title of the execution creditor. The answer to that is that no such words as these are in the 95th section, but that what that section says is, "notice of any act of bankruptcy." If the act of bankruptcy is one which does not override the title of the execution creditor it is so much the better for him, and if it does override his title it is so much the worse for him, but it is not necessary that the notice should state what the act is or when it was committed. In *Udal v. Walton* (4) there was no notice when any of the acts of bankruptcy had been committed, and the notice was held sufficient, though it was only a general notice that acts of bankruptcy had been committed by the debtor. Mr. Lewis referred us to the case of *Evans v. Hallam* (6), to shew that the notice of an act of bankruptcy ought to be more precise than the notice in the present case. There the notice was that the debtor had made an assignment, but the notice was so worded that I think Lush, J., was quite right in saying that the impression it would convey was not that the assignment was for the benefit of creditors, but was an assignment to the debtor's daughter to raise money on, that is to say, in other words, that it did not refer to any act of bankruptcy. That was the construction which the Court in

that case put on the letter which had been written, but the Court did not, I think, intend to overrule what was decided in *Udal v. Walton* (4), that a general notice of any act of bankruptcy is sufficient. The moment the execution creditor has received notice that an act of bankruptcy has been committed it is for him to ascertain or take the risk whether or not it is an act of bankruptcy which defeats his title.

LOPES, J.—I also think that our judgment in this case must be for the trustee in bankruptcy. The 95th section of the Bankruptcy Act, 1869, protects the execution creditor, unless before sale he has had notice of an act of bankruptcy committed by the debtor; and the question here is whether the notice which he received in this case was a sufficient notice of an act of bankruptcy. The case of *Evans v. Hallam* (6) raised at first some difficulty in my mind, but when that case is examined, I think the notice there is more properly to be looked at as referring to something which was not an act of bankruptcy, and therefore it was held by the Court to be too vague. Can it, however, be said in the case before us that the notice was not a notice of an act of bankruptcy? for a petition in bankruptcy must be founded on an act of bankruptcy. I think that this case is governed by that of *Udal v. Walton* (4), and that judgment must, therefore, be for the plaintiff.

Judgment for plaintiff.

Solicitors—T. A. G. Powell, for plaintiff; O. J. Allen, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. { CHAPMAN v. THE GREAT WESTERN
March 5. { RAILWAY COMPANY. THE SAME
April 7. { v. THE LONDON AND NORTH-
WESTERN RAILWAY COMPANY.

Railway Company — Bailment — Consignment of Goods "to be left till called for" — Destruction by Fire before Delivery — Carriers or Warehousemen.

Certain goods were consigned by the defendants' railway to W. addressed to the plaintiff, "to be left till called for." On their arrival at W. they were placed in the station warehouse, to await their being called for. Two days afterwards, without default on the part of the defendants, the warehouse was burned down and the plaintiff's goods were consumed by fire:—Held, that the goods were not, at the time when they were destroyed by fire, in the custody of the defendants as carriers but as warehousemen, and that, consequently, the defendants were not liable for a loss which had arisen through no default on their part.

These were actions tried before Cockburn, C.J., at the Bristol Assizes, when a verdict was entered for the plaintiff, it being agreed that the question of law involved should be reserved for the decision of this Court on an application for judgment. The facts are sufficiently stated in the judgment of the Lord Chief Justice.

Poole, on behalf of the plaintiff, now moved for judgment.—The only question which arises here is whether the defendants were carriers, or warehousemen of the goods at the time when they were destroyed by fire. It is contended that the liability of the defendants as carriers did not cease, and that they could not become warehousemen instead of carriers of the goods until after the lapse of a reasonable time. See *Hyde v. The Trent Navigation Company* (1). Here the goods were taken under a contract to deliver them when called for, and a reasonable time had not elapsed within which it was the plaintiffs' duty to claim delivery, so that the owner cannot be said to have

been guilty of delay in removing the goods. Moreover, the defendants ought to have given notice to the consignee of the safe arrival of the goods at Wimborne. He cited *Bourn v. Gatliffe* (2) and *Mitchell v. The Lancashire and Yorkshire Railway Company* (3).

Kinglake for the defendants.—The defendants are exempt from liability under the terms of the contract, the consignee having dispensed with delivery. They ceased therefore to hold the goods in their capacity of carrier, though retaining the control or possession of them.

Our. adv. vult.

The judgment of the Court (4) was (on April 7) delivered by—

COCKBURN, C.J.—These two cases depend on the same facts and involve the same point. The facts are not in dispute, and lie in a word; but they give rise to a question of considerable importance.

The plaintiff travels about the country with drapery goods. A package of such goods was delivered to the defendants, the Great Western Railway Company, at Bristol, to be forwarded from thence by their line to their station at Wimborne. A second was delivered to the defendants, the London and North-Western Railway Company, to be forwarded from London to the station of the Great Western Railway Company at Wimborne. Both were addressed to the plaintiff; both were directed "to be left till called for." The one from Bristol arrived on the 24th of March, the one from London on the 25th. On their arrival they were placed in the station warehouse to await their being called for. They had not been called for when, on the morning of the 27th, a fire having accidentally broken out, the warehouse was burned down, and the plaintiff's goods were consumed by fire.

The plaintiff brings his action against both defendants on their liability as common carriers, contending that that liability still subsisted when the goods were destroyed.

(2) 8 Sc. N.R. 604; 3 Man. & G. 643.

(3) 44 Law J. Rep. Q.B. 107; Law Rep. 10 Q.B. 256.

(4) Cockburn, C.J.; Lush, J.; and Manisty, J.

(1) 5 Term Rep. 389.

Chapman v. Gt. Western Rail. Co., Q.B.

The plaintiff was aware that the goods were coming. He called on the 22nd to inquire after them, but found that they had not yet arrived. He called again in the course of the 27th, but the goods had been destroyed that morning.

The question is whether the goods in question are to be considered as having been in the custody of the defendants, as carriers, in which case the defendants would be liable for the loss, though not arising from any default of theirs, or as warehousemen, in which case they would be liable only for want of proper care, which is not alleged to have been the case here. The facts not being in dispute, it was arranged on the trial at *Nisi Prius* that a verdict should pass for the plaintiff for the value of the goods in each case, but that the question of law as to the liability of the defendants should be reserved for the decision of this Court on an application for judgment.

The question of where the liability of the carrier ceases, or rather becomes exchanged for that of an ordinary bailee for hire, is sometimes one of considerable nicety and by no means easy of solution. We are not, however, embarrassed in the present case by any consideration as to an undertaking to forward the goods, such as arose in *Garride v. The Trent and Mersey Navigation Company* (5) or as to any obligation on the part of the company to give notice of their arrival, which was one of the points which arose in *Bourn v. Gatcliffe* (2). It is plain that the delivery was to be made at the station to which the goods were addressed, and to the plaintiff himself, or some one duly authorised on his behalf. Nor does any question arise as to the readiness of the defendants to deliver. The goods had arrived safely, and were ready for delivery, had they been called for, down to the time of the fire. It is not suggested that the defendants were under any obligation to give notice to the plaintiff of the arrival of the goods. Nor, indeed, could they have done so. He was not a resident at Wimborne, nor did they know his address. He was going about the country on his business between the time

of the arrival of the goods and that of their destruction. No evidence was offered at the trial of any prior course of dealing between the parties, or of any established practice on the part of the railway company in dealing with goods addressed to, and to be delivered at, the station. We have therefore to consider the question with reference to general principles alone.

The contract of the carrier being not only to carry, but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond, as well as precede, the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure, sometimes one of considerable duration. Next there is the time which in most instances must necessarily intervene between their arrival at the place of destination and the delivery to the consignee, unless the latter, which, however, is seldom the case, is on the spot to receive them on their arrival. Where this is not the case some delay, often a delay of some hours, as for instance when goods arrive at night, late on a Saturday, or where the train consists of a number of trucks which take some time to unload, unavoidably occurs. In these cases, while, on the one hand, the delay being unavoidable, cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other hand, the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of carrier. *A fortiori* will this be the case where there is unreasonable delay on the part of the carrier, if the consignee is ready to receive.

The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable, not to the carrier, but to the consignee of the goods. Here again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to a reasonable time to demand and re-

Chapman v. Gt. Western Rail. Co., Q.B.

ceive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night time, or of which the arrival is uncertain, as of goods coming by sea, or by a goods train, the time of the arrival of which is liable to delay. On the other hand, he cannot, for his own convenience, or by his own laches, prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance—at all events when the carrier has no means of communicating with him, which was the case in the present instance—cannot avail him in prolonging the liability of the carrier, as such, beyond a reasonable time. When once the consignee is *in mora*, by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman: he ceases to be liable in case of accident. What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law, as such it must depend on the circumstances of the particular case.

Such being the general rule, it is of course competent to the parties to modify the contract by the introduction of any terms or conditions they may please. The question arises whether they have done so, and, if so, to what extent in the present instance. The goods were specially directed “to be left till called for.” What is the meaning of these words? What effect, if any, have they on the contract, as affecting the liability of the defendants? In our opinion none. They amount to no more than an intimation to the carrier that the goods are not to be delivered elsewhere, but will be fetched from the station. They are words which have been long in use, and had their origin in former times, when the carrier generally had his office in the town to which he carried, and was in the habit of delivering at the house or place of business of the person to whom the goods were addressed.

To prevent goods, which it better suited the convenience of the consignee to receive at the office of the carrier—more especially when he had no residence or office at the particular place—from being sent out for delivery, and possibly misdelivered, and to ensure their being kept at the office of the carrier ready for delivery, they were specially so addressed. There are still places at which railway companies send out goods from the station. The consignors of the goods now in question were probably unaware whether the defendants' company did so at Wimborne or not. They no doubt knew that the plaintiff did not reside or carry on business there, except in passing. They were probably aware that he was going about the country with his goods, and that it was uncertain at what precise moment it would suit him to receive them. They therefore directed them to be left at the station till called for, obviously for the plaintiff's convenience, not for that of the company. No doubt some effect must be given to the words. Having contracted to carry the goods subject to the condition of keeping them till called for, the company would be bound to keep them, possibly not for an indefinite, but at all events for a reasonable time. But in what capacity? As carriers or as warehousemen? In our opinion no change in the conditions and liability is introduced by these words. It would be in the highest degree unreasonable that the company, having agreed to keep the goods for the convenience of the owner, should be saddled with a more onerous liability than would otherwise have attached to them. It cannot be supposed that they undertook to keep the goods till it suited the convenience of the plaintiff to take them away, with the intention of prolonging their responsibility throughout the time, whatever it might be. In our opinion, as soon as a reasonable time for delivery had passed, the defendants were fully entitled to treat their responsibility as carriers as at an end, and as exchanged for that of warehousemen.

This brings us to the question of what under the circumstances would be a reasonable time. Now, the fire happening

Chapman v. Gt. Western Rail. Co., Q.B.

on the morning of the 27th of March, one of these packages had been lying at the station since the 24th, the other since the 25th. If the plaintiff, who expected these goods, had called for them on the 26th, and had not had them delivered to him, and had sustained a loss in consequence, he would have had a good ground of complaint against the company, inasmuch as they would then have had full time to unload the goods, and to have them ready for delivery. The reason he did not do so was that he was following his business elsewhere, but for which he would have fetched his goods away. It seems to us that there must be a corresponding obligation on his part, and that he was consequently in *mora*, and must put up with the loss, as resulting from his own delay, instead of throwing it on the company.

This view of the case receives support from the decision of the Court of Common Pleas in *In re Webb* (6), which, in principle, is quite analogous to the present case, though the facts are not precisely the same. There the defendants, the carriers, in order to obtain their exclusive custom, had agreed with the plaintiffs to store all goods arriving for them in the defendants' warehouse, free of charge, till it suited the plaintiffs to take them away. A fire having accidentally broken out, and goods of the plaintiffs, which had been lying in the defendants' warehouse upwards of a month, having been destroyed, it was held that having been in the keeping of the defendants for the convenience of the plaintiffs, the defendants were not liable for the loss. Here, too, the goods were equally in the keeping of the defendants for the convenience of the plaintiff, and the same result must ensue.

Judgment for the defendants.

Solicitors—Darley & Cumberland, agents for Clifton & Carter, Bristol, for plaintiff; M. H. Hall, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879.

Dec. 1, 7. } MAPLESON v. MASSINI.

Security for Costs—Foreigner residing out of Jurisdiction—Breach of Contract—Counter-claim for Damage on same Cause of Action.

The plaintiff brought an action against the defendant, a foreigner residing out of the jurisdiction, for breach of contract. The defendant, besides denying the breaches, brought a counter-claim against the plaintiff, alleging that the plaintiff broke the contract, and claiming damages less in amount than those claimed by the plaintiff:—Held, that the defendant ought not to be called upon to give security for the costs occasioned by the counter-claim, inasmuch as the statement of claim and counter-claim respectively rested upon the same circumstances.

Winterfield v. Bradnum (47 Law J. Rep. Q.B. 270) distinguished.

This was a motion to set aside an order made by Lindley, J., at chambers, whereby security for costs was ordered to be given by the defendant for plaintiff's costs occasioned by a counter-claim, unless within a certain time he should give particulars of his counter-claim, and an undertaking not to claim more damages than the plaintiff might recover.

The facts are as follows. The defendant, a professional singer of considerable reputation, entered into an agreement with the plaintiff to sing as first tenor at certain places, and the present action was brought against the defendant for breach of that agreement, the damages being laid at 10,000*l.* The defendant denied the breaches, and also, by way of counter-claim alleged that if the contract existed with the plaintiff, the latter committed a breach of it, by not employing the defendant in the manner stipulated for in the contract, whereby he had lost the benefit of the contract and suffered great loss and damage. The counter-claim therefore arose out of the same facts, the damages in respect of the same being laid at 1,500*l.* The order was applied for on the ground that the defendant was abroad, and under these circumstances

Mapleson v. Massini, Q.B.

the plaintiff obtained an order from Lindley, J., at chambers, to the effect above stated. [The above facts are taken from the judgment of Field, J.]

Moulton, for the defendant, now moved by way of appeal.—The defendant ought not to have been required to give security for costs. Prior to the Judicature Act it was a general rule in equity that the plaintiff in a cross suit could not be called upon to give security for costs to the plaintiff in the original suit. Daniel's *Chancery Practice*, 5th edit., vol. 1, pp. 28, citing *Vincent v. Hunter* (1) and *M'Gregor v. Shaw* (2).

The decision of this Court in *Winterfield v. Bradnum* (3) is distinguishable, for there the counter-claim relied upon was an altogether different transaction.

Chandos Leigh, for the plaintiff, supported the order.—The counter-claim is in the nature of a distinct action, and the defendant has become a principal actor in the proceedings—*Winterfield v. Bradnum* (3). Prior to the Judicature Acts the defendant would have been obliged to bring a separate action, and to give security for costs; and although he can now set up in a counter-claim appended to his statement of defence in the action brought against him, his own claim which he would otherwise have had to assert in a distinct action, the practice relating to the giving of security for costs has not been altered. In the *Julia Fisher* (4) a party out of the jurisdiction putting in a counter-claim was ordered to give security for costs, so that the defendant was treated as a plaintiff, and as if there were two actions.

Moulton replied.

Cur. adv. vult.

FIELD, J. (on Dec. 7), after stating the facts already set out, continued.

Now I am of opinion that the order of Mr. Justice Lindley must be set aside, and the appeal allowed. The authorities that were cited in the argument prin-

cipally consist of cases decided before the Judicature Acts, where the Chancery Courts have said that a man did not cease to be a defendant for the purpose of being required to find security merely because he tacked on to his cross bill a claim for relief arising out of the same transaction. I thought at first that the decision *Winterfield v. Bradnum* (3) was at variance with our present decision. There the action was brought by the plaintiff, a foreigner residing out of the jurisdiction, against the defendant, to recover a sum of money for goods sold and delivered. The defendant admitted that the money was due, but alleged the breach by the plaintiff of another contract between them, for which he counter-claimed against the plaintiff to an amount exceeding the plaintiff's claim. Under these circumstances an application was made to me, sitting at chambers, for an order on the plaintiff to give security for costs, which I made. I thought that the defendant was in the same position as he would have been if the application had been made before defence, or he had relied on a set-off in the action, and that the mere circumstance that he asked for something beyond his defence could make no difference. However, the Court of Appeal took a different view, holding that the defendant had by the course he had thought proper to pursue in getting up his counter-claim, become a principal actor, and was not entitled to obtain security for costs from the original plaintiff. But there is a broad distinction between *Winterfield v. Bradnum* (3) and the present case. There the counter-claim arose out of a different transaction altogether; here the counter-claim is based upon identically the same facts arising out of one and the same transaction. I therefore think that the order made by Lindley, J., was wrong, and that the defendant ought not to be called upon to give security.

MANISTY, J.—I entirely agree, the ground of my decision being that there is but one subject matter out of which both the claim and counter-claim arise. The case seems to me to fall within the general rule which prevailed with reference to bill and cross bill in equity, the object

(1) 5 Hare, 320.

(2) 2 De Gex, & S. 360.

(3) 47 Law J. Rep. Q.B. 270; Law Rep. 3 Q.B. D. 324.

(4) Law Rep. 2 Prob. Div. 115.

Mapleson v. Massini, Q.B.

being to dispose in one suit of the whole subject matter. A counter-claim stands in the same position as a cross bill, and the mere fact that damages are asked for by the counter-claim cannot be a reason for calling on a defendant to find the security asked for. The appeal must therefore be allowed.

Appeal allowed.

Solicitors—J. & R. Gole, for plaintiff; F. E. Goodhart, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1879.

Dec. 12.

1880.

April 8.

CHAPMAN v. KNIGHT;
WATSON (claimant).

Bill of Sale—Prior unregistered Bill of Sale—Assignment by Cestui que Trust—Inventory and Receipt—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31)—County Court Appeal.

The goods of the defendant had been seized in execution and sold by the sheriff to one Oliver, to whom the sheriff gave an inventory and receipt attached; this document, which was given subsequent to the passing of the Bills of Sale Act, 1878, was not registered; possession of the goods was never taken by Oliver, and they remained in the possession of the defendant. Four days after, Oliver conveyed the goods by deed in trust for the defendant's wife, with a power to the trustee to sell upon her direction; this document was not registered. The defendant's wife subsequently sold the goods to the claimant Watson, and an inventory and receipt signed by her and the defendant were given to him; this document was duly registered, but the trustee was not a party to it. Watson allowed the goods to remain in the possession of the defendant:—

Held, that the assignment to Watson was invalid and void as against an execution creditor of the defendant, because not a proper compliance with the Bills of Sale Act and also contrary to the direction of the settlement.

Per GROVE, J. (LOPES, J., dissentiente),
VOL. 49.—Q.B., C.P. & EXCH.

that the assignment to Oliver being invalid, because not registered under the Bills of Sale Act, 1878, he could confer no better title than he himself possessed, and that the subsequent assignments were therefore void as against the execution creditor.

The Court will uphold the decision of the County Court Judge, where it can be supported on points other than those on which he decided, though such other points were not taken in the Court below.

Appeal by motion under 38 & 39 Vict. c. 80. s. 6, from the Clerkenwell County Court of Middlesex.

The action, which was an interpleader issue, was brought to determine the title to certain goods in the possession of the defendant seized by the plaintiff Chapman as execution creditor, the defendant Knight being execution debtor, and Watson claimant under a bill of sale.

The goods, which were originally the property of the defendant, had been, on the 27th of June, 1879, seized by the sheriff under a writ of *fi. fa.*, issued in an action of one *Bamberger v. Knight*. They were then sold by the sheriff to one Oliver, who was brother-in-law to the defendant, and an inventory of the goods, to which was appended a receipt for the purchase-money, signed by the sheriff, was handed to Oliver; this document was not registered, and the goods remained in the possession of the defendant. Four days after, Oliver by deed conveyed the goods to one Higgs, as trustee for Emily Knight, the wife of the defendant, to be used and enjoyed by her for life for her separate use, independently of her husband, or upon the direction in writing of the said Emily Knight to sell the same, and in default of sale in trust for the executors and administrators of the said Emily Knight, as part of her separate estate. This document was also unregistered. On the 15th of August, 1879, judgment was recovered by the plaintiff against the defendant. On the 16th of September Emily Knight, with a written authority from Higgs, sold the goods to the claimant Watson, a money lender; an inventory and receipt, signed by Emily Knight and the defendant, was given to Watson,

Chapman v. Knight, C.P.

and this document was duly registered under the Bills of Sale Act, 1878; by an instrument of the same date Watson let the goods on hire to the defendant and his wife, the goods throughout all these transactions remaining in the possession of Knight. On the same day the execution in the suit of *Chapman v. Knight* was levied.

The County Court Judge found as a fact that possession was never given to Oliver, and held that the inventory and receipt constituted a bill of sale within the Bills of Sale Act, 1878, and ought to have been registered as provided by that Act. The County Court Judge further held that Watson could stand in no better position than Oliver, and he barred Watson's claim, and gave judgment for Chapman, with costs to be taxed and paid by Watson.

The claimant Watson subsequently obtained a rule *nisi* under section 6 of 38 & 39 Vict. c. 50, to set aside this judgment, and enter judgment for him.

R. V. Williams shewed cause.—A bill of sale must be registered where the grantor remains in possession of the goods. The sale to Oliver by inventory and receipt attached should have been registered. By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4, the expression "bill of sale" shall include, *inter alia*, "inventories of goods with receipt thereto attached." As this bill of sale was not registered, and possession was never given to Oliver, there could be no transfer to Oliver, and Oliver could not therefore convey any title to Higgs.

[*LOPES, J.*—Oliver had a good common law title to the goods. *GROVE, J.*—But the object of the Act would be defeated if the grantee of an unregistered bill of sale could, by transferring to another by bill of sale which was registered, confer a good title, so as to defeat an execution creditor.]

But even if the assignment to Higgs was valid, the assignment to Watson cannot be upheld, because it was made by the wife, who was not the legal owner of the goods.

Prosser, in support of the rule.—In order to uphold the judgment of the

County Court Judge on the grounds on which it was based, it must be shewn that the Bills of Sale Act, 1878, requires registration of bills of sale granted by previous owners of the goods. A bill of sale is only voidable in the event of an execution being put in—*Edwards v. English* (1). This is a fresh transaction, and Watson's title is therefore good.

The point that the bill of sale by Emily Knight to Watson is invalid because not granted by the legal owner, is not open to the plaintiff, because it was not taken in the Court below, and the County Court Judge was not asked to take a note of the question—*Rhodes v. The Liverpool Commercial Investment Company* (2).

The defendant might have proved authority in the wife. At the most the plaintiff would be entitled to a new trial. The judgment of the County Court Judge cannot be upheld on a new point, if it is wrong for the reasons given.

R. V. Williams, in reply.—On the admitted facts it is clear that the assignment by the wife was bad, and therefore judgment cannot be entered for the claimant. If it can be shewn that on other grounds the judgment of the County Court Judge can be supported, the judgment will be upheld—*Stanciffe v. Clarke* (3).

Cur. adv. vult.

GROVE, J. (on April 8).—This case came before my brother *Lopes* and myself on a rule to set aside the judgment which had been entered for the plaintiff, and to enter judgment for the claimant instead. The rule was argued last December, but in consequence of circuit and numerous engagements, we have not been able till lately to meet together and consider our judgment.

[Having stated the facts as above set out, his Lordship proceeded as follows:—]

The County Court Judge held that although the last transfer was registered, yet Oliver, who took by an unregistered bill of sale, could confer no better title

(1) 7 E. & B. 564; 26 Law J. Rep. Q.B. 193.

(2) Law Rep. 4 C.P.D. 425.

(3) 7 Exch. Rep. 439; 21 Law J. Rep. Exch. 129.

Chapman v. Knight, C.P.

than he himself possessed, and therefore the third bill of sale was invalid.

A point was taken before us which was not argued in the Court below, namely, that the last bill of sale, not having been granted by the legal owner, was not valid, and it was contended that if this point was sufficient to uphold the decision of the County Court Judge it ought to be upheld; on the other side it was contended that the point if a good one might entitle the plaintiff to a new trial, but could not be sufficient to uphold the decision if it could not be upheld for the reasons given.

The first question, then, that arises is, what is the Court to do under such circumstances? In magistrates' cases, where the justices have given their judgment on one point and an appeal is brought, the Court frequently upholds their decision if they were right in the result, though they might be wrong on that point. We consider we may do so in the present case. There is nothing in section 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50), which says that if the County Court Judge is right in his conclusion, the Court are to reverse his judgment, because he has decided wrongly on the point submitted to him; because, in short, that his judgment was right though his reasons were wrong. It would be absurd to reverse a right judgment or go through the farce of sending it down with a direction to the Judge to find the same way as before. I am of opinion that such a proceeding would be idle, and that we have the power to uphold the judgment of the County Court Judge in this case even though we may not agree with the reasons on which it is founded.

Two points then remain for our decision. First, the execution creditor in possession assigns by an unregistered bill of sale which is therefore void, subsequently there is an assignment by way of settlement by the grantee, which is also void, because unregistered—then does this third document, which was registered, and which I will assume Higgs to have made, defeat the claim of the present execution creditor? To hold that it would, appears to me to be in direct

opposition to the object and scope of the Bills of Sale Act. Every section seems to contemplate that an unregistered bill of sale is void against the execution creditor, when it is executed by a person who remains in possession. The object of the Act is to prevent fraud, and to prevent the injustice of a creditor, who has gone to the expense and trouble of an execution, being deprived of the fruits of his judgment by a secret disposal of the goods by the person in possession. Section 8 of the Bills of Sale Act (41 & 42 Vict. c. 31) virtually enacts that an unregistered bill of sale shall be fraudulent and void, not absolutely, but so far as regards the property in, or right to the possession of, any chattels comprised in such bill of sale. So that by going to the register it may be known that the goods, although in the possession of A., yet are owned by B. There are other sections, such as section 20, shewing that such goods comprised in a registered bill of sale are not to be deemed in the order and disposition of the grantor within the meaning of the Bankruptcy Acts, and section 10, sub-section 3, which requires any defeasance or trust to be set forth in the bill of sale. The Courts have required these conditions to be stringently complied with, in order that the register should shew that the grantor, who remains in possession of the goods, is not the true owner. But this salutary requirement would be entirely defeated if a subsequent registered bill of sale by the grantee of the goods in the possession of the grantor was valid against an execution creditor of the grantor. It would be impossible to tell from an examination of the register that a registered bill of sale from B. to C. comprised the goods in the possession of A., which had been granted by him to B. by an unregistered bill of sale. If such subsequent bill were held to be valid the whole object of the Act would be defeated.

The case of *Edwards v. English* (1) is distinguishable from the present, because the second bill of sale in that case was by the person in possession, and it is, therefore, so far in favour of my judgment, because it decides that the person who remained in possession could give a

Chapman v. Knight, C.P.

bill of sale which would defeat a prior unregistered bill of sale. The main object of the Act is that the name of the person in possession should be on the register, and in *Edwards v. English* (1) it was. In *Hollingsworth v. White* (4) there were three bills of sale by the person in possession, and the grantee of a third bill of sale, which was registered, took priority as against the execution creditor and the grantees of the previous bills of sale which were not registered. On the first point, therefore, I am of opinion for the reasons given that the third assignment does not defeat the execution.

On the second point both my brother Lopes and I agree that the third assignment is not a proper compliance with the Act. If it were to be held good, the object of the Act would be defeated, for persons would only have to form a secret trust and get the *cestui que trust* to execute a bill of sale, in order to defeat the object of the Act. The third assignment is also contrary to the direction of the settlement. It may be that the wife has a good equitable interest under the deed, but that is not the question to be decided under the Act, which is, whose name is to appear on the register? I am of opinion, therefore, that the assignment by Emily Knight is not a proper assignment, that the Act is not complied with, and that it is therefore void. This fact cannot be altered by a new trial. If either point were decided the other way we should be judicially repealing the Act. I am of opinion that neither the words nor the object of the Act is complied with, and therefore there must be judgment for the respondent.

LOPES, J.—I am of opinion that the judgment should be affirmed. I agree with my brother Grove on the second point, and the reasons which he has given, but with regard to the first point, with great hesitation I differ. I am not prepared to go the length of holding that a prior bill of sale void as against an execution creditor can have the effect of rendering inoperative a subsequent bill of sale, which was properly registered.

It is not, however, necessary to decide this point as on the second, with which I concur, I agree that judgment must be given for the respondent.

Judgment for the respondent.

Solicitors—J. P. Poncione, for appellant; W. T. Boydell, for respondent.

[IN THE COURT OF APPEAL.]

1880. } POWELL AND ANOTHER
March 18. } v. FALL.*

Locomotive Act, 1865 (28 & 29 Vict. c. 83), ss. 5 and 12—Locomotives on Roads—Nuisance—Liability of Owner for Injuries caused by using Locomotives on Roads under Statutory Power.

A person who, without negligence and in accordance with the provisions of the Locomotive Act, 1865, uses a locomotive engine on roads, is liable for injuries caused to the property of others by such use.

Appeal from the judgment of Mellor, J., at a trial without a jury.

The action was to recover damages for loss sustained by the plaintiffs in consequence of their stack of hay having been set on fire by sparks flying from a locomotive steam traction engine belonging to the defendant, which was being driven along a highway near the stack.

It was proved at the trial that the engine was constructed according to the requirements of the Locomotive Acts, 1861 and 1865, and it was admitted that there was no negligence on the part of the defendant or his servants causing the injury to the plaintiffs. Mellor, J., gave judgment for the plaintiffs.

Oave and Kinglake, for the defendant.
—It is possible that the defendant would have been liable under section 13 of the

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

Powell v. Fall (App.), Q.B.

earlier Locomotive Act of 1861 (1); but by the Act of 1865 (section 5) express authority is given to drive engines in manner provided by the Act. The case is therefore distinguishable from *Rylands v. Fletcher* (2) and *Jones v. The Festiniog Railway Company* (3). It is within the principle of *Vaughan v. The Taff Vale Railway Company* (4). Here the use of the engine being expressly authorised by the Legislature, and there being no negligence on the part of the defendant, he is not liable. It is intended by section 12 of the Act of 1865 to preserve the right of persons injured by the use of these engines in cases only where that use has been negligent; and it is to be noticed that, in section 12 of the second Act (1), the words "private nuisance," used in section 13 of the first Act, are left out.

A. Charles and Bullen were not required to argue.

(1) The Locomotive Act, 1861 (24 & 25 Vict. c. 70), makes provision for regulating the use of locomotives on turnpike and other roads, and the tolls to be levied on such locomotives.

By section 13 it is enacted that "nothing in this Act contained shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use, where, but for the passing of this Act, such indictment or action could be maintained."

By the Locomotive Act, 1865 (28 & 29 Vict. c. 83), further provisions are made for regulating the use of locomotives on roads.

By section 5—"Subject to the provisions of this Act, any locomotive" (constructed in accordance with the requirements of the Act) "may be used on any turnpike road or public highway."

By section 12—"Nothing in this Act shall authorise any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law, and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive."

The Act of 1865 repeals certain sections (not affecting this case) of the Act of 1861, and subject thereto the two statutes are to be construed together as one Act.

(2) 37 Law J. Rep. (H.L.) Exch. 161; Law Rep. 3 H.L. 330.

(3) 37 Law J. Rep. Q.B. 214; Law Rep. 3 Q.B. 733.

(4) 5 Hurl. & N. 679; 29 Law J. Rep. Exch. 247.

BRAMWELL, L.J.—I am of opinion that the judgment of Mellor, J., should be affirmed. The act done by the defendant on the road is confessedly dangerous, because it is admitted that no care on the part of those who manage the engine can prevent the sparks from flying. It is conceded that at common law, before the Act was passed, the plaintiff could have maintained his action; but the Act is said to furnish a defence. To my mind the Act not only goes to shew that the action would formerly have been maintainable, but also carefully provides that nothing contained in it shall prevent the action being maintainable still. It seems to me a just and reasonable enactment that, if a man for his own advantage uses a dangerous machine on the highway, he should pay damages for injury caused thereby. If the profit which he obtains from using it is not enough to enable him to pay for the damage he causes, the loss is not one to which the community or the injured person ought to be subject, and it is for the public benefit that the use of the machine should be suppressed. The action being maintainable at common law, it is in accordance with good sense, and in my view the statute is careful to provide that no conclusion should be drawn from its provisions such as was drawn in *Vaughan v. The Taff Vale Railway Company* (4). I am bound to say that the result of the arguments used in the present case has been to harden my conviction that *The King v. Pease* (5) and *Vaughan v. The Taff Vale Railway Company* (4) were wrongly decided.

BAGGALLAY, L.J.—I agree that this appeal should be dismissed. It is contended that the authority conferred by section 5 of the later Act protects the defendant, but that section provides only that locomotives may be used on roads "subject to the provisions of this Act," and on no other terms. It is quite clear that, under the provisions of the 12th section of the Act, the defendant would be liable.

(5) 4 B. & Ad. 30; 2 Law J. Rep. M.C. 36.

Powell v. Fall (App.), Q.B.

THESIGER, L.J.—I am of the same opinion. It is conceded that, apart from the statute, the defendant would have been liable; but the statute, so far from authorising any act to be done which could not have been done before the passing of the statute, seems rather to have restricted the rights of persons using these engines, whilst it keeps up every right which a person injured by the use of them might have.

Judgment affirmed.

Solicitors—Kingsford & Dorman, for plaintiffs;
Rickards, Maude & Maude, for defendant.

[IN THE DIVISIONAL COURT FOR THE
Q.B., C.P. AND EXCH. DIVISIONS.]

1880. }
Feb. 18. } DIX v. GROOM AND ANOTHER.

Practice—Judgment by Default in Action on a Replevin Bond final, not Interlocutory—Rules of Court, 1875, Order XXIX., Rules 2 and 4.

In an action on a replevin bond, when judgment goes by default, such judgment is final and not interlocutory, and there is no necessity for a writ of inquiry. The old procedure is not altered by the Judicature Act.

This was a motion by way of appeal from an order of Denman, J., sitting at chambers, who had refused to rescind an order made by the District Registrar of Hanley.

The defendants had executed a replevin bond, with a penalty of 150*l.*, to avoid a distress for rent levied upon the Red Lion Inn at Hanley. The bond was forfeited for non-prosecution of the action of replevin; and the plaintiff thereupon commenced this action on the bond, and endorsed his writ with a claim for 102*l.* 8*s.*, which was the amount admitted to be due under the distress for rent and expenses. The defendants appeared to the action, but delivered no statement of defence. The plaintiff then obtained *ex parte* an

interlocutory judgment, and a writ of inquiry from the District Registrar of Hanley to assess the damages. On the 23rd of November, 1879, the defendants applied to the District Registrar to set aside this interlocutory judgment and all subsequent proceedings, as irregular, on the ground that the judgment ought to have been final in the first instance. The District Registrar dismissed the application; and on the 12th of December Denman, J., upheld his decision. The present appeal was then brought.

O. Dodd, for the defendants.—The judgment should have been final in the first instance, and not interlocutory. The writ of inquiry was a wrong proceeding, and we ought not to be made to pay the costs of that. Before the Judicature Act no writ of inquiry was necessary in the case of the forfeiture of a replevin bond, as was expressly decided in *Middleton v. Bryan* (1). It was there held that the statute 8 & 9 Will. 3. c. 11 did not apply, as the Court itself could grant the same relief as equity did in the case of other bonds. *Shaw v. The Marquis of Worcester* (2) and *Moody v. Peasant* (3) were also cited.

A. E. Hardy, for the plaintiff.—Under 11 Geo. 2. c. 19, the value of the goods was ascertained at the time of executing the bond, and the bond was conditioned for double such value. The sureties also, by executing the bond, admitted the value. But under 19 & 20 Vict. c. 108. s. 65, the amount of the bond has to be fixed by the Registrar; and the condition is also changed, for the plaintiff in replevin is required to prosecute his action without delay. The endorsement for 102*l.* 8*s.* on the plaintiff's writ is a claim for damages, and not a special endorsement. A writ of inquiry is therefore necessary, as a proceeding to inform the conscience of the Court, in order to reduce the penalty.

LUSH, J.—I am of opinion that this application ought to succeed, on the ground that the writ of inquiry was not necessary or authorised. Under the old practice, the course of the defendant was to come

(1) 3 M. & S. 155.

(2) 6 Bing. 385.

(3) 2 Bos. & P. 443.

Dis v. Groom, Q.B.

to this Court and apply for a stay of proceedings; and it was then referred to a Master to ascertain the amount actually due. This practice is not affected by the Judicature Act. The plaintiff has the option of claiming either the specific amount of the bond, or else damages. If he does the former, then it is an action for debt and therefore a liquidated claim. This is shewn by the forms given in the Appendix to the Judicature Act for endorsements of claim. In the form for a money bond, a blank is left for the specific amount; but in the form for an action for damages upon a bond, no amount is given. In the latter case, there would be an interlocutory judgment, followed by a writ of inquiry under Order XXIX., rule 4. But here the plaintiff has claimed a liquidated amount, namely, 102*l.* 8*s.* on a bond to secure 150*l.* The interlocutory judgment, therefore, is wrong; and the writ of inquiry is also wrong. The defendants must have the costs of this application and of the summons, the plaintiff to be at liberty to sign final judgment.

POLLOCK, B.—I agree, and I think it would be a great misfortune if the practice had been made more expensive since the Judicature Act. The authority of *Middleton v. Bryan* (1) is still binding, and the grounds of that decision still remain. There is no express reference to the matter in the Judicature Act; but it seems quite clear that this is a liquidated demand under Order XXIX., rule 2. It is open to the Court, in the regulation of its own practice, to deal with the matter without having recourse to a writ of inquiry. I am of opinion that the course laid down by my brother Lush should be followed.

Judgment and subsequent proceedings set aside; defendants to have the costs of the summons right through; plaintiff to be at liberty to sign final judgment.

Solicitors—Gregory, Rowcliffes & Co., agents for J. L. Hamshaw, Hanley, for plaintiff; Pitman & Lane, agents for E. A. Ashmall, Hanley, for defendants.

[IN THE COURT OF APPEAL.]

1880. { THE PRISON COMMISSIONERS v.
March 2. { THE CORPORATION OF LIVERPOOL.*

Prison Act, 1877 (40 & 41 Vict. c. 21), ss. 4, 57—*Expenses incurred in Maintenance of Prisoners—Reformatory Schools—Expense of Clothing for Boy sent to Reformatory School—Reformatory Schools Act, 1866, 29 & 30 Vict. c. 117. s. 23.*

The expense of providing a prisoner sentenced to be detained, after a term of imprisonment, in a reformatory school, with clothing suitable for his admission to the school, is an expense incurred for the "maintenance of a prisoner" to be borne by the Prison Commissioners, under section 4 of the Prison Act, 1877.

Appeal from a judgment of the Queen's Bench Division on a Special Case.

The question raised by the case for the opinion of the Court was whether, when a youthful offender was sentenced under the Reformatory Schools Act, 1866, to be detained in a reformatory school, after a term of imprisonment in the borough prison at Liverpool, the cost of supplying him with clothing suitable for his admission to the school ought to be borne by the Corporation of Liverpool, who, up to the passing of the Prison Act of 1877, were the prison authority for the borough, or by the Prison Commissioners under the Prison Act, 1877.

The Queen's Bench Division gave judgment for the Corporation, and the Prison Commissioners appealed.

The case in the Court below is fully reported, and the special case and the material sections of the Acts of Parliament bearing upon the matter are fully set out, 48 Law J. Rep. Q.B. 436.

A. L. Smith (*The Attorney-General* with him), for the appellants, argued as in the Court below.

Herschell and B. S. Wright, for the respondents, were not required to argue.

LORD COLERIDGE, C.J.—I am of opinion that our judgment should be for the re-

* *Coram* Lord Coleridge, C.J.; Bramwell, L.J.; and Thesiger, L.J.

Prison Commissioners v. Corporation of Liverpool (App.), Q.B.

spondents. The question arises in respect of a sum of 30s., the cost of a suit of clothing supplied to a prisoner who was sentenced to a term of imprisonment in the Liverpool gaol, and after the expiration of his sentence was taken to a reformatory school into which he would not be admitted without a suit of clothes. The case finds that the clothes were proper clothes for the school. It is admitted for the appellants that, under 29 & 30 Vict. c. 117, the expenses of providing proper clothing in order to secure the admission of the prisoner into the school would, before the Act of 1877, have been borne by the Corporation of Liverpool, the corporation being the prison authority for the borough within the words of an earlier Act—the 28 & 29 Vict. c. 126. s. 5. The question here is, whether the corporation are still the prison authority and liable to pay, or in other words, whether the clothes are to be paid for by the State, or by the different counties and boroughs who still continue for certain purposes to be prison authorities. The Act of 1877 enacts, by section 4, that all expenses incurred in the maintenance of prisoners in prisons shall be defrayed by the State. By the interpretation clause, section 57, "maintenance" includes "all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would, if this Act had not passed, be payable by a prison authority." In my opinion this section by its very terms settles the question. The clothing being proper and requisite for the prisoner's admission into the reformatory it comes within the expression "maintenance from the period of his committal up to his discharge." It is said that detention in a reformatory is not the same thing as detention in a prison. It is true that in a certain sense it is not. But the words used in section 57 do not refer to prisons only, but include also places of confinement, and looking at the Reformatory Schools Act, 1866, ss. 21 and 22, it is clear that for certain purposes reformatory schools are

places of confinement. It is made an offence punishable by three months' imprisonment with hard labour to escape from them. The liberty of a person sent there is interfered with in consequence of the sentence of a Court; he is confined under the authority of the law. I am, therefore, of opinion that these expenses are clearly within the words of section 57, "expenses of the maintenance of a prisoner," which by section 4 are to be paid by the State.

But there is another ground upon which the question may be determined. These clothes are admitted to be requisite for the admission of the prisoner to the reformatory, and the expense of providing them comes therefore within the terms of the Act as an expense necessarily incident to his removal from prison to the reformatory school, because he could not have been removed from the borough prison at Liverpool to the training ship without them. On both grounds, therefore, I think these are expenses which by the direct words of the Act of 1877 are thrown upon the State, and that the judgment of the Court below was right and should be affirmed.

BRAMWELL, L.J., and THESIGER, L.J., concurred.

Judgment affirmed.

Solicitors—Hare & Fell, for plaintiffs; Venn & Son, agents for Rayner, Liverpool, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN, on the prosecution of
Dec. 3. { THE GUARDIANS OF THE MEDWAY
UNION (respondents) v. THE
GUARDIANS OF THE MAIDSTONE
UNION (appellants).

Poor Law—Settlement of Pauper Lunatic—Husband and Wife—Desertion by Husband—Order of Removal—Wife's Settlement—Statutes 24 & 25 Vict. c. 55. s. 3, and 39 & 40 Vict. c. 61. s. 34.

[For the report of the above case, see 49 Law J. Rep. M.C. 25.]

[IN THE COURT OF APPEAL]

1879.
 Dec. 8. }
 1880. } LOWREY v. BARKER AND SONS.*
 March 19.]

Bankruptcy—Lease—Disclaimer—Use and Occupation—Trespass—Personal Liability of Trustee—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), section 23.

A trustee in bankruptcy used and occupied leasehold premises of the bankrupts, and paid the next quarter's rent to the landlord. Thenceforth the trustee ceased to use the premises, but for a time retained the key of them, and ultimately disclaimed the lease, and handed over the key to the landlord:—

Held, that the trustee was not personally liable, either upon an implied contract of tenancy or as a trespasser, to pay the landlord in respect of the possession of the premises between the time when the trustee's actual occupation ceased and the date of the disclaimer.

Sed quære, per COCKBURN, C.J., and THESIGER, L.J., whether a trustee in bankruptcy, although he has disclaimed, would not be personally liable to the lessor in respect of any actual use and occupation of the premises.

Appeal of the defendants from the judgment of Brett, L.J., at the trial.

The facts of the case sufficiently appear from the judgment of Cotton, L.J. (*post*).

O. Russell and H. Shield, for the defendants.—Brett, L.J., gave judgment for the plaintiff on the defendants' counterclaim, holding that, on the disclaimer by the plaintiff, the lease must be deemed for all purposes to have been surrendered at the date of the order of adjudication, so that the defendants had lost all remedy under the covenants in the lease, and that their only remedy was under section 23 of the Bankruptcy Act, 1869. It is contended that the plaintiff is liable for his use and occupation of the premises up to the date of the disclaimer. He was, in fact, in possession up to the 28th of May, and there is nothing in the Bank-

ruptcy Act which hinders the Court from implying a contract to pay for use and occupation. Section 23 does not apply. The defendants are not injured by the operation of that section within the meaning of the proviso at the end of it, and if they had gone before the Court and objected to the disclaimer the Court could not have imposed conditions upon the trustee. The only order which the Court could have made would have been one with respect to the possession of the premises. It is conceded that the policy of the Act is against throwing any personal liability on the trustee, but here the question is whether or not the trustee shall fulfil an implied contract to pay a fair sum for use and occupation actually enjoyed by him, and the *onus* lies upon him of shewing some reason why he should not. The authorities do not conflict with this contention. In *Ex parte Davis*; in *re Sneezum* (1), the decision was merely that the trustee was not personally liable to continue carrying on a contract, which he had carried on for two years, and that the only remedy of the other parties to the contract was to prove against the estate for damages under section 31. There was no disclaimer in that case, and the principles applying to a contract differ from those applicable to a lease. *Ex parte The Llynvi Coal and Iron Company* (2) only goes to shew that upon the disclaimer the defendants might have claimed against the estate of the bankrupt for the injury they had sustained by reason of the disclaimer. In *re Roberts*; *ex parte Brooke* (3), does not affect the contention for the defendants. There the trustee severed fixtures which belonged to the landlord unless they were removed at the expiration of the lease, and the trustee afterwards disclaimed. The effect of that decision really is that the trustee after the disclaimer was in the same position as if he had never had any interest in the lease, and therefore that the severance

(1) 45 Law J. Rep. Bankr. 137; Law Rep. 3 Ch. D. 463.

(2) 41 Law J. Rep. Bankr. 5; Law Rep. 7 Chanc. 28.

(3) 48 Law J. Rep. Bankr. 22; Law Rep. 10 Ch. D. 100.

* *Coram* Cockburn, C.J.; Bramwell, L.J.; Cotton, L.J.; and Thesiger, L.J.

Lowrey v. Barker (App.), Exch.

was wrongful. The term does not cease for all purposes by virtue of the disclaimer—*Smyth v. North* (4). If a contract to pay for use and occupation cannot be implied, the plaintiff was a trespasser, and is liable in damages for his wrongful occupation of the premises. They also cited *Ex parte Dressler*; *re Solomon* (5); *Ward v. Mason* (6); and *Harland v. Bromley* (7).

Alfred Wills (A. L. Smith with him), for the plaintiff.—By the Bankruptcy Act, 1869, all property including every obligation, whether beneficial to the estate or otherwise, is vested in the trustee. The Legislature intended that every facility and protection should be afforded to the trustee in order to enable him to wind up the estate to the best advantage for the creditors, and section 23, enabling him to disclaim onerous property and contracts, was intended by way of additional protection to him, for there was no express power to disclaim under the old Act of 1849. *Ex majore cautela*, section 23 provides that he may disclaim "notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto." The framers of the Act intended to limit the remedy to that given by section 23. They could not have intended that the trustee's liability should be increased by virtue of the power given to disclaim. The Courts have, in fact, always treated the trustee's jurisdiction under the section as a wide and beneficial one, and have given him every protection in the exercise of it. The utmost injury that can happen to the landlord is that he may be compelled to accept a dividend upon the rent accruing whilst his notice to quit is running. *Ex parte Davis*; *in re Sneezum* (1) is an authority against an extension of the liability of the trustee. The facts in the present case negative any implication of a promise to pay for use and occupation

after the last payment of rent. That payment was made while both parties thought the lease was a subsisting one, so that no implication arises upon it; nor is the mere fact that the trustee subsequently retained possession of the key of the premises, which is the only evidence of use and occupation, sufficient to raise the implication.

There is also no evidence to support the liability of the trustee as a trespasser, because, until the disclaimer was executed, such possession as he had was under the lease.

H. Shield, in reply.—There was a constructive occupation by the trustee up to the date of the disclaimer. In order to relieve the trustee of liability it must be shewn that the occupation which he had formerly had terminated—*Harland v. Bromley* (7).

Cur. adv. vult.

The following judgments were (on the 19th of March, 1880) delivered by

COTTON, L.J.—The question in this appeal arises on a counterclaim put in by the defendants. The plaintiff is trustee in bankruptcy of the estate of Messrs. Dixon, who became bankrupt on the 8th of October, 1877. At the time of the bankruptcy Messrs. Dixon held certain manufacturing premises as tenants of the defendants under a lease made in March, 1874. The plaintiff after the bankruptcy for a time continued to occupy these premises for the purpose of completing certain work in hand, and while so in occupation did work for the defendants. The plaintiff paid the rent due on the 1st of January, 1878, and after that time he in no way used the demised premises, except that, till some time in January, 1878, he kept there, and in that month sold, certain chattels belonging to the bankrupt's estate. The quarter's rent due on the 1st of April, 1878, was paid not by the plaintiff, but by Messrs. Wilkinson & Kendal, who were creditors of the bankrupts, and entitled by assignment to such interest as the bankrupts had in certain machinery on the premises which, under a covenant in the lease, were at the expiration thereof to be paid for by the landlord. Apparently some negotia-

(4) 41 Law J. Rep. Exch. 103; Law Rep. 7 Exch. 244.

(5) 48 Law J. Rep. Bankr. 20; Law Rep. 9 Ch. D. 252.

(6) 9 Price, 291.

(7) 1 Stark. 455.

Lowrey v. Barker (App.), Exch.

tions were going on between the defendants and Messrs. Wilkinson & Kendal with reference either to this machinery or to the lease of the premises, and in the meantime the plaintiff retained the key, but on the 20th of May the negotiations between the defendant and Wilkinson & Kendal having come to an end, the plaintiff, under the provisions of the 23rd section of the Bankruptcy Act, disclaimed the lease of the premises, and gave up the key to the defendants. The plaintiff brought his action for the price of the work done for the defendants, and they by counterclaim sought to recover rent from the 1st of April to the time when the key was given up by the plaintiff to them. Under the 23rd section of the Bankruptcy Act, when a disclaimer is given, the lease is to be deemed to be surrendered as on the date of the adjudication—in this case the 8th of October, 1877—and having regard to the operation of the statute, the trustee must be considered as never having had any interest in the lease, and the question is whether or no, notwithstanding that in fact the lease existed down to the 20th of May, and such possession as he had previously to that day was under the lease, he is to be held liable under an implied contract for use and occupation, or as a trespasser. Lord Justice Brett, before whom the case was tried, decided in favour of the plaintiff against the counterclaim. Hence the appeal to us.

I will first deal with the question whether the counterclaim can be sustained under an implied contract by the trustee in bankruptcy, to pay for use and occupation of the premises. Such use and occupation as existed was with reference to and under the lease, and though the subsequent disclaimer of the trustee requires us to treat the lease as if it never existed subsequently to the bankruptcy, yet, when in fact the occupation has been with reference to an expressed existing contract, it is not, in my opinion, right to imply a contract with reference to the occupation which the parties never could have contemplated. It is a very different question whether the trustee can be treated as a trespasser. In dealing with this part of the case I think we

must consider the intention of the enactment which we are considering. Independently of its operation, a trustee in bankruptcy who, for the benefit of the estate, had for a time occupied premises held on lease by the bankrupt, would be personally liable as tenant, with a right of indemnity against the estate if sufficient for the purpose; and the object of the statute was to relieve the trustee from this personal liability and the creditors from the loss resulting from his claim for indemnity. Moreover, it does so by treating the lease as surrendered, not as from the date of the disclaimer, but as from the date of the order of adjudication, which points to an intention entirely to relieve both the trustee and the estate from all liability. The case of *In re Roberts; ex parte Brooke* (3), is an authority that certain acts of the trustee between the adjudication and the disclaimer are to be treated as wrongful acts. But in that case the acts of the trustee were the severance of fixtures belonging to the landlord, unless removed during the existence of the lease. Here the act relied upon by the defendants was the formal continuance of possession by retaining the key without any actual use of the premises or dealing with anything thereon. In my opinion it would not be right, in consequence of the trustee subsequently exercising the power of disclaimer which he has under the Act, even although he has taken possession, to treat these acts as wrongful and tortious, and sufficient to subject the trustee to a claim for damages as a trespasser. The landlord might have protected himself, if he thought fit, by exercising the power given to him by the 24th section, of calling on the trustee to elect whether he would disclaim or not, and if the landlord is, in fact, injured by what is done, he has, under the latter part of the 23rd section, a right of proof against the estate of the bankrupt.

BRAMWELL, L.J.—I am also of opinion that this judgment should be affirmed. The question is not whether the plaintiff could disclaim when he did. The question is whether he is liable on a contract to pay for use and occupation. It is an

Lowrey v. Barker (App.), Exch.

action of contract. There is no express contract, and the question, therefore, must be whether there is one implied. The only ground for implying such a contract is that otherwise the plaintiff is a trespasser by virtue of the retrospective operation of section 23. I think that a trespass cannot be turned into a contract in this way. But that is immaterial, because, if the plaintiff was a trespasser, I think there ought to be an amendment to enable the "question in controversy" between the parties to be tried. That question is whether the lease, being deemed to be surrendered on the day of the adjudication, the defendants are entitled to a compensation for the plaintiff's occupation of the premises after that period. Is the plaintiff a trespasser, then, by virtue of such occupation? I am of opinion he is not. It seems to me impossible to hold that a power of disclaimer given for the benefit of the estate can only be exercised on the terms of the trustee becoming a wrongdoer and trespasser, nor can it be possible to imply a contract to pay for the occupation on a *quantum meruit* in respect of an occupation which, had there been no disclaimer, would have been an occupation by the trustee as assignee of the lease. As to *In re Roberts; ex parte Brooke* (3), it was not necessary for the trustee there to do what he did in order to enable him to decide whether he would take to the lease. The act was not of the character of those so necessary; but more or less of an occupation is necessary for such a purpose as is contemplated by the statute. If the occupation here was too much the defendants should have treated the disclaimer as a nullity, and sued the plaintiff as assignee of the lease. It is said to be hard on the lessor. So it is; but it is the hardship of all who deal with those who become bankrupt.

THE SINGER, L.J.—I agree with Lord Justice Cotton in the conclusion that the judgment appealed from should be affirmed; and if the reasoning by which that conclusion is arrived at be limited to the circumstances of this particular case I assent to it, for I am of opinion that here there was neither a contract by

the plaintiff to pay for use and occupation, nor liability on his part as for a trespass in respect of the period to which the counter-claim relates. The actual occupation of the plaintiff which ceased before the 1st of January, 1878, was treated as an occupation under the lease, and for it, as such, payment was made and accepted, and there was no subsequent occupation by him which could be held to constitute a trespass or to raise the implication of a contract. But I desire to guard myself against being supposed to lay down as a general principle that a trustee in bankruptcy who, after having had actual use and occupation of the bankrupt's leasehold premises without payment, disclaims the property, is under no personal liability. It seems manifestly unjust that the landlord should be remitted to proof in the bankruptcy, and should thus be a sufferer over and above the other creditors of the bankrupt in respect of damage to him, which, even under the powers given to him by section 24 of the Bankruptcy Act, he could not wholly prevent, and which is incurred after the bankruptcy, and for the benefit of the general body of the creditors. On the other hand, there is no reason, as a matter of justice, why the bankrupt's estate should not indemnify the trustee for what he is called upon to pay in respect of an occupation which he has not and would not have enjoyed except for the purpose of increasing that estate. I see no legal difficulty in the way of implying a contract to pay in a case where the trustee alleges that, notwithstanding the effect of the disclaimer, he is not a wrongdoer, and the landlord, by not calling upon him to disclaim, has in a manner assented to his occupation; while if such a contract is not to be implied, I do not see why, upon the lines of the decision in *In re Roberts; ex parte Brooke* (3), and as a further solution of the problem how to adjust rights and liabilities where something is to be deemed to have been done which has not in fact or in law been done, the trustee should not be deemed a trespasser. He has by his own act divested himself of any protection under the lease; he has, *ex hypothesi*, no other contractual protec-

Lowrey v. Barker (App.), Exch.

tion, and the section of the Act of Parliament under which he disclaims, while expressly providing that his disclaimer shall not be invalidated by his having taken possession of the property disclaimed, or exercised any act of ownership in relation thereto, which would have been the case under the old bankruptcy law, contains no provision that the liability of the trustee, which, by the general law as well as the prior bankruptcy law, would have resulted from such possession or acts of ownership, is, in every shape and form, to cease. The provision at the end of the section, that any person injured by the operation of the section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy, may perhaps be intended to include the injury caused to a landlord by the occupation of his premises by the trustee for the period between the date of the adjudication in bankruptcy and that of the disclaimer, and thus inferentially to exclude the liability of the trustee for such occupation; but it is by no means clear to me that it was so intended, or ought to be so construed, and I prefer to keep my mind open upon this important question for some occasion when it becomes necessary to decide it.

I may add that the Lord Chief Justice of England desires me to say that he concurs in this judgment.

Judgment affirmed.

Solicitors—Hamlin & Grammer, agents for B. C. Pullan, Leeds, for plaintiff; Nelson, Barr & Nelson, agents for Nelson & Co., Leeds, for defendants.

[IN THE EXCHEQUER DIVISION.]

1879.	}	WILSON AND ANOTHER v. WALLANI AND OTHERS.
Dec. 20.		
1880.		
March 2.		

Bankruptcy — Liability of Trustees — Vesting of Leaseholds — Disclaimer — "Writing under his Hand" — Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 23.

The leaseholds of a debtor liquidating under the Bankruptcy Act, 1869, are vested absolutely in the trustees on their appointment, subject to the right to disclaim, and the trustees are personally liable on the covenants unless they have made a valid disclaimer.

A letter signed by the solicitor of the trustees in his own name is not a "writing under their hand" sufficient for the purposes of disclaimer within section 23 of the Bankruptcy Act, 1869.

This was an action tried by Stephen, J., at Westminster on the 19th of November, 1879, and reserved for further consideration.

H. Matthews and H. Payne were for the plaintiffs; *Ambrose and E. G. Man*, for the defendants.

The facts and arguments fully appear in the judgment.

The following judgment was (on March 3) read by

STEPHEN, J. — This was an action brought by the landlords of a house, No. 32, Alfred Place, Bedford Square, against Wallani, who was the tenant under an agreement dated the 25th of December, 1876; against various persons to whom Wallani had sublet, and who need not be mentioned; and against Auguste Dumert and Cæsar Demaux, who were the trustees of Wallani under proceedings in the Court of Bankruptcy, by which it was determined that Wallani's affairs should be arranged by liquidation. The action was brought to recover the possession of the house, arrears of rent, damages for non-repair, and damages for use and occupation.

At the trial it was arranged that possession of the house should be given up

Wilson v. Wallani, Exch.

to the plaintiffs, that 40*l.* should be agreed upon as the damages in respect of want of repair, and that I should decide on further consideration whether Wallani or his trustees were liable upon the covenant to repair or for the rent, under the following circumstances:—

On the 23rd of December, 1876, the plaintiffs let the house to Wallani for three years, with covenants to repair and against subletting, and a proviso for re-entry. On the 18th of February, 1878, Wallani's affairs were in liquidation and a resolution was passed appointing Dumert and Demaux his trustees. On the 5th of March, 1878, the trustees (who had previously put a man named Boden in possession of the house) sent a cheque for 22*l.* 10*s.* to the plaintiff's agent in payment of a quarter's rent left unpaid by Wallani, but due at Christmas, 1877. In the course of the month of March, 1878, a sale was, by consent of the plaintiffs, held on the premises by the trustees. The rent due on the 25th of March, 1878, was also paid by the trustees, but no rent has since that date been paid. Wallani continued to live in the house and sublet parts of it to various persons subsequently to March, 1878. There was no evidence that after the payment of the Lady Day rent the trustees interfered with the house in any way whatever. On the 1st of November, 1878, the plaintiffs issued a writ against Wallani and his sub-tenants, but not against the trustees. On the 12th of December, 1878, the plaintiff's solicitor wrote a letter to the solicitor to the trustees, in which he said: "My object in writing is to ask you to elect on behalf of your clients, whether you will disclaim the lease, otherwise I must apply at chambers to add your clients as defendants;" and on the 20th of December he repeated the question in another letter. On the 24th of December, Mr. Swaine, the solicitor for the trustees, wrote to the plaintiffs' solicitor the following letter:—

"Dear Sir—*Re* Wallani—I have seen my clients on this matter. I was under the impression that the debtor had made arrangements with his landlord for the purpose of continuing as tenant.

"My clients did, I believe, disclaim

the lease of 32, Alfred Place, but if I am mistaken, please accept this as such on their behalf. Yours faithfully,

"C. A. Swaine."

On the 28th of December two letters, signed in the name of the plaintiffs' solicitor by his clerk, were addressed, one to Mr. Dumert, one of the trustees, saying, "I am in receipt of your letter of the 24th inst., for which I am obliged;" the other to Mr. Swaine, saying, "I am in receipt of your letter disclaiming lease of No. 32, Alfred Place, Bedford Square, on behalf of the trustees of the above-named debtor."

On the 2nd of January, 1879, the plaintiffs' solicitor called the defendants' solicitor's attention to Rule 28 of 1871, and said that the leave of the Court to disclaim their interest in the lease was necessary. Further correspondence on the subject took place, which it is unnecessary to refer to specifically. The result was, that the application for leave to disclaim was made on behalf of the trustees on the 27th of January, 1879, and was refused by the Court on the 18th of February, 1879. Under these circumstances the question is whether Dumert and Demaux or Wallani are liable upon the covenants of the lease down to the date when the writ was issued, and to mesne profits down to the time when possession was given up by Wallani.

The argument presented on the part of the plaintiffs was that the lease with all liabilities under it was vested absolutely in the trustees by the Bankruptcy Act, 1869, s. 17, subject to their power to disclaim, and that they had not disclaimed in the manner directed by the statute, and so continued liable. The argument on the part of the defendants was, that upon the true construction of the Bankruptcy Act, 1869, the trustees were not liable unless they had elected to take the lease, that they had not so elected, and that even if they had it was not open to the plaintiffs to say so on the pleadings. The plaintiffs alleged in reply that if an election was necessary the conduct of the trustees amounted to an election to take the lease, and that that point was open to the plaintiffs on the pleadings.

Wilson v. Wallani, Exr.

Wallani (who appeared in person at the trial) did not appear when the case came on for further consideration.

I now proceed to consider these arguments.

The first question is whether the Bankruptcy Act of 1869, vests the bankrupt's leasehold properties in the trustee absolutely subject to his right of disclaimer, or whether it is necessary that the trustee should elect to take the lease in order that he may become liable to the burden of the covenants. This question has never, I think, been decided, and in order to solve it it is necessary to compare together the provisions of the present and those of the earlier Bankruptcy Acts and to consider the cases decided upon them.

Under the different Acts relating to bankruptcy down to and including 6 Geo. 4. c. 16, the commissioners appointed by the Lord Chancellor were authorised to seize the property of the bankrupt and assign it to assignees for the benefit of the creditors. It was held by a series of authorities, of which *Copeland v. Stephens* (1) is perhaps the most distinct and elaborate, that an assignment made in general terms did not vest the bankrupt's leaseholds absolutely in the assignees, but left in them a power to renounce them if it was for the interest of the creditors that they should be renounced. It should be observed, however, that in that case Lord Ellenborough is careful to limit his language to the particular matter before him, which he does in these words: "The judgment of the Court in this case is founded upon its own special and peculiar facts; namely, a general assignment under a commission of bankruptcy, not accompanied or followed by notice of the existence of the term nor by any act of acceptance, entry or possession." It must also be observed that the judgment proceeds throughout upon an enquiry into the question as to what is required in order to vest a term of years in an assignee of the term. Subsequent legislation has altered the whole scheme of the law of bankruptcy.

By 1 & 2 Will. 4. c. 56, which first established a Court of Bankruptcy, it was

enacted (section 25) that when any person was adjudged a bankrupt "all his personal estate and effects present and future which by the laws now in force may be assigned by commissioners, acting in the execution of a commission, against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being by virtue of their appointment without any deed of assignment for that purpose, as fully to all intents and purposes as if such estate and effects were assigned by deed to such assignees and the survivor of them."

By the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106. s. 141) this provision was re-enacted in substance, but all reference to commissions of bankruptcy and to deeds of assignment was omitted. The operative words of the section are, "All his personal estate . . . shall become absolutely vested in the assignees . . . by virtue of their appointment." Upon the earlier Act it might perhaps have been said that the assignees were put in the same position by their appointment as they would have been put in by the execution of the deed of assignment, but not in the position in which they would have been placed by acting under it. The terms of the Act of 1849 do not leave room for this interpretation. The words vest the bankrupt's leaseholds absolutely in the trustees "by virtue of their appointment," though section 145 of the Act recognises rather than creates the necessity of an election by the trustees. This view of the matter was taken by Vice-Chancellor Stuart in *Cartwright v. Glover* (2), in which it was decided that the assignees of a bankrupt who allowed the bankrupt to remain in possession of leasehold property and to pay the rent to the lessor could make a good title to a purchaser although they had done nothing amounting to an election to accept the lease. In his judgment on this case the Vice-Chancellor says, "Nothing can be more clear than that the state of things upon which *Copeland v. Stephens* (1) proceeded, namely, that nothing vested until the power was exercised, is no longer applicable to the

(1) 1 B. & A. 593, 607.

(2) 2 Giff. 620; 30 Law J. Rep. Chanc. 324.

Wilson v. Wallani, Excn.

right of those who claim by assignment under assignees in bankruptcy," and he goes on to treat of the sections which deal with the right of election on the part of the assignees in bankruptcy as a sort of equivalent for the right to refuse burdensome property which they had been held to possess, without any express enactment, under the earlier system. This decision, therefore, seems to be an authority for the proposition that under the Bankruptcy Act of 1849 a bankrupt's leaseholds vested absolutely in his assignee, subject to the provisions of that Act as to the assignee's power of election.

The Act of 1869, 32 & 33 Vict. c. 71, s. 17, contains the following provision: "Upon adjudication the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." So far, therefore, as the vesting of the property in the trustee is concerned, the language of the Act of 1869 is as strong as that of 1849, and is entirely different from that of the Acts consolidated in 1824, upon which *Ope-land v. Stephens* (1) and other cases were decided. Upon the whole it appears clear that the effect of the provisions contained in the Act of 1849 and 1869 is to vest the bankrupt's leaseholds in the trustees absolutely, subject to the provisions contained in those Acts as to election and disclaimer.

The second question is whether, taking into account the provisions of section 23 of the Act of 1869, this vesting makes the trustees personally liable upon the covenants of the lease. In order to answer this question it is necessary to compare the provisions of the Acts of 1849 and 1869, and to consider the cases which have been decided upon the Act of 1869.

First, I will compare the two statutes. Each provides for three possible cases—the case of the assignee or trustee taking the land, the case of his declining to take, and the case of his abstaining from either course. Neither statute states explicitly the full consequences of either of these three courses of action. Each leaves much to be implied. First, as to the Act of 1849. Section 145 of that Act provides that if the assignee elects to take the lease

the bankrupt is to be free from the burden of the covenants, that if the assignee declines the lease the bankrupt shall be able to free himself from the covenants by delivering up the lease to the lessor within fourteen days after notice that the assignees have declined, and that if the assignee makes no election on being required to do so the lessor shall be at liberty to apply to the Court for an order that he shall elect, whereupon the Court may order the assignee to elect or make such other order as may seem right. The election to take the lease might be made by conduct, and especially by taking possession and doing acts of ownership, and various cases arose as to what amounted to a taking possession or exercising an act of ownership. The effect of all this was that the question whether the bankrupt was or was not to continue liable to the lessor depended on the course taken by the trustees, and that the position of the lessor depended upon the construction to be put upon the conduct of the trustees, a matter which might raise questions of considerable difficulty.

The Act of 1869 contains an entirely different set of provisions, the object of which seems to me to be to give the landlord the means of ascertaining for himself whether the trustees mean to take to the lease or not; and to enable the trustees, on the other hand, to get rid of onerous property, although they may have done acts which would have amounted to an election to take it under the Act of 1849. Section 23 effects these objects by providing that the trustee may disclaim by writing under his hand any burdensome property, "notwithstanding he has endeavoured to sell or has taken possession of such property or exercised any act of ownership in relation thereto;" but by section 24 this right ceases if the trustee declines or neglects to give notice whether he disclaims or not for twenty-eight days after an application in writing to make such a statement has been made to him by some person interested in the property. The Act contains no explicit provision as to the bankrupt being freed from his liability by the trustee's acceptance of his lease, or as to his being able to free himself from it by surrendering

Wilson v. Wallani, Exch.

his lease. Neither does it contain any explicit provision as to the liability which is imposed upon the trustee either in the case of his disclaiming or in the case of his not disclaiming the lease. It is therefore necessary to consider what consequences follow apart from any such express provision.

This matter has been discussed to some extent in the two cases of *Ex parte Davis*; *in re Sneezum* (3) and *In re Solomon*; *ex parte Dressler* (4), and though neither of these cases is precisely in point, the two together throw much light on the subject. In the case of *Ex parte Davis*; *in re Sneezum* (3) the bankrupt's trustees had carried on a contract into which the bankrupt had entered. After being called upon to say whether they disclaimed it or not they returned no answer, but continued to carry it on so long as they found it profitable. When they ceased to do so they ceased to perform it, and the Court of Appeal held, confirming the Chief Judge in Bankruptcy and the County Court Judge, that they were not liable either personally or on behalf of the estate. It will be found on examining the judgments of the Lords Justices that the case decides that section 23 does not mean that if the trustees fail to disclaim a contract they thereby impliedly adopt the contract, but that its effect when taken in connection with other parts of the Act is that if the trustees do disclaim a contract it is to be determined from the date of the adjudication, and that if they do not disclaim they may carry it on as long as they please and discontinue it when they think proper, the other party being at liberty to prove against the estate as for a debt for any loss which he may sustain by their conduct. This decision proceeds upon the principle that the Act of 1869 leaves the earlier law unaltered except in those cases in which the alteration is made by express words. The earlier law as to a bankrupt's contracts was that the bankrupt continued to be liable upon his contracts notwithstanding his bankruptcy, but his assignees might

perform them in his place if they pleased, and as long as they pleased. The express words of section 31 of the Act of 1869 take away the bankrupt's liability, but the power of the assignees not being taken away by express words, and not being absolutely inconsistent with the provisions as to disclaiming, remains unaltered.

In *In re Solomon*; *ex parte Dressler* (4) the trustee took possession of a bankrupt's lease, and when called upon to disclaim omitted to do so, and it was held that he became personally liable to pay the rent. The Judges who decided the case took the same view as to the effect of the Act of 1869 as was taken in *Ex parte Davis*; *in re Sneezum* (3). They thought that the earlier law was unaltered except so far as the express words of the statute altered it. But the earlier law was that a trustee who took possession of the bankrupt's lease became personally liable upon the covenants. He therefore continued to be so.

Each of these cases proceeds on the principle that the scope of section 23 is not to be extended by implication, and that the trustee is to have the same rights and liabilities as the assignees had before him, unless they are altered by express words.

The question, therefore, in the present case is whether the Act of 1869 contains any express words whereby the necessity for the election of the trustees to take a lease as a condition precedent to their liability on its covenants is taken away. The examination of the history of the law given in the earlier part of this judgment seems to me to supply the answer. I think that under the first set of bankruptcy laws—those which were consolidated in 1824—the power of the trustees to renounce onerous leases arose from the absence of any legal enactment vesting such leases in them, and from the insufficiency for that purpose (as explained in *Copeland v. Stephens* (1)) of a general assignment. Under this second set of bankruptcy laws, including the Act of 1849, the property was actually vested in them, but a power to elect whether they would take it or not was confirmed by the express words of section 145 of the

(3) 45 Law J. Rep. Bankr. 137; Law Rep. 3 Ch. D. 463.

(4) 48 Law J. Rep. Bankr. 20; Law Rep. 9 Ch. D. 252.

Wilson v. Wallani, Exch.

Act of 1849. This Act was repealed by 32 & 33 Vict. c. 83. Under the third system established by the Act of 1869, the leases of the bankrupt are vested absolutely in the trustee, subject to his right of disclaimer, but no power of election is given to him or recognised in him. It thus appears to me that the power of election conferred by the Act of 1849 being repealed by express words, and the estate being vested in the trustee by the express words of the Act of 1869, he has no power to get rid of it, except by following the express words of section 23. I do not think this view is inconsistent with the cases to which I have referred. They shew only that the provisions of the Act of 1869 are not to be extended by implication. I do not intend to do so by this judgment. I think that the position of the trustee has been altered by express words, though not by words which expressly state all the consequences of the alteration. Upon the whole I hold that the lease was vested in the trustees on their appointment, and that they are personally liable upon the covenants, unless they make a valid disclaimer. I think *In re Solomon*; *ex parte Dressler* (4) is an express authority as to their personal liability, assuming the lease to be vested in them absolutely.

Did they, then, make such a disclaimer as is required by section 23; that is, did they, or either of them, "by writing under his hand," disclaim such property? It was alleged in argument that the letter of the 24th of December signed by the solicitor to the trustees was such a writing, but I am of opinion that it was not. It is not under the hand of either of the trustees, even if it were absolute in its terms, as to which I think there may be a doubt. Several cases were quoted on the subject, the one most relied upon by the counsel for the defendant being *The Queen v. The Justices of Kent* (5), in which case a notice of appeal required by statute to be "in writing signed by the person giving the same or his attorney," was held to be sufficient when it was signed in the name of the person giving the notice by his attorney's clerk in his

presence. In this case, as I understand the report, the attorney's clerk wrote the name of Weld, the appellant, by Weld's authority. In the present case he wrote his own name. I think that to hold this sufficient would be to modify the language of section 23, by reading for "under his hand," "under his hand or under the hand of his agent."

It was also argued that the letter of the 28th of December, from the plaintiff's solicitor, saying, "I am in receipt of your letter disclaiming lease of No. 32, Alfred Place, on behalf of the trustees of the above-named bankruptcy," was a waiver of the lessor's right to a more formal disclaimer, and *Ex parte Moore*; *in re Stokoe* (6) was referred to upon this subject. I do not myself think that the letter was more than an acknowledgment of the receipt of the other letter, with a reference to its contents by way of identification. The case of *Ex parte Moore*; *in re Stokoe* (6) shews only that this was a matter which might be, and which I suppose was, taken into consideration when the question of extending the time for disclaiming was before the Court.

Upon these grounds there will be judgment for the plaintiffs for 85*l.* (45*l.* for rent, and 40*l.* for repairs) and costs. I do not think the plaintiffs are entitled to recover anything for mesne profits, as the trustees were not in possession of the house after the lease was determined by issuing the writ.

The view which I take of the case makes it unnecessary for me to consider the other questions raised.

Judgment for the plaintiffs.

Solicitors—C. F. Yorke, for plaintiffs; C. A. Swaine, for defendants.

(5) 42 Law J. Rep. M.C. 112; Law Rep. 8 Q.B. 305.

(6) Law Rep. 2 Ch. D. 802.

[IN THE COMMON PLEAS DIVISION.]

1880. } M'ALLISTER v. THE BISHOP OF
March 2. } ROCHESTER AND OTHERS.

*Practice—Third Parties—Order XVI.
rule 20—Party to the Action—Order for
Discovery by a Third Party—Order XXXI.
rule 12.*

Where a third party, upon whom notice has been served by a defendant to an action, enters an appearance in the action pursuant to Order XVI. rule 20, such third party is a party within the meaning of Order XXXI. rule 12, and liable to make discovery of documents according to the terms of that rule.

Lumley Smith moved to set aside an order of Field, J., made under Order XXXI. rule 12, ordering the Ecclesiastical Commissioners for England to make discovery on oath of the documents in their possession or power relating to the question in the action.

The action was in the nature of *quare impedit* by the Vicar of Plumstead for not admitting a clerk nominated and presented by the plaintiff to a chapel in his parish, and the action was originally brought against the Bishop, the Rev. Stilton Henning, the incumbent whom the Bishop had admitted, and the persons who had provided the endowment fund as required by 14 & 15 Vict. c. 97, and who claimed by virtue of the declaration made by the said Ecclesiastical Commissioners to have the right to nominate. Afterwards, namely, on the 28th of March, 1879, these last mentioned defendants obtained an order under Order XVI. rule 18, that they should be at liberty to issue a notice to the Ecclesiastical Commissioners of England claiming an indemnity and other relief against them. Notice to that effect was accordingly served on them, and they afterwards entered an appearance in the action pursuant to rule 20 of Order XVI. On the 14th of May, 1879, Master Dodgson, to whom application was made under Order XVI. rule 21 for directions as to the mode of having the question in the action determined, made the following order:—"It is ordered that the Ecclesiastical Commissioners be at liberty to ap-

pear by counsel and defend this action, as they may be advised, so far as relates to the question whether all things required to be done by the said Ecclesiastical Commissioners in order to enable them, as against the plaintiff, to make a valid declaration of the right of nomination, and to vest that right in the defendants, other than the said Bishop, Stilton Henning and the Ecclesiastical Commissioners, were done by them, and that they be bound by the finding upon that question, whether found by verdict of a jury or by a judge without a jury, costs, &c."

(1). This order was affirmed on appeal by Pollock, B. The defendants, including the said Commissioners, delivered a statement of defence to which there was a demurrer, which was argued last November (see the case reported *ante*, page 114). Since then, the plaintiff amended his statement of claim, and on the 22nd February last, Field, J., made the order for discovery which is now complained of. There is no power to make such order on a third party. Such party is not a party to the action. He cannot obtain discovery from the plaintiff, nor can the plaintiff obtain discovery from him. The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 sub-sec. 3, empowers the Court to grant relief to a defendant "claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice," &c., but it has been held that the service of such notice is only for the purpose of binding the third party by the judgment in the action as between the plaintiff and defendant, and that in order to obtain relief against the third party the defendant must bring an independent action against him—*Treleaven v. Bray* (2); *Padwick v. Scott* (3).

The Acts relating to discovery, namely, 14 & 15 Vict. c. 19. ss. 6 & 17, and 18 Vict. c. 125. s. 50, relate only to discovery by a party to the action, and there is nothing in the Judicature Acts which gives

(1) This order is in the form given in note 3 to *Benecke v. Frost* (45 Law J. Rep. Q.B. 694).

(2) 45 Law J. Rep. Chanc. 113; Law Rep. 1 Ch. D. 176.

(3) 45 Law J. Rep. Chanc. 350; Law Rep. 2 Ch. D. 736.

M'Allister v. Bishop of Rochester, C.P.

the right to make such an order as this for discovery by a third party.

H. Cowie, in support of the order.—Order XXXI. rule 12 enables “any party to apply to a Judge for an order directing any other party to the action to make discovery,” &c., and the question is whether the Ecclesiastical Commissioners are not parties to the action within the meaning of that rule, and so liable to have this order made for discovery by them. Subsection 3 of section 24 of the Judicature Act, 1873, states that every person served with such notice, which this section enables a defendant to serve on a third party, “shall henceforth be deemed a party to the cause or matter with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant.” The order of Master Dodgson gives the Commissioners liberty to defend the action, and states the question raised between them and the plaintiff in distinct terms, and the object of the Judicature Acts, as pointed out by the Master of the Rolls in the *Swansea Shipping Company v. Duncan, Fox & Co.* (4), is to prevent any substantial question which may be determined in the action, not only between the plaintiff and the defendant, but between the defendant and a third party, from being tried twice over. The Ecclesiastical Commissioners being desirous of disputing the plaintiff's claim and of raising this question for trial, entered an appearance in the action pursuant to rule 20 of Order XVI., and then under rule 21 of this Order, the order of Master Dodgson was made. Surely after this it is impossible to contend with any success that the Ecclesiastical Commissioners are not parties to the action, and therefore liable to make discovery. Moreover, by sec. 100 of the Judicature Act, 1873, “party” is to “include every person served with notice of or attending any proceeding although not named on the record.”

Lumley Smith replied.

LINDLEY, J.—This is an appeal from an order made at chambers by my brother

(4) 45 Law J. Rep. Q.B. 638; Law Rep. 1 Q.B. D. 649.

Field for the discovery of documents by the Ecclesiastical Commissioners who were not parties originally to the action. In consequence of the turn the action took, the defendants thought it expedient to serve the Ecclesiastical Commissioners with notice under Order XVI. rule 18, claiming indemnity and relief from them, the object being that if the plaintiff should succeed in his action the defendants might get the Ecclesiastical Commissioners to restore to them the amount of endowment which had been paid. Now, the Ecclesiastical Commissioners having been served with such notice might have taken either of the following courses—They might have taken no notice of it, and have done nothing, when they would have been bound by the judgment in the action, or they might have adopted the other alternative of appearing in the action according to the power given by rule 20 of Order XVI., which says that “if a person not a party to the action, who is served as mentioned in rule 18, desires to dispute the plaintiff's claim in the action as against the defendant, on whose behalf the notice has been given, he must enter an appearance in the action.” That last is what the Ecclesiastical Commissioners have done in this case. They have appeared in the action, and with what object? Why, to dispute the plaintiff's claim. Under these circumstances they have elected to make themselves parties to the litigation, and have done so for the purpose of endeavouring to defeat the plaintiff's claim, and which it is their interest to do. Then rule 21 of Order XVI. states “that if a person not a party to the action served under these rules appears pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined.” Under this rule an order was made by Master Dodgson and affirmed by Pollock, B., which is as follows (the learned Judge here read the order of the 14th of May, 1879). The result is that the action is now so constituted as to make it competent to the Ecclesiastical Commissioners to defend the action as against the plaintiff, and therefore, as it appears to me,

McAllister v. Bishop of Rochester, C.P.

they have a right to have discovery from the plaintiff, and the plaintiff has a right to have discovery from them. A question might have been raised as to whether the order for discovery, which was made in this case, was made prematurely or not, but if it had been, the matter would have been merely a discretionary one with the learned Judge when he made the order, and there is nothing here to shew that the discretion was wrongly exercised by my brother Field, and besides the matter is not one which is now before us. The order, in my opinion, was rightly made.

LOPES, J.—The question in this case is whether the Ecclesiastical Commissioners are parties to this action within the meaning of the Judicature Acts, 1873 and 1875, and the orders thereunder, so as to be within Order XXXI. rule 12, and liable therefore to an order to make discovery according to the terms of that rule. I think that they are, and I base my opinion mainly on sec. 24, sub-sec. 3 of the Judicature Act, 1873, and the interpretation of the word "party" given by sec. 100 of that Act.

Appeal dismissed.

Solicitors—Hewitt & Alexander, for plaintiff;
White, Borrett & Co., for the Ecclesiastical Commissioners.

[IN THE QUEEN'S BENCH DIVISION.]

1880. }
March 17. } CAMPBELL v. FAIRLIE.

County Court—Objection to Trial in County Court where Claim exceeds 20l.—19 & 20 Vict. c. 108, sect. 39—Order IX. rule 5, County Court Rules, 1875—"Return Day"—New Trial.

The provisions in 19 & 20 Vict. c. 108, sect. 39, and Order IX. rule 5, County Court Rules, 1875, enabling a defendant in the County Court to a claim exceeding 20l. in contract or 5l. in tort, to object to the trial taking place in the County Court, on giving notice five clear days before the "return

day," do not apply to the case of a second trial.

Where, therefore, a new trial of an action had been, on the application of a defendant, granted by the County Court Judge,—Held, that the defendant could not, under the above statute, take objection to the new trial being had in the County Court.

This was a case in which a rule for a new trial had been obtained on various grounds, and also for setting aside the previous trial, on the ground of want of jurisdiction.

The action had been brought in the Westminster County Court, and came on for trial in December, when the plaintiff obtained a verdict for 36l. Afterwards the defendant moved before the County Court Judge for a new trial, which was granted upon certain terms, and a day was fixed for the second trial. More than five clear days before that day the defendant gave notice that he objected to the action being tried in the County Court, the action being for more than 20l., and gave security for the amount claimed and costs, assuming to act under section 39 of 19 & 20 Vict. c. 108 (1), and rule 5 of Order IX. of the Consolidated County Court Orders and Rules, 1875 (2). The County Court Judge overruled the objection, and proceeded to hear the case, and again the plaintiff obtained a verdict.

Thereupon, the defendant obtained the rule *nisi* in the Divisional Court, against which

(1) 19 & 20 Vict. c. 108, sect. 39. If in any action of contract the plaintiff shall claim a sum exceeding 20l. . . . and the defendant shall give notice that he objects to the action being tried in the County Court, and shall give security to be approved of by the Registrar, for the amount claimed and the costs of trial in one of the Superior Courts of Common Law, not exceeding in the whole the sum of 150l., all proceedings in the County Court in any such action shall be stayed.

(2) Order IX. rule 5, The County Court Rules, 1875. "A defendant intending to avail himself of the power given by section 39 of the County Courts Act, 1866, to object to an action being tried in the County Court, shall give notice personally or by post, of such intention to the Registrar and to the plaintiff five clear days before the 'return day,' according to the form set forth in the schedule."

Campbell v. Fairlie, Q.B.

C. A. Russell shewed cause.—It must be admitted, that if the day appointed for the new trial be the "return day," within the meaning of rule 5 of Order IX., then this objection was validly made. But it is contended that it must be limited, so far as an objection of this kind is concerned, to the day fixed for the original trial of the action, if that should not be identical with the "return day." The defendant, by not objecting at first, submitted to the jurisdiction. Then he submitted again to the jurisdiction by applying to the County Court Judge for the new trial; this application, which was granted, was for a trial in the County Court. There is no inherent want of jurisdiction.

The form of recognisance does not provide for plaintiff's costs in the County Court, so they would be thrown away, which would be manifestly unjust.

Order XXVIII. rule 1, confirms plaintiff's construction of "return day" (3).

Bompas and Moloney, in support of the rule.—As "return day" is defined as any day fixed for the trial of an action (4), and a trial is defined as any trial of the action (5), the defendant was clearly within his right in making the objection before the new trial. Suppose defendant originally appeared and applied for an adjournment, which was granted, he could surely make the objection before the day so fixed for the trial of the action, and this is exactly the same in principle.

COCKBURN, C.J.—It is quite clear to my mind that the defendant has no right here to say that there was no jurisdiction.

(3) Order XXVIII. rule 1. "An application for a new trial, or to set aside proceedings, may be made and determined on the 'return day,' if both parties be present, or such application may be made at the first Court holden next after the expiration of twelve clear days from such 'return day.'"

(4) The County Court Rules, 1875. Interpretation Clause—

"'Return day' shall mean and include the day appointed by an ordinary summons for the appearance of the defendant, or any other day fixed for the trial of an action."

(5) *Ibid.* "'Trial' shall mean any trial of the action, or the hearing of any matter before the Court."

It was competent to the defendant when the plaint was originally served upon him to object, but he must have done so by giving five clear days' notice before the "return day;" and although, by the interpretation clause, "return day" includes the day of the trial of the action, there was not here, in my opinion, any notice ever given by the defendant which could be operative within the rule so interpreted.

The first trial took place on the "return day," so that the "return day" was the day of the trial. It is true that there has been a second trial, but, in my opinion, the condition of the statute, by which a defendant may object to trial in the County Court, does not apply to the case of a second trial. The circumstances were peculiar, and were such as altogether precluded the defendant from objecting at the time he assumed to do so. He gave no notice of objection to the first trial. His counsel was there to represent him, but if he had been personally present he could not have objected then, as he had not given notice. The application to adjourn the hearing was refused, but afterwards his application to have a re-hearing, which should be like an adjournment, was made, and was granted upon certain terms. What were those terms? They were of a re-hearing in that Court. He never said then that he wanted a new trial in order to take objection to the jurisdiction; if he had, probably the Judge would have declined to grant it. He is therefore, I think, estopped, as a matter of good faith, as well as by the true construction of the Act and rules.

Suppose that on the first trial the Judge had misdirected the jury, and a new trial had been granted by this Court. Could the defendant then have objected to the jurisdiction? Clearly not, he having requested this Court to send him back for a trial in that very jurisdiction. This shews plainly that if objection is to be taken to the jurisdiction it must be taken before the Court begins to try the action.

LUSH, J.—Upon reading the Act under which these rules are framed, it is clear to my mind that this objection must be

Campbell v. Fairlie, Q.B.

taken by a defendant before any trial at all takes place. The statute does not define the notice requisite, but the rule does, and then the definition says that "return-day" shall include any day fixed for the trial. This, I take it, intends to provide for the case being adjourned. I am fortified in this view by the fact that neither the statute nor the rules make any provision for the costs of a first trial, and they would therefore be thrown away. I agree also in thinking that when the County Court Judge here granted a new trial, it was on the condition that it was to be tried in the County Court, where alone he could grant the trial.

MANISTY, J., concurred.

Solicitors—Blewitt & Tyler, for plaintiff; J. B. Batten & Co., for defendant.

[IN THE QUEEN'S BENCH DIVISION.]
1880. } FORWOOD AND CO. v. WATNEY
May 6. } AND ANOTHER.

Arbitration—Statute 3 & 4 Will. 4. c. 42. s. 39—Validity and Effect of Agreement to refer—Pure Question of Law—Application for Leave to revoke Submission.

A contract entered into between the plaintiffs and defendants for the purchase of some wheat contained the following clause: "Should any dispute arise, the same to be submitted for settlement to the arbitration of two London cornfactors respectively chosen, whose decision shall be final and binding":—Held, that the clause in question formed part of the consideration for the contract, and was intended to include questions of law as well as of fact which might arise upon the construction of the contract.

This was an appeal from a decision of Manisty, J., made at chambers, upon a summons dated the 27th of April, when the learned Judge refused to make an order to restrain the defendants from entering upon or proceeding with any arbitration in pursuance of a certain contract hereinafter set out.

The action was brought to recover

damages for breach of contract entered into on the 18th of February, 1880, between the plaintiffs and defendants for the purchase by the defendants of the plaintiffs of "all the parcel of Australian wheat of fair average quality of the season's shipment at time and place of shipment shipped or to be shipped from Melbourne for a first-class iron vessel, say about fifteen hundred quantities of 480 lbs. each (ten per cent. more or less) as per bill of lading dated or to be dated in February, 1880. Payment by cash in London at sixty days from the date of arrival of documents or (at buyer's option) at any earlier date, less discount for the unexpired term of sixty days at Bank rate unless the vessel should never arrive, in which case documents are immediately to be taken up by buyers."

The said contract also contained a clause in the following words: "Should any dispute arise, the same to be submitted for settlement to the arbitration of two London cornfactors respectively chosen, whose decision shall be final and binding, and this stipulation shall be made a rule of Court of any of the divisions of the High Court of Justice on the application of either of the contracting parties."

Subsequently to the making of the contract the plaintiffs duly tendered to the defendants two bills of lading, comprising 1,647 quantities of Australian wheat, of a quality and description which would satisfy the contract, but the defendants refused to accept the bills of lading or to take delivery of the wheat, upon the ground that it ought to have been included in one bill of lading only.

On the 26th day of April, 1880, the defendants served upon the plaintiffs a notice as follows:—

"To Messrs. Forwood, Brothers,
"60, Gracechurch Street, E.C.

"Gentlemen,—We hereby give you notice that we have appointed Mr. John Ross, of the firm of Begbies, Ross & Gibson, of No. 5, Lime Street, in the City of London, cornfactor, to act as an arbitrator in reference to the dispute which has arisen between us under a contract dated the 18th of February, 1880, for the sale by you to us of the

Forwood v. Watney, Q.B.

parcel of Australian wheat, and we require you, the above-named Forwood, Brothers & Co., to appoint an arbitrator to act for you in the said reference. And we further give you notice that if for seven clear days after the service of this notice on you, you fail to appoint an arbitrator to act for you, we shall appoint the said John Ross to act as sole arbitrator, and that the award made by him will be binding upon you—(Signed)

“Watney & Keene.”

On the 27th of April, 1880, an application was made by the plaintiffs at chambers to restrain the defendants from proceeding with the arbitration. Manisty, J., refused to make any order. The plaintiffs therefore appealed.

Watkin Williams (Gainsford Bruce with him), for the plaintiffs, now moved by way of appeal.—The only question here is whether or not upon a true construction of the contract the defendants are entitled to have the quantity of wheat contracted for comprised in one bill of lading. This is a pure question of law, which was not intended to be referred to arbitrators, and which cornfactors would not be competent to deal with.

A. L. Smith, for the defendants, supported the order.—It has been expressly decided that where parties agree in writing to refer to arbitration disputes arising out of the contract the parties are bound, even though the question raised is one purely of law upon the construction of the agreement—*Randegger v. Holmes* (1). See also the observations of Jessel, M.R., to the same effect, in *Russell v. Russell* (2).

W. Williams, in reply.—The cases cited were under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 11. This is an application for the leave of the Court to revoke a submission under 3 & 4 Will. 4. c. 42. s. 39. Before that Act was passed the submission could have been revoked at any time without leave, and the arbitration would then have been at an end. This can only now be done by “leave of the Court”

under 3 & 4 Will. 4. c. 42. s. 39, and it clearly is the intention of the Legislature that the leave should be given for good cause.

COCKBURN, C.J.—I feel no difficulty in coming to the conclusion that the order asked for was rightly refused by the learned Judge at chambers. The parties here have chosen to make it part of the terms of this contract that in case of any dispute, the matter in dispute should be settled by arbitration. The intention evidently was to avoid all litigation, and to have all differences settled by persons conversant with commerce. The clause in question formed part of the consideration, and we cannot take upon ourselves to make a fresh contract. Mr. Watkin Williams says, though that may be so, still I ask you to revoke the submission under 3 & 4 Will. 4. c. 42. But we must not exercise the power conferred on us by that statute to the deterioration of the contract into which the parties have entered. This appeal must therefore be dismissed.

FIELD, J.—I am of the same opinion. The application is in substance for leave to revoke a submission entered into with eyes open and upon a contract well understood in trade. The contract would never have been entered into if that clause had been struck out; for all kinds of nice points arise out of these kind of contracts entered into daily in the City of London. The statute which has been cited was passed with the intention of preventing a party who had referred a matter to arbitration afterwards endeavouring to get rid of such arbitration when he found the case going against him.

MANISTY, J.—I need hardly say that I am of the same opinion. I certainly thought the clause both clear and comprehensive, and that I should defeat the very object of the parties by allowing this submission to be revoked.

Appeal dismissed.

Solicitors—Flux, Slade & Co., for plaintiffs;
Plews, Irvine & Hodges, for defendants.

¶ (1) Law Rep. 1. C.P. 679.

(2) 49 Law J. Rep. Chanc. 268.

Goodland v. Ouseyough 52 L. 6 L. 98

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880. } CHAPMAN v. THE MIDLAND RAIL-
April 14. } WAY COMPANY.*

Practice—Costs on higher Scale—Injunction—Principal Relief sought—Additional Rules of Court (Costs), Order VI. rule 2.

To entitle a party in an action in which an injunction is claimed in addition to other relief, to charge fees allowed in the "higher scale" of costs, the action must not only be one of the actions specified in rule 2 of Order VI. of the rules as to costs; but the injunction must also be the principal relief sought to be obtained.

So held by the Court of Appeal, affirming the decision of the Queen's Bench Division.

The Master is to decide whether the "higher scale" is to be allowed under rule 2.

Appeal from the Queen's Bench Division. The case is reported *ante*, p. 245.

The plaintiff claimed damages for trespasses by the defendants, and also an injunction to prevent their repetition.

It appeared that the trespasses had continued for eighteen months before the plaintiff brought his action, that he claimed damages for loss of stock which strayed from his farm owing to the injuries caused to fences by the defendants, and that he had at one time applied to have the case remitted to the County Court. The other material facts will be found in the report in the Court below.

The plaintiff having obtained a perpetual injunction, and having accepted a sum paid into Court by the defendants, applied to have his costs taxed on the higher scale under the provisions of the Additional Rules of Court (Costs) Order VI. rule 2 (1). The Master refused

* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

(1) Additional Rules of Court (Costs), Order VI.

"Rule 2. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'higher scale' in the schedule hereto; in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to pro-

leave chiefly on the ground that there had been a claim for substantial damages. The Judge at chambers affirmed that decision, and the Queen's Bench Division affirmed the order of the Judge.

The plaintiff appealed.

A. Wills, Oozens Hardy (E. Wright with them), for the plaintiff.—The plaintiff claims to have his costs taxed on the higher scale because he claimed and procured an injunction as the principal relief (1) in the action. The word special is superfluous, as since 15 & 16 Vict. c. 86. s. 58 common injunctions are things of the past. The Judge who tries a case is the only person who can tell whether an injunction is the principal relief sought, so that if, as is submitted is the case, the fact of an injunction being claimed does not of itself entitle the plaintiff to the higher scale, still the Master cannot be the person who is to decide the question. The plaintiff's cause of action is within the rule as, though a trespass is the foundation of the action, still his land was broken up and there was both "injury to property and infringement of right," there was more than an unauthorised user of an occupation road. The words "the principal relief" must be construed to mean a principal relief, so that if the injunction sought is a primary object of the action and not something granted as merely ancillary to the relief sought and obtained in the action, the plaintiff has a right to the higher scale.

[COTTON, L.J.—This is a case in which the Court of Chancery would formerly have granted an injunction.]

Yes, for there was always a special doctrine in the Court of Chancery as to trespasses by public companies, and the

property and infringement of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed 'lower scale' are hereby made applicable.

"3. Notwithstanding these rules, the Court or Judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs."

Chapman v. Midland Rail. Co. (App.), Q.B.

Court would restrain them by injunction from exceeding their statutory powers.

The higher scale applies whenever the case is within any of the classes of cases mentioned in the rule (1), and whenever the injunction is not merely ancillary, so that in this case the plaintiff has a right to the injunction; if, however, the Master has a discretion it is submitted that he has exercised that discretion wrongly. The plaintiff could have claimed an injunction by itself, he does not lose that right because under the Judicature Act several causes of action may be combined, and because in this case he added a claim for damages. The trespass was in this case admitted, so that the plaintiff obtained a perpetual injunction on the admission in the pleadings under Order XL. rule 11.

W. Harrison (with him *Sutton*), for the defendants.—The contention of the plaintiff requires an alteration in the language of the rule, it changes "the" into "a" and thus construes the rule to mean that the injunction need only be one of the reliefs sought. The facts of the case shew that the injunction was not the principal relief sought, the trespasses were continued for nearly two years, and no claim for an injunction was ever preferred. The affidavits shew that the object of the plaintiff was to recover damages for loss of stock which strayed, and of herbage which was injured. The plaintiff applied to remit the case to the County Court, and after the defendants had paid money into Court the plaintiff increased his claim for damages, and the injunction was not applied for till a late period of the case, so that it is evident from the conduct of the plaintiff that the injunction was not the principal relief sought to be obtained.

Some one must have jurisdiction to determine the question, and it is but natural that the Taxing Master should do so, and that his decision should be final.

Wills in reply.

BRETT, L.J.—The real, that is to say, the main question for our decision, is the interpretation of rule 2 of Order VI. (1) of the additional rules of Court relating to costs, and I am of opinion that the

judgment of the Divisional Court should be affirmed. In the first place, it seems to me that the phrase "where the procuring such injunction is the principal relief" is a phrase which governs all the preceding part of the rule, and therefore that in order that the higher scale of costs should apply to any particular case, it is necessary that the circumstances of the case should bring it within both branches of the rule. The action must be both one of the actions specified in the rule, and it must also be an action in which the injunction is the principal relief sought to be obtained.

In order to secure the higher scale of costs it is necessary to shew that this action is one of the actions specified in the earlier part of the rule, it is therefore necessary to shew that there is injury to property. A suggestion was made that the circumstances of this case brought it within the words "injuries to property and infringement of rights," and we were invited to put a construction on those words. Now it is obviously not necessary to determine the meaning of those words in the present case, for the case must also come within the second part of the rule if the higher scale of costs is to apply. It may be that injury to property does not mean a mere trespass, it may be that it requires an actual injury to the land; but it may also be said that in the present case the plaintiff's land was actually cut up and injured by the defendants. The inclination of my opinion is that the phrase "injuries to property" applies to something more than to a mere trespass, and requires actual injury to the land. I do not however now desire to decide on this point. I have said that the part of the rule, which requires that the injunction should be the principal relief sought to be obtained, applies to the whole of the rule, and I will therefore assume that the facts of the present case bring it within the first part of the rule. Is it, however, within the second part of the rule? It was said in argument that the words "the principal relief" mean a primary as distinguished from an ancillary relief. With regard to this argument one is at once struck with the fact that it implies a violent change

Chapman v. Midland Rail. Co. (App.), Q.B.

in phraseology. It is difficult, taking the words in their grammatical sense, to construe them as proposed; and it has been found difficult if not impossible to suggest a case within the first part of the rule in which relief which could be called only ancillary could be applied for. Another argument for the appellants was that we should read "*the principal relief*" as "*a principal relief*;" but this argument again invites us to alter language which is clear and certain; and we ought not to do so unless there is some strong reason for the change, but we ought to read it taking the words in their ordinary and natural sense.

It seems to me that those who used the phraseology which is found in this rule assumed that there was more than one relief which could be obtained. The rule deals with the case of at least two reliefs sought to be obtained, and the form of the phraseology employed implies, according to ordinary English idiom, a comparison between two forms of relief, and asserts that one form is more principal than the other. The rule means that where damages and an injunction are both sought to be obtained, there is a comparison between the two sorts of relief, and the question whether the higher or the lower scale of costs is to be adopted depends on this comparison and on the determination whether in the particular action the injunction is or is not the principal relief sought to be obtained.

The person to institute this comparison and to decide the question is the Taxing Master. The third rule (1) of the same order applies to cases within rules 1 and 2, and by providing that the Court or Judge may direct the scale to be allowed, supercedes the Master when such a direction is given, and confirms the view that in the absence of such directions the person to make the comparison is the Master. In each case the Master must determine what is the principal relief sought by the party, he has not to determine whether more than one relief is sought, the rule assumes that, but in every case he has to consider all the circumstances, and on those circumstances to determine the question. It is impossible to lay down

any rigid rule; many tests might be suggested which would serve as a guide; one good test is whether the plaintiff chooses to bring his action in the Chancery Division or in one of the Common Law Divisions. It is natural that a person who really seeks for an injunction, and makes that his principal cause of action, should bring his action in the Chancery Division, where those who will have to deal with the matters to be discussed, will be more conversant with the subject-matter than elsewhere. On the other hand, when damages are the principal cause of action, it is more natural that the action should be brought in a Common Law Division. I desire, however, while saying this, to guard myself from being supposed to say that this is decisive. It is not so, for in each of the suggested cases there might be other circumstances which would shew that in the Common Law Division an injunction was, and in the Chancery Division damages were, the principal relief sought to be obtained. The duty of the Master is to give his determination after considering all the circumstances of the case; that decision is subject to review and there can be an appeal, as in other proper cases, to a Judge, to a Divisional Court, and to this Court. Can we say that in this case the Master, the Judge and the Divisional Court have all come to a wrong conclusion? I think that the conclusion is right, and even if it were not, I should be loth in such a case to set aside the decision of the various tribunals which I have mentioned, only an extreme case would make me overrule it. I however think that it was right, and that this appeal must be dismissed.

COTTON, L.J.—The first question which we have to consider is, what is the proper construction of Order VI. rule 2 (1), as to costs. This rule applies only to certain kinds of actions in which special injunctions are sought to be obtained in certain specified cases. The word "special" is in fact superfluous, as the old common injunctions no longer exist.

Does the clause as to the principal relief sought to be obtained apply to all the actions mentioned in the rule? I

Chapman v. Midland Rail. Co. (App.), Q.B.

think that it does. And there seems to be a good reason for the introduction of the clause into the rule, since by the provisions of the Judicature Act several causes of action may be joined together in one action. For it would clearly be productive of evil if it were possible to tack on an injunction to any cause of action specified in the earlier part of this rule, and thus to secure the application of the higher scale of costs.

I am of opinion that it is necessary, in order to get costs taxed on the higher scale, that the subject-matter of the action should bring it within one of those actions which are specified in the rule, and also that the injunction should be the principal relief sought to be obtained.

I will therefore consider, first, whether or no this action is within the rule in respect of its subject-matter. Trespass is not mentioned amongst the specified actions, and it is to be observed that the Court of Chancery was not wont to grant injunctions against trespasses, although the Chancery as well as the other divisions do so, since the Judicature Act; but the Court of Chancery used to grant injunctions in cases where a public body did, while professing to pursue the powers given to it by statute, in fact exceed those powers. I do not think that the case is excluded from the operation of the rule because it is a case of trespass; but I think that mere trespass is not within the rule, while a case of trespass which caused actual injury to property would be within it.

What, secondly, is the meaning of "the principal relief sought to be obtained?" I agree with Brett, L.J., that we cannot change "*the principal*" into "*a principal*," nor can we say that it is equivalent to a primary relief. Instances can easily be suggested in which the injunction asked for in an action is the principal relief sought. Suppose that an action were brought for cutting down trees, and that three trees had been cut down in such a way as to shew an intention to cut down a whole belt or clump of trees, an action would be brought for damages and an injunction would be asked for. Can any one doubt that in such a case the injunction would be the principal relief sought

to be obtained? Again some act is done within the cases specified in this rule, and thus a claim for damages arises; but further, the action is of such a nature that the party complaining cannot be compensated by damages, and he therefore seeks an injunction to prevent that being done which is destroying the enjoyment, it may be, of his property as a place of residence, as, for instance, the obstructing his view or his light. In such a case the injunction would be the principal relief sought to be obtained, and the provisions of this rule would clearly apply.

Who, then, is to decide the question? The Master, because he is the officer to tax, and he on taxation can consider all the circumstances and determine the question. A Judge has a power given to him by rule 3 (1), which he can exercise without any reference to the question of what is the principal relief sought; but that is not the case with the power given to the Master by rule 2 (1).

In the present case the facts appear to me to bring it within rule 2; but the question remains, whether the injunction is the principal relief sought. I do not think it is. I agree with the conclusion of the Master, although I am not able to adopt his reasons. He appears to have based his conclusion on the fact that substantial damages were sought to be recovered. I am not of opinion that that fact is sufficient to shew that the injunction is not the principal relief sought. I am, however, of opinion that what the defendants did was to occupy the plaintiff's land for a temporary purpose; they had no intention of permanently taking and using his land. The plaintiff's conduct has to be considered as well as that of the defendants'. Now the acts complained of went on for eighteen months or two years, and the plaintiff seems to have considered that if he could recover from the defendants the loss of the profit caused by their user of part of his farm he should be satisfied. He never applied for an interim injunction, and his general conduct points to the conclusion that his real claim was for damages and that compensation was the principal relief desired by him.

Chapman v. Midland Rail. Co. (App.), Q.B.

I have said that the Master has to decide the question in the first instance; but it is not a question to be decided at his pure discretion, he must exercise a judicial discretion and he must form his conclusion on and with reference to the circumstances of each case, so that his decision is open to review and can, if necessary, be reversed. I agree that the judgment must be affirmed.

THE SINGER, L.J.—The question for our decision is whether the plaintiff is entitled to have costs on the higher scale, regard being paid to the provisions of the rules made under the Judicature Act. The construction of Order VI. rule 2 (costs) (1) is not quite clear, and it would be difficult to give a general definition which would cover all possible cases. I find no difficulty, however, in saying that the circumstances of the present case do not bring it within the requirements of the rule.

It is important to see what was the position of the law and practice as to scales of costs in the Court of Chancery and in the Courts of Common Law before the Judicature Act. There were in the Court of Chancery two scales of costs. The higher scale was, however, the ordinary scale, and the other, the lower scale, was an exceptional scale which had reference to certain particular suits which may be found in the regulations as to fees made in 1860 (2).

In the Common Law Courts there were also two scales of costs, and in these Courts the higher scale was also the ordinary scale, but the higher scale in Chancery was higher than the higher scale at Common Law.

In 1854 the Common Law Procedure Act gave the Common Law Courts power to grant injunctions, and section 79 gave power to the Common Law Courts to exercise jurisdiction in actions in which there might be a claim for a writ of injunction. This section includes cases which would perhaps as a matter of practice be more frequently brought in the Chancery Division, that is, cases in which the injunction is the principal relief sought

to be obtained; but as a matter of practice, the powers conferred by that section were not widely used in such cases, but were used in cases in which damages were sought as the principal relief and an injunction only sought as ancillary to that relief.

Two scales of costs are given by the Judicature Act, and the provisions of the rule which we are now considering apply the higher scale to certain specified cases. These two scales of costs are not identical with either of the sets of scales in force before the Judicature Act, but the higher scale under the Judicature Act answers substantially to the old higher scale in Chancery, and the lower scale to the old Common Law scale. The second rule of Order VI. (1), provides that the higher scale is to be allowed, subject to two conditions—the nature of the action is one condition, the nature of the relief sought is the other. It is not necessary to decide here whether an action for trespass would be within the rule when substantial injury had been caused. I am of opinion that it would be; but the question in this case is whether the injunction is the principal relief sought to be obtained. The distinction attempted to be drawn between primary and ancillary relief has been acknowledged in argument not to be a valid distinction; but it is said that the principal relief means a primary relief or one of the primary reliefs. I cannot agree with that, the words are plain and intelligible and I do not think that they can bear that construction. It may sometimes be difficult to say which is the principal relief sought, in action in which both damages and an injunction are sought; but the difficulty is not likely often to occur. In the present case, assuming that there is injury to property, and that the case is therefore within the first part of the rule, can it be said that the facts point to the conclusion that the injunction was the principal relief sought?

It is clear that the defendants did not bring themselves within the provisions of the Railways Clauses Consolidation Act (3), they did not take a road within the

(2) *Morgan & Davey's Costs in Chancery*, p. 415.

(3) 8 Vict. c. 20. ss. 30, 32.

Chapman v. Midland Rail. Co. (App.), Q.B.

meaning of section 30, nor did they take land for the purpose of temporary occupation within section 32. The plaintiff's conduct leads to the inference that he grumbled at what the defendants did; but that he was content to allow them to use his land if they compensated him for the loss caused by their temporary occupation, and that his real claim was for damages. The fact that he brought his action in the Common Law Division points to such a conclusion, although it is not decisive; but further we find that the plaintiff claimed more than nominal damages, that he did not ask for an *interim* injunction, that he did not claim an injunction until late in the action, and not until after payment into Court by the defendants, and that he wished to try the case in the County Court.

All these facts seem to confirm the view that the plaintiff acquiesced in the occupation by the defendants of the land for a temporary purpose, and that he brought his action to recover damages because they did not compensate him for that occupation. The injunction, therefore, was not the principal relief sought, and this appeal must be dismissed.

Judgment affirmed.

Solicitors—Lousada & Emanuel, agents for R. & W. Sheild, Uppingham, for plaintiff; Beale, Marigold, Beale & Groves, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { DE MORGAN (*appellant*) v.
Feb. 25, 28. { THE METROPOLITAN BOARD
OF WORKS (*respondents*).

Common—Metropolitan Commons Supplemental Act, 1877—Validity of Bye-laws—Right of Public Meeting—Common dedicated to Use and Recreation of Public.

[For the report of the above case, see 49 Law J. Rep. M.C. 51.]

[IN THE QUEEN'S BENCH DIVISION.]

1880. }
April 30. } WADSWORTH v. PICKLES.

Bankruptcy—Liquidation by Arrangement—Fraudulent Omission of Name of Creditor from Statement of Debts—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 49, 125, 127.

The certificate of discharge obtained by a debtor who has gone through liquidation by arrangement, under the Bankruptcy Act, 1869, s. 125, is a defence to an action for a debt provable in the liquidation proceedings, although the name of the creditor to whom the debt is due has been fraudulently omitted by the debtor from the list of creditors delivered to the registrar.

Appeal from the decision of the Deputy County Court Judge of Bradford.

The action was brought by the plaintiff to recover a sum of 50*l.* and interest, which sum had been lent to the defendant by the plaintiff in 1869.

In 1870 proceedings in liquidation were entered into by the defendant, and a meeting of his creditors held, at which a resolution was passed, and his order of discharge was granted. The defendant relied on his order of discharge as a defence to the action, and contended that it operated as a release from the debt in question, which was one provable in the liquidation proceedings.

The plaintiff contended that the order of discharge did not release the defendant, because it was, as he averred, obtained by fraud; the plaintiff's name having been fraudulently omitted from the list of creditors, at the time of the liquidation proceedings, and he having had no notice of them till long after they had been concluded.

The proceedings in liquidation having been produced, the County Court Judge held that the defendant had fraudulently omitted to insert the plaintiff's name in the list of creditors, and that the order of discharge was therefore not a valid defence to the action, but the plaintiff was entitled to sue for the debt; and gave judgment for the plaintiff for the amount claimed. A rule *nisi* was obtained to set aside this judgment, and enter judgment

Wadsworth v. Pickles, Q.B.

for the defendant, on the ground that the fraudulent omission of the plaintiff's name did not affect the order of discharge or entitle the plaintiff to sue for the debt.

Forbes, for the plaintiff, now shewed cause against the rule.—Section 125, sub-section 9, regulates the procedure in cases of liquidation by arrangement as to the granting of the discharge of the debtor. By sub-section 10 of that section a discharge of a debtor granted, as provided, has the same effect as an order of discharge given to a bankrupt. By section 49, the effect of an order of discharge of a bankrupt is to release the bankrupt from all debts provable, except a debt incurred by fraud, or whereof he has obtained forbearance by fraud, and Crown debts.

By section 127, the registration of a resolution in a liquidation by arrangement is in the absence of fraud conclusive evidence that such resolution was duly passed.

The effect, therefore, of these provisions is, that a registered resolution of discharge of the debtor in a liquidation by arrangement, is conclusive evidence, and releases the debtor from debts accruing before the liquidation, unless it can be rebutted by proving fraud. The cases of *Elmalie v. Corrie* (1) and *Heather v. Webb* (2), though they do not decide the present case, are impliedly in the plaintiff's favour. In both cases, it is true, it was held that the mere omission of the plaintiff's name in the list of creditors, did not entitle him to sue; but there was no fraud in the omission in either case, and that fact is particularly noticed by the Judges in giving their decision.

He also referred to *Girdlestone v. The Brighton Aquarium Company* (3).

Crump, in support of the rule. The cases cited shew that mere omission is not sufficient to entitle the creditor omitted to sue. The dicta relied upon in support of the contention that the case is different where fraud is proved, do not amount to what is suggested, and will

not bear the construction put upon them. Section 127 does not apply to a case such as this—it regulates the practice in the Court of Bankruptcy, but it does not provide for the effect of the order of discharge on the debtor's liability to his creditors. It is section 49 which defines that, and this case is not within the exceptions in that section.

LUSH, J.—I think this case depends entirely on the Bankruptcy Act, 1869, and the particular question at issue turns on the provisions of section 49. Under section 125, in the case of a debtor whose affairs are under liquidation by arrangement, the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting. In the defendant's case, there was a liquidation by arrangement, and a discharge of the debtor. This discharge has the same effect as a discharge in bankruptcy, and in section 49 we find what that effect is —“An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by means of any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy, with the exception of, first, debts due to the Crown; second, debts with which the bankrupt stands charged at the suit of the Crown, &c.”

The discharge releases the bankrupt from all debts provable, with the exceptions mentioned. This provision corresponds exactly with section 15 of the Debtors Act, which was passed in the same session.

Now, I think, this section 49 is the only clause in the Act which affects the present case. Section 127, upon which the plaintiff now relies, provides, that registration by the registrar of a special resolution of the creditors, on the occasion of a liquidation by arrangement, or of an extraordinary resolution of the creditors, on the occasion of a composition shall, “in the absence of fraud,” be conclusive evidence that such resolutions respectively were duly passed. That is

(1) 48 Law J. Rep. Q.B. 462.

(2) 46 Law J. Rep. C.P. 89; Law Rep. 2 C.P. D. 1.

(3) 48 Law J. Rep. Exch. 373.

Wadsworth v. Pickles, Q.B.

all that it provides. It does not say what is to be the effect of the registration of a resolution, only what the effect of fraud, if there is fraud, is to be upon the registration. If a debtor has been guilty of bribery, or other fraud, in the obtaining of the resolution of his creditors, that is ground for an application to the Court to set aside such resolution as not having been duly passed. But this provision applies only to the proceedings in the Court of Bankruptcy.

This concludes the present case. The fraudulent omission of a creditor's name from the list, may be a good reason for an application to the Court of Bankruptcy to set aside the resolution of the creditors; but it does not deprive the debtor of the right to which he is entitled under section 49 to plead his discharge as a defence to an action for a debt provable under the liquidation. I think, therefore, the rule must be made absolute to enter judgment for the defendant.

FIELD, J.—I think that this rule must be made absolute. The defendant in the action has taken advantage of his right to plead his discharge in the liquidation proceedings, in an action on a debt provable therein. There is no allegation on the part of the plaintiff, such as to bring the case within the earlier part of section 49 of the Bankruptcy Act, and to shew that the debt was one incurred by fraud, or one whereof he had obtained forbearance by fraud. The Deputy County Court Judge seems to have acted under section 127, and in doing so, to have wholly mistaken the object of that section, which, I think, only provides that a resolution may be set aside, by the Court of Bankruptcy, on proof of fraud.

*Rule absolute to enter judgment
for the defendant.*

Solicitors—W. & J. Flower and Nussey, agents for Killick, Hutton & Vint, Bradford, for plaintiff; Emmett & Son, agents for C. B. Cottam, Bradford, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. {
July 22. { ANDERSON v. OPPENHEIMER.

Landlord and Tenant—Covenant for quiet Enjoyment—House let out in Flats—Damage by Water—Bursting of Service Pipe.

When a landlord demises a house in flats to various tenants, and there is a common water supply for the whole house, distributed by branch service pipes to the tenant on each flat who pays the proportion of the rate for such supply, the landlord is not, under the covenant for quiet enjoyment, liable for damage caused to any one of the tenants by the bursting of the supply or service pipe, in the absence of want of care and skill in fixing reasonably fit and proper pipes originally, or of keeping and making and maintaining the same.

This was a case reserved for further consideration by Field, J., after a trial at the Guildhall.

The facts are sufficiently set out in the judgment.

Morgan Lloyd and M. R. Phillips, for the plaintiff.

J. Brown and A. R. Jelf, for the defendant.

Cur. adv. vult.

The following judgment was (on July 21, 1879) delivered by

FIELD, J.—This action was tried before me and a special jury at the Guildhall sittings. It was brought to recover for damage done by a quantity of water to the plaintiff's stock-in-trade on the 13th of May, 1878, under the following circumstances:—

The defendant is the owner of a large house known as Queen Victoria Buildings, in Cannon Street, in the City of London, which is fitted up and let out in different floors or flats to various tenants, and the plaintiff is his tenant of the ground-floor and basement under a lease dated the 22nd of October, 1872. The house was built by the defendant and finished in the year 1871, and the water supply to the different floors was effected by means of a cistern at the top of the house sup-

Anderson v. Oppenheimer, Q.B.

plied with water by the New River Company, and the water is distributed to each floor by means of a down service pipe connected with the cistern, and into which pipe is inserted at the junction of each floor a branch service pipe, supplying water for the use of the tenants of the floor; each floor having thus its separate branch pipe.

The cistern is filled by the New River Company, the defendant pays the water-rate by arrangement with the tenants, receiving from the plaintiff one-half of the total amount paid.

The cistern is not demised to any of the tenants of any of the floors. The injury to plaintiff's stock, in respect of which the action is brought, arose from the sudden bursting of the branch service pipe supplying the first floor, the water from which poured down into the basement where the plaintiff's goods were stored.

The part of the pipe which so burst was not open to view, and there was no evidence of any previous patent defect. The jury at the trial found, in answer to questions put by me—

1. That the branch pipe was, when fixed, a reasonably fit and proper pipe for the purpose for which it was fixed and intended to be used, and that the defendant had not been guilty of any want of care and skill in keeping and maintaining the pipe where and as it was; and upon their finding I entered the verdict for the defendant as to so much of the plaintiff's statement of claim as alleged a cause of action arising from the defendant's negligence in these respects.

But the plaintiff claimed a verdict and judgment upon the residue of the claim, which set out a covenant in the lease by which the defendant covenanted that the plaintiff might "peaceably hold and enjoy the demised premises during the said term, without any interruption by the defendant, and I reserved that question for further consideration.

I now give my judgment upon it for the defendant. The flow of the water into the plaintiff's warehouse to the extent proved is, I think, such an interference with the plaintiff's possession as to amount to an interruption within the covenant. And

Vol. 49.—Q.B., C.P. & EXCH.

if that interruption had been caused by any wilful act of the defendant—*Andrews v. Paradise* (1), or was the probable or necessary consequence of any act of the defendant done after the demise—*Shew v. Stenton* (2), I should have held that there had been a breach of the covenant for quiet enjoyment. But in the present case the water, although in a sense brought into the cistern by the defendant (he being the person who in fact contracted with the New River Company for its supply), yet was so brought for the necessary enjoyment by the plaintiff of the demised property, amongst others, and at his request and upon his payment, and was an act contemplated before and necessary to, and not an interruption of that enjoyment. The only wilful act done by the defendant towards the injury, other than the collecting and distribution of the water, was the fixing of the pipes by which the water was distributed. This was also done before the demise, and was an act in contemplation and not an interruption of the enjoyment. It is unnecessary to say whether, if the defendant had knowingly or carelessly fixed insufficient pipes, or failed to keep in good repair and condition the pipes originally properly fixed, such acts would have amounted to a breach of the covenant, for the jury have found that he was not guilty of any such negligence or want of care. There is no doubt that the plaintiff has sustained a serious loss, and from no fault of his own, but unless I can see my way in accordance with law to throw that loss upon the defendant, the burden of it must fall where the principles of law leave it; and the injury must be added to the list of those losses which happen to every one engaged in the affairs of life and commerce.

Judgment for the defendant.

Solicitors—C. F. Foster, for plaintiff; Pilgrim & Phillips, for defendant.

(1) 8 Mod. 319.

(2) 2 Hurl. & N. 858; 27 Law J. Rep. Exch. 253.

[IN THE QUEEN'S BENCH DIVISION AND
IN THE COURT OF APPEAL.]

1879.	} LETCHFORD v. OLDHAM.*
July 21.	
1880.	
April 13.	

Marine Insurance—Stranding.

Cargo was insured by a policy containing a warranty of freedom from average "unless the ship be stranded."

The voyage was to a tidal harbour, where the ship must necessarily take the ground at every tide, and could only reach the quay at high spring tides.

She grounded before reaching the quay on a small bank, and on the tide falling she settled down by the head into a hole, and the cargo was damaged.

The bank and hole were caused by steamers going out at low tide, and their existence was previously unknown:—

Held, affirming the judgment of FIELD, J., that the ship, having grounded from an unusual cause, not necessarily incident to the navigation, had been stranded within the meaning of the policy, and that the under-writers were liable for an average loss.

Appeal by the defendants, underwriters to a policy of insurance on a cargo of maize, from the following judgment of Field, J., delivered on the 21st of July, 1879, in which the facts of the case are fully stated.

Butt and J. O. Mathew, for the plaintiff; Walkin Williams and Bremner, for the defendants.

FIELD, J.—This is an action brought by assured against underwriters to recover his proportion of an average loss upon a cargo of maize shipped on board the *White Eagle*, and which the plaintiff claimed under a policy of assurance containing the usual warranty of freedom from average "unless the ship be stranded." It was tried before me without a jury. There was no doubt but, and in fact it was admitted, that the plaintiff

had sustained an average loss in respect of the cargo from a peril insured against, and there was very little doubt but that the loss had been the direct consequence of the injuries sustained by what was said to be a "stranding;" but it was also truly said on the part of the defendants, and not denied, that the loss could not create a "stranding" unless the circumstances taken by themselves amounted to it, and for the purpose, therefore, of determining whether the *White Eagle* was or was not stranded, I entirely disregard the injury in fact to the cargo and the loss thereby sustained. Upon the evidence it appeared that the risk covered by the policy was on goods until safely landed at Dingle, a port in a tidal harbour on the west coast of Ireland, in which for a vessel of the draught of the *White Eagle* there is only sufficient water to enable the vessel to reach the quay there at the highest or within a few tides of the highest springs, and that on the reflux of the tide she would be left only partially waterborne, so that she would of necessity have to take the ground twice in every twenty-four hours. It further appeared that in the ordinary course of navigation and management of a ship of her size, if she did not happen to arrive off the harbour at the time when the springs were on, she would have to bring up in Dingle Bay and wait until, in the judgment of the pilot, there would be sufficient water in the harbour to float her, either to the quay or towards the quay as far as the tide would float her; and then, if she took the ground short of the quay for want of water, she would have to wait until the next tide or tides to make further way, when there should be water enough to float her to the place where she has to discharge. The harbour being exposed to the winds from the Atlantic the depth of water at the springs varies considerably, and it is a matter of judgment of the pilot when to move. The bed of the harbour at the part where the pier and quay are situate shelves gradually upwards to the bank. There is nothing in the nature of the bottom, which was hard sand, to cause danger to a ship taking the ground at the ebb tide. This, therefore, being the ordinary course of navigation and manage-

* *Coram Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.*

Letchford v. Oldham (App.), Q.B.

ment, of which both parties must be considered to have knowledge, it is obvious that neither of them contemplated that a taking of the ground in this manner would be a stranding within the meaning of the memorandum, for, as that must of necessity occur in the course of the contemplated voyage, upon such a construction of the policy the underwriters would in any event be liable to an average loss, and lose the protection of the warranty. Indeed this was not denied by the assured, but his contention was that the circumstances and manner under and in which the *White Eagle* actually took the ground, and which I am about to describe, were not such risks as the parties contemplated as probably occurring in the ordinary course of navigation and management, but were of an accidental and fortuitous character, and therefore that the taking of the ground which the plaintiff relied on constituted a stranding within the meaning of the policy, and entitled him to recover for his loss although it was not total. It appeared that the *White Eagle* arrived in Dingle Roads on the 21st of July, and as the next highest spring tide was not until the 30th she brought up there and waited for water. On the 26th there was water enough to float her further in, and in the expectation that she would be able to get to the quay on that tide she proceeded towards it under sail, but took the ground for want of water within 300 yards of the quay. On this occasion she took the ground on an even bottom, and on sounding the pumps had no more than her usual quantity of water. She lay at this spot until the next day when she was hauled 100 yards further, when the wind having shifted she could get no further, and again took the ground on an even keel and without damage. It was not contended that on either of these occasions anything more had happened than was to be expected in the ordinary course of navigation. On the 28th she again floated, and it was what happened on this occasion that was said to amount to a stranding. She expected to reach the quay, but took the ground and remained fast twenty feet from the quay, the quay lying on her starboard bow, and the people left

her, imagining that she had taken the ground in the ordinary manner. As, however, the tide receded and she settled down, instead of resting on an even keel she pitched by the head with a heavy list to starboard towards the pier, and remained fast in that position. At the ebb she had $1\frac{1}{2}$ feet of water at her stern and three feet at her stem, and it appeared that there was a hole at her bow and another at her stern. The tide left her in the night, and at daylight it was found that there was an elevation in the channel, which was described as a small bank which was very nearly parallel with the quay, and that she had pitched by the head into the hole which apparently had been caused by the formation of the bank, and she was about two feet more by the head than by the stern. At the time she first took the ground the pumps were sounded, and no water was found in her, but when she righted the next day she was found to have two feet of water in her in consequence of having been strained as she lay in the position described. She was then lightened and proceeded to her berth at the quay, and in the course of proceeding and lying there she did not appear to sustain any injury. From the appearance of the bank and hole it seemed as if they had been caused by steamers that had been lying at the berth, and had formed them by the revolutions of their paddles on going out at low tide, and it was in substance agreed that such must have been the cause of them, and that their existence was not known beforehand, and that no vessel had met with a similar occurrence before. At the close of the evidence it was agreed that as there was no dispute as to the facts the jury should be discharged, power being reserved to me and to the Court to draw all necessary inferences of fact, and the case having been subsequently argued before me on further consideration, I now give my judgment in favour of the plaintiff. The inference which I draw is that, having regard to the place and manner in which the vessel took the ground as above detailed, such taking of the ground was not in the ordinary course of navigation and management, so as to have been in the contemplation of the parties as likely to happen

Letchford v. Oldham (App.), Q.B.

but was due to the unforeseen: accidental circumstance of the casual formation of the bank and hole, which forced the vessel into an unusual and damaging position resulting in the injury before mentioned. Had the bed of the harbour been in its usual state and condition, there is no reason to suppose but that at that state of the tide she would have taken the ground upon an even keel, resting on her bilges in safety, as she had done twice before, instead of which the accident of the existence of the bank unknown to the pilot prevented her reaching the berth which she otherwise would have safely arrived at, and the hole caused her to pitch forward with the list which no doubt hogged her—a mode of taking the ground which I regard as accidental and fortuitous, and therefore not such as the parties contemplated. This being the result of my judgment on the facts, is there any authority to compel me to come to the contrary conclusion? I find none. I accept as accurate the definition of “stranding” given by Lord Tenterden in *Wells v. Hopwood* (1), and by Lord Chief Justice Tindal, in *Kingsford v. Marshall* (2), and these definitions were, in truth, so far admitted by the learned counsel for the underwriters at the bar; but he said that this case did not fall within the meaning of the word “stranding” as there defined, inasmuch as the parties in charge of the *White Eagle* had a definite intention that she should take the ground in her course to the pier; and although they might not have had in their minds the precise spot in which she was stopped, they were willing to go in as far as they could, and were willing that she should take the ground on any part of the bed or bank on which the depth of water should be insufficient to float her, and that the mere circumstance that the spot on which she touched was dangerous, and that injury and loss were in consequence sustained, could not convert an ordinary operation of navigation into a “stranding.” But it is clear that the mere intention to take the ground is not enough to prevent a “stranding,” if there are other circumstances which shew

either that the doing so did not occur in the course of the contemplated voyage, or occurred at a spot or in a manner out of the ordinary course of navigation or management on such a voyage. Thus, in *Corcoran v. Gurney* (3), the master of a vessel bound from Nantes to Dublin in stress of weather ran for a tidal harbour at ebb tide, where he knew that the ship must take the ground; but there was held to be a stranding, for she had entered the harbour otherwise than in the ordinary course of navigation on that voyage.

In *De Mattos v. Saunders* (4) a vessel lay on a bank in Penarth Roads, a place where vessels usually lay at anchor; but she went there for security, having lost her anchor, and being towed there for salvage in distress; and there was held to be a stranding. In *Wells v. Hopwood* (1) the ship was moored at a spot where it was intended she should take the ground, but through the stretching of the rope ahead and her being moved by the wind blowing from the east, she settled on a heap of rubbish instead of in the natural bed of the river; and the majority of the Court held it to be a stranding. Again, in *Bishop v. Pentland* (5), the vessel was in a harbour dry at every tide, and moored to the spot where ships of her burthen usually lay, and where she was intended to be placed; but she fell over, and was stove in, in consequence of the accidental breaking of an insufficient rope; and this was held to be a stranding by accident, for she ceased to be in the position in which ships usually were in that port in the ordinary course of navigation.

The cases upon which the counsel for the underwriters chiefly relied in support of his contention were *Hearne v. Edmunds* (6), *Kingsford v. Marshall* (2), and *Magnus v. Buttemer* (7), but upon examination they are, I think, plainly distinguishable. In *Hearne v. Edmunds* (6) the ship took the ground in the

(1) 3 B. & Ad. 20.

(2) 8 Bing. 458.

(3) 1 E. & B. 456; 22 Law J. Rep. Q.B. 118.

(4) Law Rep. 7 C.P. 571.

(5) 7 B. & C. 219.

(6) 1 B. & B. 388.

(7) 11 Com. B. Rep. 876; 21 Law J. Rep. C.P. 119.

Letchford v. Oldham (App.), Q.B.

ordinary manner in going up Cork harbour, the bottom of which was proved on the trial to be hard and stony—see Note to *Kingsford v. Marshall* (2)—and this case may almost properly be ranged with *Magnus v. Buttemer* (7). *Fletcher v. Inglis* (8), in which the real question was not whether there was a stranding or not, but whether there was a loss by perils of the sea or not, is no authority on the present occasion. The case of *Kingsford v. Marshall* (2) is the most in favour of the defendants which their counsel was able to cite. In that case the ship took the ground in a tidal harbour at the spot it was intended she should, but upon a hard substance, and it was contended that she had done so in consequence of the accidental breaking of a rope, and that she had, therefore, been stranded. The Judge left the question to the jury whether the taking of the ground took place as was intended, merely in consequence of the ebbing of the tide in the ordinary course of navigation, or whether, in consequence of the breaking of the rope, the ship took the ground, not in the place where it was intended she should settle with the ebbing of the tide, but in some other place, in which case there would be a stranding. The jury negatived the accident, and all that the Court said was that the direction was right. It seems to me that that decision is quite consistent with the conclusion to which I have come, namely, that the *White Eagle* in the present case was stranded, and that the plaintiff is entitled to recover a sum the amount of which is to be ascertained elsewhere.

The defendants appealed.

Herschell (*Bremner* with him) (on the 13th of April, 1880), for the defendants. —What occurred in this case was not a “stranding,” and therefore the defendants are protected by the warranty in the policy. If a vessel takes the ground in the ordinary course of navigation, that is not a stranding; if she takes the ground where she ordinarily would by reason of lack of water, then it is not

a stranding, even though, in consequence of the ground being exceptionally dangerous, she is damaged—*Hearne v. Edmunds* (6). The case of *Wells v. Hopwood* (1) is distinguishable, for the decision there turns on the point that the rope stretched, which was a casualty of navigation, and caused the vessel to take the ground where it was not intended she should. If it is a mere case of navigating a tidal harbour, where from time to time there is a deficiency of water, in consequence of which the vessel takes the ground, there is no stranding—*Kingsford v. Marshall* (2).

The decision in the present case carries the definition of stranding further than it has ever been carried before, for the vessel grounded in pursuing the course which she was intended to pursue, and this is clearly not a stranding within the meaning of the policy, according to the authorities. He also referred to *Magnus v. Buttemer* (7), *Fletcher v. Inglis* (8), *Corcoran v. Gurney* (3), and *De Mattos v. Saunders* (4).

[BRETT, L.J.—In *Phillips on Insurance*, vol. ii. cap. xviii. section 1,758 (pp. 443, 444, in the 3rd edition), the rule is thus stated:—“The question has been much discussed whether a stranding comes within the memorandum where vessels usually take the ground at low tide in the ordinary course of the navigation; and the doctrine adopted on this subject is, that where there is nothing extraordinary in the stranding, it is not such within the memorandum.”]

J. O. Mathew (*Butt* with him), for the plaintiff.—A vessel is stranded within the meaning of the policy where she takes the ground accidentally, that is, at a time and in a manner not foreseen or intended—*Bishop v. Pentland* (5). In the present case the vessel was intended to take the ground, and she did so at the time and in the manner intended on the earlier occasions, but on the occasion when the damage occurred she took the ground both before it was intended she should do so and in a different manner. The cases most relied upon for the defendants are distinguishable. In *Kingsford v. Marshall* (2), there was no accident, but the vessel suffered from her own

(8) 2 B. & Ald. 815.

Letchford v. Oldham (App.), Q.B.

weakness. In *Hearne v. Edmunds* (6), this was also the case; the vessel grounded in the ordinary course of navigation. The present case is within the definition of stranding given by Tindal, C.J., in *Kingsford v. Marshall* (2).

Herschell replied.

BRETT, L.J.—I am of opinion that this judgment ought to be affirmed. I do not think it necessary or advisable to try that which would be a very ambitious and difficult attempt, that is to make an accurate general definition of "stranding." I accept the definitions given by Lord Tenterden in *Wells v. Hopwood* (1) and by Tindal, C.J., in *Kingsford v. Marshall* (2). Applying the definition of Tindal, C.J., to other cases, I do not think it necessary to apply exactly the same words which the learned Chief Justice used in that case to other cases which may differ on the facts. The words which he uses are—"Where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause." In applying this definition to the case now under consideration, we may paraphrase it by saying "not from usual causes ordinarily incident, but from an unusual cause." It is urged that there cannot be a stranding if the ship takes the ground in the usual and ordinary course of the voyage, and Mr. *Herschell's* argument would make this mean the usual and ordinary track. I cannot think course means track, for if that were so, as long as the vessel were following her usual and ordinary track, whatever accident were to happen, however unusual it might be, there would be no stranding. Mr. *Herschell* argued that we cannot depend on the knowledge or intention of the master. Now I do not depend on the knowledge or intention of the master, nor on the actual knowledge of the persons who make the contract, as to the ordinary state of the harbour, but on the knowledge of those persons who may be supposed to have knowledge on the subject. Where by reason of a tem-

porary state of circumstances, however caused, the bottom of a river or harbour is in an unusual condition, and the ship comes to the ground in a different place and in a different manner from what was usual or intended, that is a stranding. If that is true, the only question is whether the bottom of the harbour is in a different state from its ordinary state, and so the vessel comes to the ground in a different manner from that which was usual or intended. If, to the knowledge of people who knew the harbour, steamers constantly shifted the ground, that would be the ordinary state of the harbour, for I do not mean to say that in order that it may be the ordinary state of the harbour the bottom must necessarily be unchanged;—so if there were a stream which at times when it brought down much water altered the bottom of the harbour. Here the evidence shewed, and the Judge was justified in finding, that this was not the ordinary state of the harbour, but one or more steamers had taken the unusual course of forcing their way through the ground at low water, and so had caused a slight bank which was a temporary alteration of the condition of the bottom of the harbour. The vessel in going in took the ground in a manner, that is, in a position, which she would not have adopted if the harbour had been in its ordinary condition. It was caused by a temporary change in the bottom of the harbour. Therefore I am of opinion that there was a stranding, and that the judgment is correct, and ought to be affirmed.

COTTON, L.J.—I am of the same opinion. On the question of fact raised it is contended that this was the usual state of the harbour, and that there is nothing to shew that the action of the steamers had not altered the state of the bottom of the harbour so as to make this its ordinary condition. I cannot come to that conclusion on the evidence, for I think that the reasonable conclusion is that this was an unusual state of the harbour, caused by an extraneous or accidental cause. Then the case comes within the definition of stranding given by Tindal, C.J., in *Kingsford v. Marshall* (2), which has

Leitchford v. Oldham (App.), Q.B.

been read by Lord Justice Brett. Then it is urged by Mr. Herschell that in all tidal harbours there is more or less water at different times and in different places according to the tides. But here the water at this particular spot was shallower, not by reason of the tide not rising, but because by accidental and extraneous causes the bottom was raised and there was a bank and a trench on the other side of the bank; this was an unnatural alteration of the condition of the bottom of the harbour. One argument used is that there can be no stranding if the vessel takes the ground in the ordinary course of the voyage, that is in the ordinary track; but I do not think that is the meaning of "course." My opinion is that if the grounding result from some extraneous and unusual cause not brought about in the management of the vessel on the voyage, this is a stranding, and therefore there was a stranding in the present case, and the judgment ought to be affirmed.

THE SINGER, L.J.—If upon the evidence in this case it had appeared that the trench and bank where the grounding took place had been due to the ordinary shiftings of the bed of the harbour arising either from natural causes or from artificial causes constantly and more or less regularly acting, the case would not, in my opinion, have been one of stranding, but the inference drawn, and I think properly drawn, by Field, J., from the facts proved, was that the trench and bank were due to an accidental as well as artificial cause temporarily and recently arising, and that the bed of the harbour was not in its usual or ordinary state and condition. Under such circumstances, and upon the principles laid down by Tindal, C.J., and other Judges, it appears to me that the judgment for the plaintiff was right.

Judgment affirmed.

Solicitors—Hollams, Son & Coward, for plaintiff;
Ashurst, Morris, Crisp & Co., for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879.
May 16, 27. }
1880. } GREENE v. POOLE AND OTHERS.
March 18. }

Ship and Shipping—Marine Insurance—Payment by Cargo Owner in respect of Bottomry Bond—English Policy on Foreign Ship—Loss by Perils of the Sea.

By a marine policy effected in England on goods in a French ship it was provided that general average was to be payable as per judicial foreign statement. On the voyage the master was obliged to take up a loan secured by bond on ship freight and cargo, in order to effect repairs to the ship occasioned by a collision which did not damage the cargo. The ship and freight proving insufficient to satisfy the bond, the cargo was seized, and the owner obliged to pay the deficiency to obtain his goods.

On action by the owner of the cargo to recover the amount so paid from the underwriters,—

Held, that the defendants were entitled to judgment, on the ground that according to English law there was no loss by perils of the sea, and as the policy stipulated for the application of foreign law only as regarded general average, the plaintiff was not at liberty to construe by French law any other portions of the policy so as to constitute the loss a loss by perils of the sea.

This was an action by the owner of cargo on a policy of marine insurance on goods shipped in a French ship. The plaintiff was an English merchant, and he effected the policy in England with the defendants, English underwriters. By the policy general average was to be payable as per judicial foreign statement.

On the voyage the ship was damaged by a collision, the cargo being uninjured. To pay for the necessary repairs the master obtained at Gibraltar a loan on bottomry bonds of ship, freight and cargo. To satisfy these bonds the cargo was seized, and the plaintiff to obtain his goods had to pay to the bondholder the deficiency after the realisation of the value of the ship and freight. On action brought to recover such payment from

Greer v. Poole, Q.B.

the underwriters, the facts were brought before the Court in the form of a special case.

Cohen, for the plaintiff.—The question is whether the owner of the cargo, who has been obliged to pay the bottomry bonds in order to have his goods, can recover against the underwriters, it being remembered that the necessity imposed on the master of giving the bond arose from a collision at sea.

It is contended that he can; first, because it is a loss by perils of the sea. The case of *Dent v. Smith* (1) shews that where by the immediate consequence of the accident at sea the cargo gets into the hands of the foreign authorities and is dealt with by foreign law, the money which a cargo owner has to pay to release it may be recovered as a loss by perils of the sea.

[LUSH, J.—Your argument really makes the underwriters liable for the deficiency in value of the ship.]

The expenses were really necessary for the repairs and so for completing the adventure. The perils of the sea put the adventure in jeopardy, and the master was compelled to hypothecate ship and cargo. Therefore the hypothecation was caused by perils of the sea. It is not necessary that the goods should be themselves actually damaged—*Rodoconachi v. Elliott* (2).

[LUSH, J.—Suppose the master had sold goods to pay for the repairs, would you contend that that was a loss by perils of the sea?]

Certainly I should. It is just as if the cargo had got into the hands of salvors and came in burdened by salvage. Jettison is the act of the master, and so is salvage, and the hypothecation of the goods is an exactly similar act.

Then by French law the shipowner can abandon ship and freight to the bondholders and relieve himself of liability, and this policy must be construed according to French law, which would in this way treat the money paid to the

bondholder to release the goods as a loss by perils of the sea, this being a French ship—*Lloyd v. Guibert* (3). He then cited the Code de Commerce, the German Code, Pardessus, and other authorities on foreign law which became immaterial in the view taken by the Court.

English Harrison (*Watkin Williams* with him), for the defendants.—The policy must be construed according to English law. The plaintiff and defendants are English, and the policy was made in England; the fact of the ship being French will not alter the rule of construction, and foreign law is only applicable in reference to the particular stipulation introduced, namely, as to general average. But this is not a general average loss. And by English law it is contended that it is equally clear that it is not a loss by perils of the sea. The loss arose entirely from the inability of the master to get credit at Gibraltar, the port where the vessel put in for repairs.

Powell v. Gudgeon (4) is a distinct authority that this is a loss for which the shipowner, not the underwriter, is responsible. He cited also *Sarguy v. Hobson* (5) and *Harris v. Scaramanga* (6).

Our. adv. vult.

The judgment of the Court (7) was (on March 18, 1880) delivered by

LUSH, J.—This is an action on a marine policy on goods, on a voyage from Lagos to Marseilles, in a French ship. By the terms of the policy, general average was to be payable as per judicial foreign statement.

The ship having come into collision with another ship, put into Gibraltar for repairs. The cargo was undamaged. The master, not having funds enough to do the necessary repairs, took up a loan on bottomry upon ship, freight and cargo.

(3) 35 Law J. Rep. Q.B. 74; Law Rep. 1 Q.B. 115.

(4) 5 M. & S. 431.

(5) 2 B. & C. 7; 4 Bing. 131.

(6) 41 Law J. Rep. C.P. 170; Law Rep. 7 C.P. 481. See also *Hendricks v. The Australasian Insurance Company*, 43 Law J. Rep. C.P. 188; Law Rep. 9 C.P. 460.

(7) Cockburn, C.J.; Mellor, J.; and Lush, J.

(1) 38 Law J. Rep. Q.B. 144; Law Rep. 4 Q.B. 414.

(2) 43 Law J. Rep. C.P. 255; Law Rep. 9 C.P. 518.

Greer v. Poole, Q.B.

On arrival at Marseilles, the bondholder took proceedings to enforce his rights against ship, freight and cargo, and ship and freight proving insufficient to satisfy the bond, the plaintiff had to pay the deficiency in order to release his goods. A judicial average statement was made out at Marseilles, which, however, did not comprise the sum paid to the bondholder, as the payment had not then been made. The defendants paid into Court a sum sufficient to satisfy the claim for the particular charges and expenses and general average under the adjustment, and the only question submitted to us is, whether the amount paid to release the goods is recoverable under the policy.

On the argument, Mr. Cohen, who appeared for the plaintiff, feeling that he could not maintain the claim as general average, contended that this was under the particular circumstances a loss by perils of the sea, the circumstances relied on being that the French law entitled the owner of the vessel in question to abandon ship and freight to the bondholder, and thus to release himself from further liability, the French law, as he contended, differing in this respect from English law. Whether this contention is well-founded or not, is not in our opinion material, for, supposing it to be so, it does not make the loss a loss by perils of the sea. The proximate cause of the loss, to which alone our law has regard, was the inability of the agent of the shipowner to pay off the charge which he had, for want of funds at Gibraltar, created on the cargo. The goods sustained no sea damage.

It was further contended, on behalf of the plaintiff, that as the policy was upon goods in a French ship, it must be construed as if it had been a French policy, and that under such a policy the loss would have been deemed a loss by perils of the sea.

Whether a French policy would have been so construed is again immaterial. It is, no doubt, competent to an underwriter on an English policy to stipulate, if he thinks fit, that such policy shall be construed and applied, in whole or in part, according to the law of any foreign state,

VOL. 49.—Q.B., C.P. & EXCH.

as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average, but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel.

Our judgment is therefore for the defendants.

Judgment for defendants.

Solicitors—Gregory, Rowelliffes & Co., for plaintiff; Parker & Co., for defendants.

Credit by Post 502562107
Commande 502562189
Hamilton, Chaine 502562407

[IN THE COMMON PLEAS DIVISION.]

1880. }
 March 17. }

HAMLIN v. BETTELEY.

Bill of Sale—Statement of Consideration
—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.

A bill of sale recited that the grantor, having two executions on his premises, and being unable to carry on his business by reason thereof, had applied to the grantee to lend him 182l. 3s. to enable him to pay out such executions, and that the grantee had agreed to this; and it then stated that in pursuance of the said agreement, and in consideration of the said sum of 182l. 3s. then paid, the grantor assigned the goods therein mentioned to the grantee. The evidence was that the 182l. 3s. was in fact paid by the grantee, but that part of it only was given to pay off an execution, that part was given to an execution creditor, part to the grantor's solicitor for costs and money lent, and the residue to the grantor himself; but that all these were so paid with the knowledge and sanction of the grantor:—

Held, that the bill of sale truly set forth the consideration for which it was given so as to satisfy the requirements of section 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).

Interpleader issue whether certain stock-in-trade, furniture and effects seized in execution by the sheriff of Essex were at the time of such seizure the property of the plaintiff as against the defendant.

Hamlyn v. Bettoley, C.P.

The defendant was the execution creditor of one Thomas Woodcock Warner, and under his execution the goods in question had been so seized. They had been previously assigned under a bill of sale by the said T. W. Warner to the plaintiff; and at the trial of the interpleader issue before Denman, J., at the last Chelmsford Assizes, the point was raised whether such bill of sale set forth the consideration for which it was given so as to satisfy in that respect section 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) (1). The bill of sale stated that it was made on the 23rd of October, 1879, between Thomas Woodcock Warner, of, &c., thereafter called the mortgagor, of the one part, and Lesoufe Hamlyn, of, &c., thereafter called the mortgagee, of the other part; and it then proceeded as follows:—"Whereas the said mortgagor, having two executions upon his premises, situate in High Street, Great Dunmow aforesaid, and being unable to carry on his business by reason thereof, hath applied to and requested the said mortgagee to advance and lend him the sum of 182*l.* 3*s.* to enable him to pay out such executions and to carry on his said business, which the said mortgagee hath agreed to do on having the assignment or other assurance hereinafter contained. Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the said sum of 182*l.* 3*s.* now paid," &c. There then followed an assignment to the plaintiff in the usual way of the property the subject of this interpleader issue.

There was indorsed on the bill of sale a receipt by the said T. W. Warner expressing that he had received "the sum of 182*l.* 3*s.*, being the consideration money within expressed."

It was proved at the trial by the plaintiff that he paid the said sum of 182*l.* 3*s.* in the following manner: he gave one J.

(1) Section 8 of 41 & 42 Vict. c. 31, enacts that "Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given; otherwise such bill of sale," as against the persons therein mentioned, shall be deemed fraudulent and void.

Jeffery, a sheriff's officer, a cheque for 8*l.* 3*s.* 3*d.*, to pay out an execution against the goods of the said T. W. Warner; he gave another cheque for 103*l.* 17*s.* 5*d.* to a Miss Oman, who had been an execution creditor, in discharge of her claim against the said T. W. Warner; he gave a cheque for 25*l.* 0*s.* 9*d.* to Mr. John Evans, who attested the bill, for his claim against the said T. W. Warner for money lent and for costs as his solicitor; and he gave a cheque for the residue, namely, 45*l.* 1*s.* 7*d.*, to the said T. W. Warner. All these cheques were so drawn and given with the approval of the said T. W. Warner, and they were all duly honoured.

The learned Judge was of opinion that the consideration was not duly set forth in the bill of sale, and he therefore directed the jury to find a verdict for the defendant. A rule *nisi* was afterwards obtained for a new trial on the ground of misdirection in this respect, and against such rule

J. G. Witt now shewed cause.—The Act requires the bill of sale to set forth the consideration, which means the true consideration, for which it was given.

[GROVE, J.—The consideration in the present case is what the grantee paid, and is not that stated? The object of the Act was to prevent fictitious sums being stated, and to let persons know what was the amount which was really advanced. It is true that the consideration may not always be money, but it must be what moves from the grantee to the grantor, and that must be stated.]

There is stated in this bill of sale more perhaps than was necessary, but the object for which the advance was to be made is stated, and being not truly stated it is misleading.

[GROVE, J.—That may be a ground for fraud, but how is it within the meaning of this enactment? What a grantor may do with the money which is to be paid by the grantee is no part of the consideration for the grant.]

Suppose the deed had stated that it was made in consideration of 182*l.* 3*s.* now advanced by the grantee to pay off certain executions, would not such statement have formed part of the consideration?

Hamlyn v. Betteley, C.P.

[GROVE, J.—Not to my mind.]

[DENMAN, J.—Part of the money was paid to Evans, and looking at the relation between him and the grantor as that of solicitor and client I thought at the trial that this was important, and that it was not correctly set forth in the bill of sale.]

What is set forth is a misdescription and misleading.

Edward Pollock, in support of the rule.—The plaintiff acted *bona fide*, and there is no suggestion of fraud. The consideration was the sum of 182*l.* 3*s.*, and that sum in fact was paid by the plaintiff, and it did not matter to him what was done with this money by Warner, or whether it was all paid to him direct or to different persons on his behalf. In *Leake on Contracts*, page 611, it is stated that “the matter of the consideration required to support a promise is defined as consisting of ‘any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed or inconvenience suffered by the plaintiff with the consent, express or implied, of the defendant, or, in the language of pleading, at the special instance and request of the defendant;’” citing for this *per Tindal, C.J.*, in *Laythoarp v. Bryant* (2). In *Hutton v. Orutwell* (3), Mrs. Yandall, a trader, being indebted to Lansdell in 200*l.*, agreed with the defendant that on the defendant paying the 200*l.* to Lansdell she, Yandall, would assign by bill of sale all her effects to the defendant; and it was held that this was a good consideration as against creditors. “We think,” said Lord Campbell, C.J., in delivering the judgment of the Court, “it cannot be impeached by the circumstance of the money being paid directly by the defendant to Lansdell, the creditor of Mrs. Yandall; for it was in truth an advance to her to enable her to satisfy a pressing demand, and the defendant was her agent in making the payment in the same manner as if the money had remained some time in her actual possession.”

DENMAN, J.—I think I was wrong in ruling at the trial that the consideration was not truly stated. If there had been a wilful misdescription as to the object of the advance, I do not say that there would have been here a proper setting forth of the consideration; but the evidence does not go to that extent, and the mere fact that there was an arrangement that Evans, the solicitor, should receive part of the money would not prevent the statement of the consideration from being true.

GROVE, J.—The real consideration for this bill of sale was the 182*l.* 3*s.* which passed from the grantee to the grantor. There is a statement in the deed that this sum was advanced to enable the grantor to pay out certain executions and to enable him to carry on his business, and there was no evidence that in this respect the statement in point of fact was untrue. But then it is said that the money did not pass to the grantor direct, and that part of it was paid to his solicitor. In strict law payment to another at his request is the same as payment to him or for his use, and there is therefore nothing in this objection. If, however, what is a misstatement is so mixed up with the consideration as to give another effect and meaning to the statement of consideration to what it really is, there might be an improper setting forth of the consideration. But that is not the case here, and for the reasons already given I think the rule for a new trial must be made absolute.

Rule absolute.

Solicitors—J. Evans, for plaintiff; S. Betteley & Co., for defendant.

(2) 3 Sc. 250.

(3) 1 E. & B. 15; 22 Law J. Rep. Q.B. 78.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880. }
 May 8, 9, 16. } BURNS v. NOWELL.*

Pacific Islanders Protection—Kidnaping Act, 1872 (35 & 36 Vict. c. 19), sections 3, 6, 9, 16, 18, 20—Offence against the Act—Seizure of Vessel—Reasonable Suspicion that Offence is being committed.

By the *Kidnaping Act, 1872*, it is unlawful for a British vessel to carry native labourers, not part of the crew, without a license, or to ship natives without their consent, and naval officers may seize "any British vessel which shall upon reasonable grounds be suspected of being employed in the commission of" the above offences.

Plaintiff's vessel started on a trading expedition in 1871. Natives were shipped, with their consent, but under circumstances which the Court held not to constitute them part of the crew. During the voyage the Act was passed, and the captain did not hear of it until he was returning to land the natives.

Defendant, a naval officer, finding the natives on board, seized the vessel.

In an action for such seizure the jury, being asked whether defendant had reasonable cause for thinking that the vessel was employed in breaking the Act, found a verdict for defendant:—

Held, affirming the judgment of the Queen's Bench Division, that there was no misdirection, and defendant was not liable.

Held also, that the carrying of the natives, having been commenced before the Act was passed, was not an offence against the Act.

Appeal from the Queen's Bench Division. This action was brought to recover damages for the seizure and detention of the plaintiff's schooner *Aurora* by the defendant, a lieutenant in the navy, who was in command of Her Majesty's ship *Sandfly*.

The *Aurora* started from Sydney, in the year 1871, under the command of Captain Bennett, on a trading and fishing expedition among the South Sea

Islands. At Simbo, in the Solomon Islands, and at some other places in the same group, Captain Bennett shipped certain natives, who were employed during the voyage, partly in working the vessel, and partly on shore in trading, and partly in fishing and diving. These natives did not sign articles, but they were shipped with their own consent, and Captain Bennett agreed to take them back at the end of their service to the islands from which they had embarked. While the *Aurora* was absent on this voyage, the *Kidnaping Act, 1872* (35 & 36 Vict. c. 19) (1) was passed, and was pro-

(1) The following are the material provisions of the *Kidnaping Act, 1872* (35 & 36 Vict. c. 19):—

Preamble.—"Whereas criminal outrages by British subjects upon natives of islands in the Pacific Ocean, not being in Her Majesty's dominions, nor within the jurisdiction of any civilised power, have of late much prevailed and increased, and it is expedient to make further provision for the prevention and punishment of such outrages."

Section 3.—"It shall not be lawful for any British vessel to carry native labourers of the said islands, not being part of the crew of such vessel, unless the master thereof shall, with one sufficient surety, to be approved by the governor of one of the said Australasian colonies, or by a British consular officer appointed by Her Majesty to reside in any of the said islands, or by any person appointed by either of those officers, have entered into a joint and several bond in the sum of five hundred pounds to Her Majesty, her heirs and successors, in the form contained in Schedule (A) to this Act annexed, or in such other form as shall be prescribed by the legislature of any of the Australasian colonies in respect of vessels sailing from the ports of such colony, nor unless he shall have received a license in the form contained in Schedule (B) to this Act annexed from any such governor or British consular officer."

Section 6.—"All the provisions of this Act with respect to the detention, seizure, bringing in for adjudication before any Vice-Admiralty Court, trial, condemnation, or restoration, of vessels suspected of being employed in the commission of any of the offences enumerated in the 9th section of this Act, shall, *mutatis mutandis*, apply to any British vessel which shall be found carrying such native labourers without a license, or in contravention of the terms of any license which may have been granted to the master thereof."

Section 9.—"If a British subject commits any of the following offences, that is to say (1), decoys a native of any of the aforesaid islands for the purpose of importing or removing such native into any island or place other than that in which he was at the time of the commission of

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Theigier, L.J.

Burns v. Nowell (App.), Q.B.

claimed, and came into force in the Australian colonies. Captain Bennett did not hear

such offence; or carries away, confines or detains any such native for the purpose aforesaid, without his consent, proof of which consent shall lie on the party accused; (2) ships, embarks, receives, detains or confines, or assists in shipping, embarking, receiving, detaining or confining, for the purpose aforesaid, a native of any of the aforesaid islands on board any vessel, either on the high seas or elsewhere, without the consent of such native, proof of which consent shall lie on the party accused; . . . he shall for each offence be guilty of felony . . ."

Section 16.—"Any British vessel which shall upon reasonable grounds be suspected (1) of being employed in the commission of any of the offences enumerated in the 9th section of this Act . . . may be detained, seized and brought in for adjudication upon the charge of being or having been so employed or fitted out as aforesaid before any Vice-Admiralty Court in any of Her Majesty's dominions, by any of the following officers, that is to say . . . (3) any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer . . ."

Section 18.—"The Vice-Admiralty Court before which any vessel is so brought for adjudication shall have full power and authority to take cognisance of, and try the charge upon which such vessel is brought in, and may on proof thereof condemn the vessel and cargo, or either, as the case may be, as forfeited to Her Majesty, or may order such vessel and cargo, or either of them, to be restored, with or without costs and damages, as to the Court shall seem fit . . ."

Section 20.—"Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a vessel by the Vice-Admiralty Court, no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any vessel in pursuance of this Act."

Section 21.—"This Act shall be proclaimed in the several Australasian colonies by the respective governors thereof, within six weeks after a copy of such Act shall have been received by such governors respectively, and shall take effect in the several colonies from the day of such proclamation."

The above sections are amended in several respects by 38 & 39 Vict. c. 51 which (by s. 11) repeals s. 18 of 35 & 36 Vict. c. 19, but without prejudice to anything done, or any right or liability accrued, or any legal proceedings commenced, under that section.

The only section of 38 & 39 Vict. c. 51 which is material to this report is s. 2, which, after reciting 35 & 36 Vict. c. 19. s. 3, proceeds as follows:—"And whereas such license does not authorise the carrying in any British vessel of

of the Act until August, 1873, when he was told of its having come into force by the captain of a vessel which he met with on his return voyage. The *Aurora* then proceeded on her return voyage, and when off Simbo she fell in with the *Sandfly*, which was commanded by the defendant, who, finding the natives who had been shipped at Simbo still on board, seized the *Aurora* and her cargo, on the ground that she was engaged in the commission of an offence against the Kidnapping Act. The *Aurora* was taken into Cleveland Bay, which is in the jurisdiction of the Brisbane Court of Queensland, and part of the cargo was transhipped and taken to Sydney. Proceedings were instituted in the Vice-Admiralty Court of Sydney, but the suit was dismissed on the ground that the Court had no jurisdiction.

At the trial, Lord Coleridge, C.J., left it to the jury whether at the time of the seizure or detention the defendant had reasonable cause for thinking that the *Aurora* was employed in breaking the Act of Parliament.

The jury found a verdict for the defendant.

A rule for a new trial on the ground of misdirection was discharged by Cockburn, C.J., and Lush, J., and the plaintiff now appealed from their decision.

A. Wills and Edwyn Jones (on March 8 & 9), for the plaintiff.—There was a misdirection in this case, in not leaving to the jury the question whether, as a matter of fact, these natives who were being carried on board the *Aurora* formed part of the crew of the vessel, for if they were part of the crew there could not possibly be any offence against section 3 of the Kidnapping Act, 1872 (35 & 36 Vict. c. 19). There is no definition of

the said native labourers for the purpose of carrying on any fishery, industry or occupation in connection with the said vessel, and it is expedient to authorise the same; be it therefore enacted as follows:—The license mentioned in sections 3 and 5 of the principal Act may authorise a British vessel to carry native labourers in such vessel, for the purpose of carrying on any fishery, industry or occupation in connection with the said vessel . . ." (The section contains further provisions altering the forms of the license and bond contained in the Act of 1872).

Burns v. Nowell (App.), Q.B.

"crew" in the Act, but the word ought to be construed as including every person employed on board a vessel, and this is the sense in which it is used throughout the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104); see especially section 149. The defendant misinterpreted the word "crew" in the Act; this was a mistake of law, and he cannot be protected from the consequences. The evidence shews that the natives were shipped and remained on board with their own consent, and therefore it is clear that no offence was committed against section 9. The word "carry" in section 3 must mean some originally wrongful taking, and here the natives were taken on board before the Act came into operation. In order to be free from liability it is not enough for the defendant to have had a reasonable suspicion that some offence was being committed. The protection given by the Act applies only where the person claiming that protection honestly believes in the existence of facts, which, if they had really existed, would have justified what he did—*Roberts v. Orchard* (2), *King v. Chamberlain* (3), *Downing v. Capel* (4). A further wrong was done to the plaintiff by instituting proceedings in the wrong Vice-Admiralty Court, by which he was deprived of the opportunity of obtaining restoration of the vessel and redress by costs or damages, which he would have had under section 18, if the proceedings had been before a Court which had jurisdiction.

A. Staveley Hill (Bosanquet with him), for the defendant, referred to *Judge v. Selmes* (5), *Smith v. Hopper* (6), *Hardwick v. Moss* (7).

[He was then stopped by the Court.]

Cur. adv. vult.

(2) 2 Hurl. & C. 769; 33 Law J. Rep. Exch. 65.

(3) 40 Law J. Rep. C.P. 273; Law Rep. 6 C.P. 474.

(4) 36 Law J. Rep. M.C. 97; Law Rep. 2 C.P. 461.

(5) 40 Law J. Rep. Q.B. 287; Law Rep. 6 Q.B. 724.

(6) 9 Q.B. Rep. 1005; 16 Law J. Rep. Q.B. 93.

(7) 7 Hurl. & N. 136; 31 Law J. Rep. Exch. 205.

The judgment of the Court was (on March 16) read by

BAGGALLAY, L.J.—It is not, in our opinion necessary for the decision of this appeal to determine whether the schooner *Aurora* was, at the time of the seizure by the defendant, employed in the commission of any of the acts which are made offences by the Kidnapping Act, 1872; for it appears to us that, even upon the assumption that no such offence had been committed, the defendant cannot be held responsible to the plaintiff in respect of the seizure and detention of the vessel, and that this appeal must consequently be dismissed.

We will presently express our opinion upon the question whether any such offence had in fact been committed, as we deem it only fair to the plaintiff, as the owner of the *Aurora*, and to Captain Bennett her master, that we should do so; but we propose, in the first place, to consider the nature and extent of the protection afforded by the Act to those commanding officers of Her Majesty's ships, who, in the discharge of their duties, seize and detain vessels suspected of being employed in the commission of such offences.

The 16th section of the Act authorises any commissioned naval officer on full pay to detain, seize and bring in for adjudication before a Vice-Admiralty Court any British vessel which shall *upon reasonable grounds be suspected* of being employed in the commission of any of the offences enumerated in the 9th section of the Act; and by the 6th section this provision is made applicable to any British vessel which shall be found carrying native labourers in contravention of the provisions of the 3rd section; and by the 20th section it is provided that no officer shall be responsible, either civilly or criminally, in respect of the seizure or detention of any vessel *in pursuance of the Act*.

The first question, then, which we have to consider is, what meaning should be attributed to the words, "*shall upon reasonable grounds be suspected*," as used in the 16th section of the Act, and "*in pursuance of the Act*," as used in the 20th section.

It has been contended by Mr. Wills, on

Burns v. Nowell (App.), Q.B.

behalf of the appellant, that an officer detaining or seizing a vessel cannot properly be considered either as having reasonable grounds to suspect that an offence has been committed, or as acting in pursuance of the Act, unless he believes in the existence of facts which, if they did actually exist, would be sufficient to establish the commission of the offence, and in support of this contention he has referred to decisions and *dicta* in cases in which, notice of intended action having been required by law to be given to persons sought to be made responsible for having exceeded their powers, questions have arisen as to the circumstances under which such persons were entitled to notice.

We are, however, unable to accede to the argument based upon the supposed authority of these cases; we do not doubt their value as guides for the decision of cases of a similar character, but the words which we have now to interpret are contained in a statute of a very special character, and their true meaning can only be arrived at by a consideration of the general scope of the statute, and of the circumstances under which, and the purposes for which, it was avowedly passed. To adopt the limited construction contended for by Mr. Wills would render the Act almost a dead letter; the practical effect of so doing would be to make the justification of the officer depend, in almost every case, upon the offence having been in fact committed; and he would consequently have to discharge his duty at the risk of being held responsible in damages should he make a mistake in applying a newly made law to a state of facts, believed or suspected by him to exist, but as to the existence of which he can, speaking generally, have had but very slight means of informing himself.

We cannot suppose that the Legislature intended to place an officer upon whom it imposed duties of so important and so responsible a character in a position of such risk and peril. In our opinion an officer should be considered to have had reasonable grounds for suspicion if, at the time of the seizure, he reasonably believed in the existence of a state of circumstances, which, in his honestly formed

opinion, amounted to the commission of an offence under the Act. And this view of the interpretation which should be adopted is supported, not only by the general terms in which the 20th section is expressed, but also by the provisions contained in the 18th and 19th sections for making compensation to those who may suffer by reason of an improper seizure or detention; and though it may be urged, and perhaps with some justice, that the compensation so provided is not adequate to meet all the cases which may arise in which justice would appear to require that compensation should be made, the fact that any such compensation is provided strongly supports the view that it was not intended by the Legislature that the officer should remain liable for the consequences flowing from an honestly intended discharge of his duty. From the evidence in this case it is clear, and it is not disputed, that the defendant believed, and with good reason, in the existence of a state of circumstances, which, in his opinion, not only authorised him to seize the *Aurora*, but imposed it upon him as a duty to do so, and such being the case, he was, in our opinion, fully justified in seizing and detaining her.

It is, however, necessary to notice another point raised on behalf of the plaintiff, which was to this effect, that it was the duty of the defendant to have taken the *Aurora* and her cargo before a Court of competent jurisdiction for adjudication; that, had this course been adopted, it would have been within the power of the Court to have done justice to the plaintiff by restoring both ship and cargo, and by awarding him damages for the seizure and detention; that in consequence of the proceedings having been instituted in the Vice-Admiralty Court at Sydney, to which port the cargo had been forwarded, though the vessel had been left in Cleveland Bay, within the jurisdiction of the Brisbane Court in Queensland, the proceedings have been rendered nugatory, the Judge having decided that the Court at Sydney had no jurisdiction in the matter; and that for this alleged neglect of duty, and the consequent loss to the plaintiff, the defendant was liable in damages.

Burns v. Nowell (App.), Q.B.

Now with reference to this claim we think it is sufficient to say that no such claim is put forward by the pleadings; but, apart from this omission, which might perhaps be removed by amendment, if the circumstances would justify an amendment, it is to us clear that the transshipment of the cargo, and the sending it to Sydney, whilst the ship was left in Cleveland Bay, was an arrangement acquiesced in, if not suggested, by the plaintiff or those who acted on his behalf. It is also to be observed that we have no evidence before us to shew with whom the responsibility rested of instituting proceedings in a Vice-Admiralty Court, or as to whether the defendant had anything to do with it.

Being, then, of opinion, for the reasons which we have stated, that the defendant cannot be held responsible for the seizure of the *Aurora*, we proceed to consider whether, at the time of her seizure, she was employed in the commission of any offence within the intent and meaning of the Kidnapping Acts.

As regards the offence alleged to have been committed by an acting in contravention of the provisions of the 3rd section of the Act of 1872, we should have been prepared to express a confident opinion that no such offence had been committed, if the answer to the question had depended upon the construction of that section alone, apart from any considerations arising out of the provisions of the subsequent Act of 1875. The form of license, given in Schedule B to the earlier Act, points to the carriage of native labourers, as passengers from one place to another, and is not, as is recognised in the Act of 1875, applicable to such an employment of native labourers as that in which the natives on board the *Aurora* were engaged, and there was, in our opinion, much force in the argument of Mr. Wills, that the natives on board the *Aurora* were part of the crew of that vessel.

But the Act of 1875 is to be construed as one with the earlier statute, and, reading the two together, we think that the reasonable conclusion is that to carry native labourers without a license, for the purpose of their being employed in

the manner in which the natives shipped on board the *Aurora* were, in fact, employed, is constituted an offence within the meaning of the 3rd section of the Act of 1872, and that this must be considered to have been the true construction of the section, not only as from the time when the later Act was passed, but from the time when the earlier Act came into operation.

But the question remains, whether, having regard to the fact that all the natives who were on board the *Aurora* at the time of her seizure had been shipped some months before the Act of 1872 was passed, and to the other circumstances which we will presently mention, there was a carrying by that vessel within the meaning of the 3rd section.

The form of license given in Schedule B to the Act of 1872, purports to license the vessel to carry a limited number of native passengers from one specified place to another within a limited space of time; and the form given in Schedule B to the Act of 1875, purports to license the vessel to employ a limited number of native labourers from one specific date to another; so that the carrying in the one case and the employment in the other have a specified commencement and a specified termination.

Now inasmuch as the carrying of the native labourers on board the *Aurora* commenced before the Act of 1872 was passed, a license for the commencement of such carrying was not only not necessary, but could not have been obtained; and the subsequent carrying of the natives until they were removed from the *Aurora* on her seizure by the defendant, was a continuous proceeding, during which the vessel was never within the jurisdiction of the governor of any Australasian colony, or consular officer, competent to grant a license. Under these circumstances we should be disposed to hold that the carrying of these natives on board the *Aurora*, inasmuch as it commenced before the Act came into operation, was not a carrying within the meaning of the 3rd section, even when viewed with the additional light thrown upon it by the Act of 1875.

It may, however, be suggested that the

Burns v. Nowell (App.), Q.B.

carrying, though not unlawful in its commencement, became so when the Act came into operation, notwithstanding the ignorance of the master that any such Act was in force, and though it was then out of his power to obtain a license. But before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by means of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and, though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it, such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding, alleged to be unlawful, was continued, and when and how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued.

Now the natives who were on board the *Aurora* had been shipped by Captain Bennett under agreements by which he was bound to take them back at the end of their service to the several islands from which they had embarked; and at the time when he first became aware that the Act of 1872 was in force, he had completed his voyage, so far as its fishing and other trade purposes were concerned, and was on his way to land the natives in pursuance of his agreements with them, and then to proceed to Sydney; and to this it must be added, that when the *Aurora* was seized, which was but a few days after Captain Bennett had first heard of the Act being in force, he had already landed some of the natives, and was within a few miles of the island of Simbo, at which, and at other islands in the Solomon group, he was about to land all that he had on board. It appears to us impossible to suggest any course more proper for Captain Bennett to have adopted than that which he did adopt; though he probably adopted it as in accordance with his usual practice on such voyages, and not for the purpose of avoiding the commission of an illegal act, as he does not appear to have had any clear idea of

the provisions of the Act of 1872, until informed of them by the defendant. Had he put the natives on shore at the island nearest to him at the time when he first heard of the Kidnapping Act, he would not only have broken his contracts with them, but would have been guilty of an act of cruelty, in all probability as great as any which it was the avowed object of the statute to prevent. For these reasons we have come to the conclusion that the carrying of the native labourers on board the *Aurora* was not, under the circumstances to which we have referred, a carrying within the intent and meaning of the 3rd section of the Act of 1872, and that consequently the *Aurora* was not at the time of her seizure employed in the commission of any offence within such intent and meaning.

With reference to the suggested commission of some one or more of the offences enumerated in the 9th section we have but few remarks to make. It appears to us sufficient to refer to the several circumstances to which we have already drawn attention, to negative the existence on the part of the plaintiff, or of Captain Bennett, or of any other person for whose acts the plaintiff can be held responsible, of any such purpose as is contemplated by the 9th section, and is essential to the constitution of the several offences therein enumerated.

Our judgment proceeds on this, that the defendant acted in pursuance of the statute, *bona fide* believing that there was reasonable cause for suspecting that an offence under it had been committed, and that it was his duty to do as he did.

Judgment affirmed.

Solicitors—John Mackrell & Co., for plaintiff;
Hare & Fell (for the Solicitor to the Treasury),
for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. { GOTHARD AND OTHERS (pe-
April 23, 26. { titioners) v. CLARKE AND
OTHERS (respondents).

*Municipal Elections Act, 1875, 38 & 39
Vict. c. 40), s. 1. sub-sec. 2. sched. 1. form
2—Nomination Paper—Number on Bur-
gess Roll of Subscribing Burgess—Ballot
Act, 1872 (35 & 36 Vict. c. 33), s. 13.*

*In the nomination paper of a candidate
for the office of town councillor of a borough
under the Municipal Elections Act, 1875,
the register number of the seconder was
inserted as 695 instead of 704:—*

*Held, an insufficient compliance with
the note to schedule 1, form 2, by which
"the number on the Burgess Roll of the
burgess subscribing" is to be affixed, and
that the nomination paper was therefore
invalid.*

*Section 13 of the Ballot Act, 1872, by
which no election shall be declared invalid
by reason of any mistake in the use of the
forms, has no application to the decision of
the returning officer on the validity of the
nomination papers.*

Petition under the Municipal Elections
Act, 1872 and 1875, to set aside the
election of the respondents to the office of
councillors for the Heaton Norris Ward
of the borough of Stockport, stated in
the form of a special case, pursuant to
the order of Stephen, J., of which case
the following are the material facts:—

The petitioners who were three in
number, and the respondents who were
also three in number, were respectively
candidates for the office of councillor for
the Heaton Norris Ward at the above
election. Three councillors were to be
elected for the said ward, and the three
respondents were declared to be duly
elected.

The nomination papers of the peti-
tioners were delivered to the town clerk
of the borough by Mr. George Chapman,
the seconder of the said candidates re-
spectively, within the proper time. Subject
to the objections hereinafter appearing as
having been allowed by the mayor, such
nomination papers were valid.

On the 24th day of October, 1879, the
mayor attended at the town hall, between

the hours of two and four o'clock in the
afternoon, for the purpose of deciding on
the validity of objections to nomination
papers, when objections in writing to the
respective nomination papers of the pe-
titioners were handed to the mayor by
the agent of one of the respondents.

The objection to the nomination papers
of the petitioners, which was identical
in each case, was that the register number
on the Heaton Ward list, 695, did not
represent George Chapman, the nomi-
nator of the petitioners respectively as
candidates for the said ward.

On the 27th day of October, 1879, the
mayor attended at the town hall and gave
his decision in writing, allowing the ob-
jections to the nomination papers re-
spectively, and thereupon declared the
respondents duly elected as being, accord-
ing to such decision, the only candidates
for the said ward.

The number 695 inserted in the nomi-
nation papers of the petitioners respec-
tively, as the number on the burgess
roll of the said George Chapman, was
the number of the said George Chapman
as shewn in certain uncorrected proofs
of the burgess roll, 1879-80, which had
been supplied on or about the 17th of
October, 1879, by a clerk in the town
clerk's office to the agents of the two
political parties in the said borough. In
such proofs certain numbers, 486 to 493,
both inclusive, had by a clerical error
been inserted twice over in the list in
which the name of the said George
Chapman appeared, and when this error
was discovered, which was before the
22nd of October, 1879, the same was
corrected by the town clerk in finally
settling the burgess roll by pasting new
numbers opposite all names in the said
list subsequent to the point at which the
said error had occurred. The effect of
such correction was, that in the burgess
roll as completed on the 22nd day of
October, the said George Chapman's
number was 704 instead of 695, and the
number of all the other burgesses in the
same list subsequent to 493 were similarly
advanced by nine. The respondent's
agent obtained a copy of the published
list on the morning of the 23rd of Oc-
tober, the said copy having the correct

Gothard v. Clarke, C.P.

numbers pasted on, and therefrom filled in the registration numbers in the nomination papers of the respondents. The petitioner's agent might also have obtained a correct copy of the burgess list, 1879-80, on the morning of the said 23rd of October, but he did not apply for the same. It was no part of the duty of the town clerk before publishing the burgess roll of 1879-80 to supply copies thereof or information contained therein to the respective candidates or their agents.

The number stated in the respective nomination papers of the petitioners as the number of the said George Chapman on the burgess list for the year 1878-79, and printed in italics was correctly stated (1). The said George Chapman was a justice of the peace for the said borough of Stockport and for the Salford hundred of the county of Lancaster, a town councillor of the said borough, chairman of the board of guardians for the Stockport union, and during the years 1859 and 1860 acted as mayor of the said borough of Stockport. The said George Chapman had resided at the

address given in the said nomination papers for nearly thirty years, and was well known to all the burgesses of the said borough, and especially to those of the said Heaton Norris Ward. No person was or could be misled in any way by the alleged inaccuracy in the said nomination papers, nor was there nor could there be any doubt as to the identity of the said George Chapman.

The question for the consideration of the Court was whether the above decision of the mayor was right. If the decision was right, the petition is to be dismissed with costs. If the decision was wrong the respondents are to be declared not duly elected, and the costs are to be paid by the respondents, and the Court are to make such further order as to them shall seem fit.

Sir Henry James (Hopwood and Aspland with him), for the petitioners. The only error is that the number 695 affixed to Chapman's name should have been 704, and it is found as a fact that no one was misled, and it is submitted that the

(1) The following is a copy of the nomination paper of the petitioner Gothard; the nomination papers of the other petitioners, excepting in the name and description of the candidates, were similar in every respect, and the mistake in the number of George Chapman was the same in each case:—

Ward Election, 1 Nov. 1879.

Nomination paper—Dated 21 day of October, 1879.

Borough of Stockport Election of Councillors, for Heaton Norris Ward, in the said borough, to be held on the 1st day of November, 1879.

We, the undersigned, being respectively enrolled burgesses, hereby nominate the following person as a candidate at the said election:—

Surname of person nominated	Other names in full of person nominated	Abode of person nominated	Description of person nominated
Gothard	Adam	128, Wellington Road North, Heaton Norris	Joiner and builder

(Note). The two enrolled burgesses must sign under here.

—	Christian names in full of nominators	Surnames	Description	Abode	No. on Burgess Roll	Situation of property as stated on Burgess Roll
Proposer .	Edward .	Walmaley .	Cotton spinner	Reddish House, Reddish, near Stockport	2408 861	Low Bankfield Street, Heaton Norris
Seconder .	George .	Chapman .	Draper . .	1, Heaton Place, Heaton Norris	464 695	1, Heaton Place, Heaton Norris

We, the undersigned, being respectively enrolled burgesses, do hereby assent to the nomination of the above person as a candidate at the said election.

Then followed the names of eight assenting burgesses, stated in form similar to the proposer and seconder. The figures in bolder type are the register number on last year's list.

Gothard v. Clarke, C.P.

error does not avoid the election—the nomination is part of the election, and if there is no poll it is the whole election. The nomination is regulated by 38 & 39 Vict. c. 40. s. 1. sub-sect. 2 (2). The

(2) 38 & 39 Vict. c. 40. s. 1. "The following provisions shall be enacted and apply to nominations at all municipal elections of councillors, auditors and assessors after the passing of this Act."

Sub-section 2. "At any such election every candidate shall be nominated in writing, the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer or seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination. Each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more. Every person nominated shall be enrolled on the burgess roll of the borough. . . . The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2 set forth in the first schedule to this Act, or to the like effect."

38 & 39 Vict. c. 40. First Schedule.

Form—No. 2.

Nomination paper

Borough of . . . Election of councillors, auditors or assessors for . . . ward in the said borough [or the said borough] to be held on the day of 18 . . .

We, the undersigned, being respectively enrolled burgesses, hereby nominate the following person as a candidate at the said election:—

Surname	Other names	Abode	Description

Signed, A. B. of *
C. D. of *

We, the undersigned, being respectively enrolled burgesses, do hereby assent to the nomination of the above person as a candidate at the said election.

Dated this . . . day of . . . , 18 . . .
Signed, E. F. of *
G. H. of *
I. J. of *
K. L. of *
M. N. of *
O. P. of *
Q. R. of *
S. T. of *

(*) The number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled, on the burgess roll.

candidate has to be nominated within the express conditions set out in the body of the statute, but in the form less degree of accuracy is required. The nomination paper is to be in the form No. 2, "or to the like effect," that is, that the substance not the letter is to be followed.

In *Mather v. Brown* (3) the name Robert V. for Robert Vickers was held to be a misnomer because the sub-section directed the surname and other names to be stated in the nomination paper, but in *Houes v. Turner* (4) the contraction Fredk. was held to be no objection because it was the signature of the person proposing, and there is no obligation in sub-section 2 that the proposer should set out his Christian and surname. In *The Queen v. Lofthouse* (5), the form in the schedule to an Act was held to be directory. It was to meet the case of *Mather v. Brown* (3) that section 41 of 41 & 42 Vict. c. 26, extending section 13 of the Ballot Act to the Municipal Elections Act, 1875, was enacted (6), and under that section the mayor ought to have amended.

[GROVE, J.—The meaning of that section seems to be that one is not to go behind the election.]

But if the mayor overrules the objection his decision is final; if, however, he allows the objection, then there is an appeal, 38 & 39 Vict. c. 40. s. 1. sub-sect. 3, so that one never could go behind the

(3) 45 Law J. Rep. C.P. 547; Law Rep. 1 C.P. D. 596.

(4) 46 Law J. Rep. C.P. 550; Law Rep. 1 C.P. D. 670.

(5) 36 Law J. Rep. Q.B. 145; Law Rep. 1 Q.B. 433.

(6) By 41 & 42 Vict. c. 26. s. 41. s. 13 of the Ballot Act, 1872, shall with respect to any municipal election apply to non-compliance with any of the provisions of or mistake or error in the use of any of the forms prescribed by the Municipal Election Act, 1875.

Section 13 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), enacts that "no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognisance of the question, that the election was conducted in accordance with the principle laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

Gothard v. Clarke, C.P.

election on a matter of form. The words "no election shall be declared invalid" must be used as regards election in section 1 of the Ballot Act, i.e. nomination. In some parts of the Act the word "election" means the nomination only. See, for instance, section 1 of the Ballot Act, 1872. In *Northcote v. Pulsford* (7) Brett, L.J., says—"Nothing can be more distinctly divided in treatment or in words than that which is in the Ballot Act, called 'the election' from that which is called 'taking the poll.'" The mayor is the tribunal mentioned in section 13, and he ought to have declared this fault cured by that section, and not having done so there is an appeal. Otherwise the mayor would have the power to allow an objection and there would be no appeal.

Edward Clarke (Morton-Daniel with him), for the respondents.—Prior to the Municipal Elections Act, 1875, the registered number was not required to be specified on the nomination paper, and the question is what registered number is to be affixed. The wrong number would not be "to the like effect." In *Soper v. The Mayor of Basingstoke* (8), the situation of the property of the seconder was different from the register; it appeared that the property was better known as it was described on the nomination paper than on the register, and it was held that as it was the situation of the property which had to be described, the nomination paper was good. If the note appended to the form had stated that the situation of the property is to be described as on the register, then strictness would have had to be followed. The number has to be inserted as it is on the burgess roll, and it must therefore correspond with the burgess roll, or else the nomination paper is insufficient.

Mather v. Brown (3) shews how strictly the form has to be construed where the Act requires it, and here the Act requires it as strictly. In *Howes v. Turner* (4) the contraction Fredk. was clearly good, because the form only re-

quires the signatures, which would import the ordinary signatures; *Nosworthy v. Buckland* (9), demonstrates the strictness with which the construction of a similar enactment was followed.

Sec. 13 of the Ballot Act, by its very words does not apply. The tribunal referred to is the tribunal dealing with the election petition. The word election means more than the nomination. The form of notice of parliamentary elections in the Ballot Act is—"The returning officer will proceed to the nomination, and if there is no opposition, to the election," shewing the two things to be distinct. Had Gothard been elected the respondents would be out of Court, because it is said you shall not go behind the election and upset it on a point of form. The Legislature intended this question to be decided by the returning officer at the time.

Sir Henry James, in reply.—*Mather v. Brown* (3) proceeded upon the same principle as *Nosworthy v. Buckland* (9), where the requirement was also enacted in the body of the Act. These modes, in fact, are given so that there may be no difficulty in ascertaining who the person subscribing may be, and if the contention on the other side were to prevail, the slightest inaccuracy in any one of the modes would be fatal. It is a question of degree, and a substantial compliance is sufficient.

The words of sec. 13 of the Ballot Act are inaptly chosen, but the substance and intention is that in all proceedings in an election a mistake in form is not to be fatal, reference is made to those forms which come before the Mayor, shewing that he is the tribunal, and this Court is only reviewing the decision of that tribunal.

Our. adv. vult.

GROVE, J. (on April 26).—This case turns on a small but not unimportant point. The nomination papers of three persons, candidates for the office of town councillor for the borough of Stockport, were refused by the Mayor because the

(7) 44 Law J. Rep. C.P. 217; Law Rep. 10 C.P. 476.

(8) 46 Law J. Rep. C.P. 422; Law Rep. 2 C.P. Div. 440.

(9) 43 Law J. Rep. C.P. 27; Law Rep. 9 C.P. 233.

Gothard v. Clarke, C.P.

seconder had not inserted opposite to his name the correct number which he bore on the burgess roll; the number 695 was inserted instead of 704. The mistake was not exactly a clerical error, it appeared in a proof sheet of the burgess roll which the seconder had seen, and it was corrected before the printing of the roll. The Mayor held that by this error the Act had not been complied with, and the persons thus seconded not elected. The main point was whether the mistake in the number of the seconder was fatal.

The question mainly depends on the construction to be placed on schedule 1 of the Municipal Elections Act, 1875, 38 & 39 Vict. c. 40. Previous to this Act it was not necessary for persons nominating to affix their burgess roll number, but in this Act there appears in the form 2 to schedule 1 the following requirement as to the names of the proposer and seconder and assenting burgesses to a nomination paper—"The number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the burgess roll." This note is indicated by an asterisk, which follows immediately after the signature, thus, "A.B. of *." No doubt there is a verbal error, for how could the person signing declare himself to be A.B. of No. 695, but by changing the requirements of the note in their relative position this would be rectified, for the person signing could easily describe the situation of his property first and place his number afterwards; but even following the note strictly it is intelligible though it may be ungrammatical, and unquestionably it signifies that the proper number on the burgess roll should be affixed. Whether this is directory or obligatory may be another question, but it appears to me it should be obligatory, or else many informalities and material inaccuracies might creep in. It is clear that the two things required by the note are the number on the burgess roll and the situation of the property in respect of which the person subscribing is on the burgess roll.

I can see many reasons why it should be intended that these requirements are to be strictly followed. One obvious

reason is that the voter or person interested in the election could, by inspecting the register, at once see whether the persons subscribing are actually what they state themselves to be.

In my opinion the opposite view would lead to carelessness and trickery, and the object of the statute would be frustrated. It is not, as has been suggested, a narrow construction any more than the strict construction of any statute would be a narrow construction, and for simple and obvious reasons which to my mind are of considerable importance, the statute ought to be construed strictly.

It was contended that the mistake was immaterial, because it did not mislead, but the effect of such a contention would be to impose on the returning officer the duty of enquiring into every similar mistake in order to decide whether it would mislead or not. It would impose an inconvenient duty on him, and vest him with an inconvenient power, it would protract the election to very great length, and would change a very simple requirement of the Act into a difficult enquiry.

In dealing with this argument, I wish to guard myself against being taken to hold that there may be no clerical errors. This mistake, in fact, arose from an antecedent clerical error, but I can imagine other clerical errors in which no one could be misled, which probably would not be held to be fatal. If, for instance, the printer had left out the tail of 9, leaving 0 in its place, it may very well be that the mayor may hold such a mistake to be obvious, and therefore not fatal, and so where any other mistake is *ex facie* plain, the error might be waived. But I do not treat this mistake as a clerical error in that sense of the word.

Reliance was placed on sub-section 2 of section 1, and it was argued that when the Act was dealing with the nomination its directions were imperative, but that when it was dealing with the form of the nomination paper the directions were directory; and in support of this argument stress was laid on the words, "or to the like effect," which it was said gave scope for variation.

But applying one's common sense to the question, I cannot see how 704 can

Gothard v. Clarke, C.P.

be to the effect of 695. The cases of *Mather v. Brown* (3) and *Howes v. Turner* (4) do not support this view. In the former case the contraction of Robert V. for Robert Vickers was much less likely to mislead than 704 for 695, yet the Court held the initial to be fatal to the validity of the paper because it was not a compliance with the Act. In *Howes v. Turner* (4) a similar contraction was held to be not fatal for the obvious reason that the form merely required the signature of the subscriber, which does not necessarily mean all the Christian names in full. Some instances were given in the course of the argument of extreme cases in consequence of misprint; we are not now deciding those cases, but my opinion is, that if the number which appears in the burgess roll is affixed, the requirement will have been complied with; at all events if there was any doubt as to which of two numbers should be affixed both might be affixed. We cannot, however, undertake to give a mathematical decision which will cover all mistakes, all we can do is to give a reasonable construction to the Act.

It only remains to notice section 13 of the Ballot Act, under which it was said this mistake could be rectified. I can only say I do not see how we are to apply that section to the present case. It enacts that "no election shall be declared invalid by reason of non-compliance with the rules, or mistakes in the use of the forms;" but we are not declaring the election invalid. Nor do I see how the mayor is to apply this section. It would be an extraordinary thing if the mayor were to declare the election invalid before it was completed. It was argued that the word election is used for the process of the election as well as the completion, but looking at the 12th section and other sections of the Act, I see the word may be used in two different senses, and it appears to me that in the 13th section it must be held to mean the consummation of the election. No election in the present case can be at present declared invalid, because there is no election to declare invalid.

The Special Case seeks to provide for the costs of this decision. If the appel-

lants choose to pay the respondents' costs they may do so, but the Special Case cannot take away from the Court their ordinary jurisdiction as to costs, and ought not to interfere with the question of costs. We see no reason to depart from the ordinary rule, and therefore give judgment for the respondents with costs.

LOPES, J., delivered the following written judgment.—We are asked to declare the election of the respondents void, on the ground that the mayor improperly allowed the objection which was duly taken to the nomination papers of the petitioners. I think the decision of the mayor was right, and that this petition should be dismissed with costs. The mayor held the nomination papers of the three petitioners bad, because the register number of George Chapman, the seconder of the petitioners thereon, was not the number appended to his name on the burgess roll as completed on the 22nd of October preceding. On the nomination paper it was 695. On the burgess roll it was 704. It was found in the case that no person was or could be misled by the inaccuracy in the case of George Chapman, and that there was not and could not be any doubt as to his identity.

The case depends on the construction to be placed on sub-section 2 of clause 1 of 38 & 39 Vict. c. 40, and on the schedule therein referred to. [His Lordship read the sub-section and schedule.] We are asked to hold that the provision of the Act, so far as it relates to the insertion of the number in the burgess roll of the burgess subscribing, is directory only, and imposes no obligation, and this more especially as sub-section 2 says, "the nomination paper shall be in the Form No. 2 or to the like effect." I cannot understand how it can be seriously contended that the giving that which is absolutely wrong can be giving that which is "to the like effect." If, again, the insertion of a wrong number is not to invalidate the nomination paper, the failure to insert any number cannot render it insufficient. The insertion of a wrong number would be more misleading than the inserting no number. Again, if the insertion of the numbers in the burgess roll of the bur-

Gothard v. Clarke, C.P.

gess subscribing may be dispensed with, why may not "the situation of the property in respect of which he is enrolled in the burgess roll" be omitted, and his mere ordinary signature be sufficient. It must be recollected that in the case of the nominating burgesses, unlike the case of the nominated, the surname and other names need not be stated, the ordinary signature would be enough. In this way the whole note to the schedule would be frittered away, and the security provided by the Legislature for the identification of the subscribing burgesses be destroyed. It is said, however, that in this case George Chapman is so well known that no person could be misled, and that the case finds no person was misled. If this test was the one intended to be applied, the mayor in every case, where an objection like the present was taken, would have to hear evidence, and decide how far the inaccuracy was likely to mislead, or had misled; such a proceeding never could have been contemplated by the Legislature, and the inconvenience of it is too obvious for argument.

I am of opinion that the Legislature intended to make obligatory the insertion of the register number in the nomination paper of the nominating burgesses, in order to afford to those, whose concern it was to verify the nomination paper, the readiest means of doing so, and that the inaccurate statement in their nomination paper of such register number invalidates the document. I entirely agree with the Lord Chief Justice when he said in *Mather v. Brown* (3), that in construing these Acts it is a duty with which this Court is entrusted to keep strictly to the Acts themselves.

It was contended by Sir Henry James that the defect in the nomination paper was cured by section 13 of the Ballot Act, 1872, which is made applicable to the Municipal Elections Act, 1875, by 41 & 42 Vict. c. 26. s. 41, and that the mayor ought to have held and disallowed the objection. I cannot adopt that view, and am clearly of opinion that section 13 of the Ballot Act, 1872, was never intended to apply to any questions arising before the mayor, but refers to a time subsequent to a return by the mayor when the elec-

tion is completed. The words of the section are too clear to permit of any doubt.

But it is also contended (even if that 13th section does not refer to the proceedings before the mayor) that this Court now ought to hold the defect cured, and declare the election of the respondents void. I cannot agree with the contention. I doubt if that section applies to a case like the present, but I am clear it cannot apply where the defect is a matter of substance affecting the result of the election, as in the present case.

I agree with my brother Grove's remarks on the practice of costs. I think the parties have no right to dictate to the Court which way the costs shall be decided.

Judgment for respondents with costs.

Solicitors—Hopwood & Sons, agents for Francis Newton, Stockport, for petitioner; Beal & De Soyres, agents for C. E. Lake, Stockport, for respondents.

Walker v. Clay 492962561
Payee's dem 62562447

[IN THE QUEEN'S BENCH DIVISION.]

1880. } THE NATIONAL MERCANTILE
Feb. 24. } BANK v. HAMPSON.

Bill of Sale—Implied License to Grantor to carry on Business—Bona fide Purchase of Goods comprised in Bill of Sale—Growing Crops. *St. Northern Ry. v. Takaordin*

In an action by the grantees of a bill of sale to recover certain goods comprised therein, the defendants pleaded that the goods in question were bona fide sold to them by the grantor in the ordinary course of his business, and without any notice that they did not belong to the grantor:—Held, on demurrer, that the defence was good, inasmuch as there was an implied license given to the grantor of the bill of sale to carry on his trade, and consequently a bona fide purchaser was protected by a sale made in the ordinary course of business.

This was a demurrer to a statement of defence.

The statement of claim alleged that the

National Mercantile Bank v. Hampson, Q.B.

plaintiffs were the holders of a bill of sale dated the 13th of January, 1879, and duly registered, comprising, amongst other things, all the growing crops, and all the goods, chattels and effects which then were, or thereafter should be, on or about the farm lands and premises of one Samuel Seaman, of Tilney St. Lawrence, farmer and dealer; and that the defendant, a corn merchant, on or about the 2nd of October, 1879, wrongfully converted to his own use and deprived the plaintiffs of the use and possession of a quantity—namely, twelve quarters, or thereabouts—of wheat, comprised in the said bill of sale.

Paragraph 4 of the defendant's statement of defence was as follows:—

"If the goods so sold were the plaintiffs' property, the defendant says that the plaintiffs suffered Seaman to have possession thereof, and enabled him to hold himself forth as having not only the possession but the property in the same; and that he sold the same to the defendant, who bought them in the ordinary course of his business, and without any notice that they did not belong to the said Seaman. The said Seaman was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale, and it was the ordinary course of the said Seaman in such business to make such sales."

The plaintiffs demurred to paragraph 4 of the statement of defence; and

Lyon, for the plaintiffs, appeared in support of the demurrer.—The goods sold were comprised in the bill of sale, of which the plaintiffs were the holders; the grantor therefore had no power to sell them to the defendant. The plaintiffs had no right to prevent the grantor from carrying on his business, and were under no duty to give notice that the goods were the property of the plaintiffs. He cited *Cochrane v. Bymill* (1).

R. T. Reid, for the defendant, was not called upon to argue.

THE COURT (2).—This demurrer must be overruled. The bill of sale clearly did not

(1) 40 Law Times, N.S. 744.

(2) Lush, J., and Manisty, J.

disentitle the grantor to sell in the ordinary course of his business. There is an implied license to a trader who gives a bill of this kind to carry on his trade; consequently the plaintiffs have no *locus standi*.

Judgment for defendant.

Solicitors—J. I. Irving, for plaintiffs; Plews, Irvine & Hodges, for defendant.

[IN THE COURT OF APPEAL.]

1880. }
March 11. } PARAIRE v. LOIEL.*

Practice—Pleading—Payment into Court—Order XXX. rule 1.

Where a plaintiff claims for distinct pieces of work and labour, alleged in separate paragraphs of the statement of claim, a defendant, who has paid money into Court generally, need not specify in his statement of defence, how much is paid in respect of each head of claim.

Appeal from a decision of the Common Pleas Division.

The action was to recover 1,191*l.*, for work and labour done by the plaintiff as an architect and surveyor for the defendant. The plaintiff, in his statement of claim, claimed for work done (par. 2), in preparing plans, with a view to certain alterations in a music hall belonging to the defendant, and in negotiating, as the defendant's building surveyor, with adjoining owners as to party-walls, &c. (par. 3), in acting for the defendant in an arbitration, on a claim for compensation against the Metropolitan Board of Works, upon their purchasing the music hall; and (par. 4) in making surveys, and in preparation of plans and specifications with reference to certain other property of the defendant's at Margate.

The defendant paid 228*l.* into Court, and, in his statement of defence, pleaded payment into Court generally.

Field, J., in chambers, ordered the

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

Paraire v. Loibl (App.), C.P.

statement of defence to be amended, by specifying in respect of which of the items of the plaintiff's claim the payment into Court had been made.

The Common Pleas Division reversed this order, and the plaintiff appealed.

O. H. Anderson, for the plaintiff.—Order XXX. rule 1, provides that payment into Court shall be pleaded in the defence, "and the claim or cause of action in respect of which such payment shall be made shall be specified therein." And by Order XIX. rule 9, when the defendant relies on distinct grounds of defence, he is required to state them separately. Here the defendant ought to state in his defence, in respect of what heads of claim he has paid the money into Court.

A. Cock, for the defendant, was not required to argue.

BRAMWELL, L.J.—I am of opinion that the judgment of the Common Pleas Division was right, and that this appeal must be dismissed. It might work a great injustice to the defendant if he was compelled to specify how much he had paid into Court in respect of each item. He might be unable so to particularize, where he had paid sums from time to time on account, and the plaintiff was suing for a balance. I doubt very much whether Order XIX. rule 9, has any application, because a plea of payment into Court is not a defence to the plaintiff's claim. On the contrary, it is a statement by the defendant that, to a certain extent, the claim is well-founded. I say nothing about the plaintiff's right to particulars from the defendant as to the money he has paid into Court.

BAGGALLAY, L.J., and THESIGER, L.J., concurred.

Judgment affirmed.

Solicitors—*F. L. Soames*, for plaintiff; *Pawle, Fearon & Co.*, for defendant.

[IN THE COMMON PLEAS DIVISION.]
1880. }
Feb. 26. }

PORTER v. DREW.

Landlord and Tenant—Implied Covenant—Sub-lease—Fixtures.

A covenant in a lease by which the lessee agrees at the expiration of the lease to deliver up to the lessors "all landlord's fixtures," does not imply a representation and covenant on the part of the lessors that the lessee is to be at liberty without hindrance from anyone to remove during the term trade fixtures, and that the lessors have not entered into covenants inconsistent with such right.

Case argued on demurrer.

The statement of claim alleged—

1. On the 11th day of November, 1871, the defendants, by an indenture of lease under seal, leased to the plaintiff, who was by trade a nurseryman, a dwelling-house and nursery ground for a term of six and a quarter years, less the last three days thereof, from the 24th day of June, 1872, at a rental of 60*l.* per annum; and the indenture contained, amongst other covenants on the part of the plaintiff, the lessee, the following:—"And that the lessee, his executors, administrators or assigns will, at the expiration or sooner determination of the said term, deliver up to the lessors, their heirs or assigns, the said premises, and all landlord's fixtures which may at any time during the said term be in or about the same." The indenture did not contain the usual limited covenant by the lessor for quiet enjoyment of the premises by the lessee, nor any express covenant for quiet enjoyment.

2. The plaintiff remained in possession of the said premises until the lease expired by effluxion of time on the 26th day of September, 1878, and during the time of his possession had, with the knowledge and acquiescence of the defendants, placed certain greenhouses and other trade fixtures upon the nursery ground, and annexed the same to the freehold. The plaintiff in so placing and annexing the said trade fixtures relied upon the express provision in the covenant, whereby the tenant at the expiration of the term covenants to deliver up to the lessors all

Porter v. Drew, C.P.

landlord's fixtures to the exclusion of trade fixtures, and upon the implied covenant of the lessors that the plaintiff should be at liberty, without hindrance from anyone, to remove during the continuance of the said term the said fixtures; and that they, the defendants, had not at the time of the execution by them of the lease entered into covenants or engagements, or done anything inconsistent with the right of plaintiff, as lessee, to carry on the trade of a nurseryman, and remove before the end of the term trade fixtures annexed by him to the nursery ground during the term.

3. The defendants, at the time when they executed the lease to the plaintiff as aforesaid, were themselves tenants of the said nursery garden and premises under a lease granted to them, or those under whom they claim, for a term expiring at Michaelmas, 1878, and the said lease, hereinafter called the superior lease, contained a covenant by the lessees, whereby the lessees covenanted to deliver up at the expiration of the term, not only all the landlord's fixtures, but also all trade fixtures annexed during the last seven years of the said term under the superior lease.

4. The plaintiff was not aware until the granting of the injunction in the next paragraph mentioned, that the defendants held under the superior lease or any lease containing any covenant for the delivering up of trade fixtures, or any covenants in restraint of trade or other unusual covenants.

5. Shortly before the determination of the term under the lease by the defendants to the plaintiff, the plaintiff sold the greenhouses and other trade fixtures placed and annexed by him as aforesaid, to a person named Hall for 120*l.*, but afterwards the reversioners under the superior lease obtained, *ex parte*, an interim injunction restraining the now plaintiff from removing the said fixtures, and commenced an action in the Chancery Division of the High Court of Justice to restrain the plaintiff from removing the said trade fixtures. The plaintiff, acting reasonably, defended the action, but judgment was given therein for the reversioners with costs, and a perpetual injunction

granted restraining the now plaintiff from removing the said trade fixtures, whereby the now plaintiff has been prevented from performing the contract of sale to Hall, and has lost the price and value of the said fixtures. The plaintiff has become liable to pay the costs to the reversioners, and to pay certain costs to his own solicitors for defending the said action.

The plaintiff claimed the value of the said fixtures and the costs of defending the action brought by the reversioners.

Defence.—Denial that the plaintiff placed the said greenhouses and other trade fixtures on the said nursery ground with the knowledge and acquiescence of the defendants, and

Demurrer, on the ground that the tenant's express covenant to deliver up all landlord's fixtures, and the facts, as in the statement of claim alleged, did not in law create an implied covenant on the part of the lessors either that the tenant should be at liberty to remove the trade fixtures during the continuance of the term, or that the lessors had not at the time of the execution by them of the lease entered into any covenant or engagement, or done anything inconsistent with the right of the tenant to remove trade fixtures annexed by him during the term.

Alfred Wills (Kingsford with him), in support of the demurrer.

E. V. Williams, in support of the statement of claim.

In addition to those cited in the judgment the following authorities were referred to—*Hyde v. Warden* (1); *Parker v. Whyte* (2).

GROVE, J.—I am of opinion that the demurrer should be allowed. So far as this covenant is express, it might not unreasonably be implied that the lessee was not bound to deliver up some fixtures other than landlord's fixtures; but on the part of the plaintiff it is sought to carry the implied covenant much further, and to say it is a covenant on the part of the

(1) 47 Law J. Rep. Exch. 121; Law Rep. 3 Ex. D. 72.

(2) 1 Hurl. & N. 167; 32 Law J. Rep. Chanc. 520.

Porter v. Drew, C.P.

landlord that he will prevent anyone else interfering, and will either guarantee the tenant against the superior landlord taking these fixtures, or will pay damages for breach of covenant. This seems to be a strong implication to arise from a covenant which is for the benefit of the landlord. Another important matter for consideration is that the alleged implied covenant is not restricted to things on the premises at the date of the lease to the plaintiff. The claim is for fixtures placed on the premises subsequently to the execution of the underlease. It seems to me that if such a covenant were to be implied from an express covenant to deliver up all the landlord's fixtures, it would be difficult to fix the limit of implied covenants. It would come to this—that in perhaps a short lease containing one or two covenants, in which the landlord makes stipulations as to himself, we should have to imply that the landlord covenants against everything else. The argument cannot stop there, for we should have to imply that the landlord guarantees against interference by the superior landlord. There is nothing in the cases which goes so far. On the face of the lease, wherein the last three days of the term are excepted, there is obvious reference to some other lease, shewing that the tenant knows of a superior lease.

Under these circumstances am I to imply a covenant by way of warranty that the superior landlord shall not interfere with the tenant who has had an opportunity of looking at the superior lease, and knows of its existence, merely because the landlord has put into the sublease some covenants for his own benefit? The draughtsman of a lease would be involved in great and unreasonable difficulty if he had to anticipate that other covenants might be inferred from the insertion of a covenant as to one particular matter. I can imply no such covenant as that on which the claim is founded.

The cases are a little conflicting. *Cosser v. Collinge* (3) goes furthest of them all. In that case the Court decided that as there was notice of the head lease, and

ample opportunity of seeing it at the solicitor's office, the defendant was liable to the covenants of the head lease, although they were unusual. The Master of the Rolls, in the first part of his judgment, decides the case quite irrespective of the fact that the head lease was at the solicitor's office, and might have been inspected. He then goes through the evidence, and comes to the same conclusion. The other cases do not go quite so far, for in *Flight v. Barton* (4) it was held that where a lessee knows of the existence of a head lease, he has constructive notice of all usual covenants in it. But *quere* whether he has notice of unusual covenants. In *Van v. Corpe* (5) there was an agreement for a lease to contain all usual covenants, and a covenant that the house should not be converted into a school, and it was held in an action for specific performance that the plaintiff was not bound to accept a lease containing other unusual covenants, but that the defendant was bound to grant a lease conformable to the terms of an agreement. This decision does not touch the present case, and I am rather surprised the matter should have been disputed there. In *Probert v. Parker* (6) the lessee did not know of his head lease, and that case does not properly apply to the present one. But *Dennett v. Atherton* (7) does appear in favour of this demurrer.

None of the cases support this statement of claim, or go the length of deciding that because a person covenants for his own benefit, that certain things shall be done, he is therefore to be taken to imply not only that certain other things shall be done, but that he will guarantee that the landlord or even others shall not interfere. On this broad distinction my judgment is mainly based.

But there is another point. Suppose that a person having a covenant on a particular subject might be held to imply the converse of it; for instance, suppose that the covenant here should imply that

(4) 3 Myl. & K. 282.

(5) 3 Myl. & K. 269.

(6) 3 Myl. & K. 280.

(7) 41 Law J. Rep. Q.B. 165; Law Rep. 7 Q.B. 316.

(3) 3 Myl. & K. 283.

Porter v. Drew, C.P.

no other than landlord's fixtures should be given up, ought not such implication to be made only when the matter must be, I will not say reasonably but, necessarily in the contemplation of the parties, for otherwise it would fix the parties with a covenant not in their thoughts at all. Here, for instance, was a nursery ground; could it be said that because the subject-matter of the demise happened to be a nursery ground, the landlord was bound as to fresh buildings of a character not called landlord's fixtures, and was supposed by this covenant to be guaranteeing the tenant against removal. That would be a very strong construction. It would, in fact, be making the landlord covenant for a matter which he never might have thought of at all. If it were an old nursery ground, nobody would suppose any more erections were going to be placed on it, and yet it is said that the landlord is making himself liable to protect the tenant against the superior landlord.

*Judgment for defendants with costs.
Leave to amend.*

Solicitors—Harper, Broad & Battcock, for plaintiff; Wilkinson & Drew, for defendants.

[IN THE COURT OF APPEAL.]

1880. } WAGSTAFF, BRASSEY AND
Feb. 27, 28. } OTHERS v. ANDERSON, MOSS
Mar. 1. } AND OTHERS.*

Shipping—Charter-party—Agency of Master—Liability of Brokers "acting for Owners" for Tort of Master.

The defendants offered the plaintiffs room for a cargo at a named rate in the ship *D.*; they then chartered that ship under a charter-party which provided *inter alia* that the ship should go to *O.*, should receive on board such goods as might be required, that the whole ship should be at the disposal of the charterers, that the master and owners should be responsible as if the ship were

loaded for the owners independently of the charter-party, that the master should sign bills of lading at any rate of freight the charterers might require without prejudice to the charter-party, that the ship should be addressed to the charterers' nominee at the port of discharge, and the charterers' responsibility, except for freight, should cease on the vessel being loaded.

Shortly after, the defendants "acting for the owners of" the *D.*, agreed with the plaintiffs to receive on board a cargo at the rate previously mentioned by them to the plaintiffs, and further agreed that the barges as they came along should be immediately discharged or they undertook to pay demurrage. The cargo was received on board, the master signed bills of lading for the cargo to be delivered at *O.* to the plaintiffs' order or assigns. Half the freight, less discount, was, by agreement, paid to defendants before the ship sailed; the residue, being the sum mentioned in the bill of lading, was to be paid at *O.*

The ship sailed, met with bad weather, put into an intermediate port, and was condemned, the cargo was discharged and the master sold it without communicating with the plaintiffs.

In an action for the value of the cargo the jury found that the sale was unjustifiable:—

Held, that the defendants were not liable, that the contract between the plaintiffs and the defendants was at an end when the cargo was on board, and that the master was not the agent or servant of the defendants.

Appeal from the judgment of Denman, J., on further consideration after trial with a jury. The case is reported 48 Law J. Rep. C.P. 759.

Action for the value of a cargo of stone and cement, shipped by the plaintiffs on board the ship *F. K. Dumas*, of which the defendants were charterers, which it was alleged the master had improperly sold at an intermediate port during the voyage from London to Callao.

By the charter-party made on the 25th of June, it was agreed, amongst other things, between the master on the part of the owners of the ship and the defendants,

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

Wagstaff v. Anderson (App.), C.P.

that the ship should go from London to Callao, that she should receive on board all such lawful goods as might be required, that the whole ship should be at the disposal of the charterer for the conveyance of goods, except the space necessary for the crew and stores, that the master and owners should give the same attention to the cargo, and in every respect be and remain responsible to all whom it might concern, as if the ship was loaded in her berth by and for the owners, independently of the charter, that the master was to sign bills of lading at any rate of freight the charterer might require, without prejudice to the charter-party, that the ship should be addressed to the charterer's nominee at the port of discharge. The total freight to be paid for the use and hire of the ship was agreed at the sum of 2,500*l.*, to be paid against captain's order by charterer's acceptance at ninety days, or in cash less discount at captain's option and the charterer's responsibility, except for freight, was to cease on the vessel being loaded.

On the 26th of June the defendants Moss and Mitchell, whose acts it was admitted bound the other defendants as well as themselves, entered into the following agreement with the plaintiffs:—

"It is this day mutually agreed between Moss & Mitchell, acting for the owners of the *F. K. Dumas*, and Thomas Brassey & Co., the plaintiffs, that the former shall receive on board . . . 1,000 tons of cement in casks and stone in blocks, at the rate of 30*s.* per ton, freight from London to Callao . . . The barges as they come alongside shall be immediately discharged, or Moss & Mitchell undertake to pay demurrage on barges. The cargo to be received at Callao as customary, freight to be paid one-half on signing bills of lading . . . and the remainder on final discharge at Callao. Penalty for non-performance of this agreement 1,500*l.*"

Before entering into the charter-party the defendants had, on the 24th of June, written to Smith, Sundius & Co., brokers for the plaintiffs, offering room in the *F. K. Dumas* for 750 tons of cement and 250 tons of stone at the rate of 30*s.*,

and 1,000 tons of cement and stone were shipped.

The master signed bills of lading for the cargo "to be delivered at Callao unto order or to plaintiffs' assigns on paying freight for the goods 786*l.* 17*s.* 4*d.* The sum of 780*l.* 6*s.* 1*d.*, half of the freight, minus discount, was paid by the plaintiffs to the defendants before the ship sailed.

The ship met with bad weather and put into Monte Video. A survey was there made, the cargo was discharged by order of the surveyors and landed and housed. The ship was properly condemned and a portion of the cargo was sent on to Callao in other vessels; but the master sold the cement and the stone without communicating with the plaintiffs.

The jury found that the sale was unjustifiable, but Denman, J., gave judgment for the defendants.

The plaintiffs appealed.

W. Williams and *A. L. Smith*, for the plaintiffs.—This action is maintainable both on the contract to carry and on the bill of lading, for the defendants contracted to carry the cargo and the bill of lading signed by the master is, in fact, the defendants' bill of lading, as he was for that purpose their agent.

The defendants contracted to carry the cargo to Callao, and they were, in fact, the owners of the ship for that voyage. The master, therefore, became their agent for all matters connected with the carriage of the goods, and they are liable for his tortious act in selling the cargo—*Colvin v. Newberry* (1), *Marquand v. Banner* (2), *Schuster v. McKellar* (3). If the perils of the seas prevented them from themselves carrying the cargo to Callao, still the sale was not justifiable—*Acatos v. Burns* (4). The sale was not warranted by the exception in the bill of lading, and therefore the master as representing the ship owner, that is in this case the defendants, ought to have taken

(1) 1 Cl. & F. 283.

(2) 6 E. & B. 232; 25 Law J. Rep. Q.B. 313.

(3) 7 E. & B. 704; 26 Law J. Rep. Q.B. 281.

(4) 47 Law J. Rep. Exch. 566; Law Rep. 3 Ex. D. 282.

Wagstaff v. Anderson (App.), C.P.

care of the cargo—*Notara v. Henderson* (5).

The act of selling was unjustifiable, but it was within the scope of an agent's authority, and therefore the defendants are liable, and they cannot shift that liability by the employment of sub-agents—*Ewbank v. Nutting* (6), *The Cobequid Marine Insurance Company v. Barteaux* (7), *Sandeman v. Scurr* (8).

Butt (with him *Mathew*).—Whatever may be the conclusion of law, the fact remains that the shipowners and not the defendants were the carriers. The charter-party must be considered, and that shews that the master was the servant of the owners. The master was not the servant or agent of the defendants, for signing bills of lading; the learned Judge to whom that was left has so found. The charter-party does not bind the plaintiffs; but it shews what the intention of the defendants was. If, then, the master was not in fact the agent of the defendants, and if the defendants were in fact not the owners of the ship for that voyage, could it be said that they have held the master out as their agent or that they have by their conduct misled the plaintiffs and induced them to act in some way other than that in which they would have acted? It is submitted that no such conduct can be alleged, the letter of the 24th of June offers "room," the agreement of the 26th speaks of them as "acting for owners," and provides that "the ship shall receive" the contract, that is, the defendants contract that the ship owners shall receive the cargo and give the documents and then their contract is at an end and the plaintiffs are left to the ordinary contract of carriage, *Schuster v. McKellar* (3).

He was stopped by the Court.

W. Williams in reply.

BRAMWELL, L.J.—I am of opinion that this judgment must be affirmed. The first ground on which I think so is one

(5) 41 Law J. Rep. Q.B. 158; Law Rep. 7 Q.B. 225.

(6) 7 Com. B. Rep. 797.

(7) Law Rep. 6 P.C. 319.

(8) 36 Law J. Rep. Q.B. 58; Law Rep. 2 Q.B. 26.

which has scarcely been mentioned. The document of the 26th of June is on the face of it an agreement made by the defendants Moss and Mitchell "acting for the owners of the *F. K. Dumas*," the ship in respect of which the charter-party was made. Now without doubt there have been several decisions which have established the principle that, although a person expresses himself in the body of a document to be acting as an agent for another, yet that fact does not prevent him from being personally liable upon the document, in cases in which his signature has been affixed absolutely and without qualification. I think, however, that the principle of those cases is not applicable here. It is manifest from this agreement, especially if it be remembered that the agents were shipbrokers and that ship brokers do not act for themselves, that Moss and Mitchell did not intend or profess to bind themselves by this agreement; but that they were really acting for the owners of the *F. K. Dumas*.

It is said that Moss and Mitchell personally undertook to pay the demurrage on barges if it should become payable; but I am of opinion that they only entered into that undertaking as agents for the shipowners, and not as being themselves principals.

Supposing, however, that Moss and Mitchell had no authority to act as agents, and that they would therefore be liable in damages for making a false representation, still I do not think that the principle of the cases to which I have already referred applies, and I do not think it can be said that they can be treated as principals because they had no authority. If that were so, then it may be observed that the rights and obligations must be mutual.

This is not a contract in which there is a personal consideration; this is a case where a man pledges or contracts for performance of something by a ship and the shipowner, and which is therefore different from a pledge of personal liability. It seems to me that this agreement purports, on the face of it, to bind the ship and the shipowners, and is in no sense an undertaking by the defendants that they would carry the cargo, and as I have said, the only

Wagstaff v. Anderson (App.), C.P.

ground for maintaining an action against Moss and Mitchell would be that they had represented themselves as having an authority which they did not possess, if indeed such were the facts. Further, however, even if these difficulties were not insurmountable, the defendants may well ask the plaintiffs what cause of complaint they have against them. Take the agreement, and if its various clauses be referred to, it will be found that the defendants have done their part, and that the agreement has been performed. The owners of the ship were to receive on board a certain cargo, they have done so; at a certain rate of freight, they have done so; from a certain place to another named place, they have done so. Then there is the demurrage clause; now if they had no authority to enter into this agreement, then possibly *quoad* this clause Messrs. Brassey might have said that they would have nothing to do with the agreement at all, as the defendants had not authority to make the agreement, taking it as one entire agreement; but I think that they had authority because they were shipbrokers, and they could specify the time within which barges should be unloaded. Moreover, no difficulty has arisen upon the demurrage clause. Every word of the agreement has, as I think, been carried out by the defendants, and therefore I do not think the plaintiffs can maintain this action. The plaintiffs set out the charter-party in order to prove that the defendants contracted to carry, and further allege that the defendants entered into the agreement on their own behalf and not for the shipowners. I do not think that this can be maintained.

It was further said on behalf of the plaintiffs that there would be an uncertainty as to the persons to whom the freight might be payable. But the freight is payable to the shipowners. I have no doubt that they were content that it should be paid to the brokers, and that so much of the freight as was payable in England should be received by them, and as to that which was payable at Callao it would be by arrangement paid by means of bills, which would enable the master to receive it out there. It was then said

that Messrs. Brassey might refuse to receive the goods at Callao, and to pay the freight, and it was asked who would in that case be entitled to sue them. I answer that the shipowners could, and that it was intended they should do so. True, the freight received by the owners would be something other than that which the freighters would pay; but that was a matter of arrangement. One does not desire to invent what may be called *quasifiduciary* positions, and I do not think it is necessary to do so here, for the figures have been so arranged, as I understand, that the only persons interested in the freight are the shipowners, so that it is not necessary to invent a supposed trusteeship. It would not be difficult to do so, because if the shipowners did receive more than the lump sum arranged between them and the charterers, they would be trustees for that amount and would be bound to pay it over.

It was also said that if this be the right view, why were Anderson & Co. joined as defendants? I do not know why, unless because they were joint adventurers, but if Moss and Mitchell are considered as brokers only, then Anderson & Co. could not be liable, and I think this tells in favour of the defendants, because if the agreement was made by the defendants for themselves, why should not the joint adventurers, Anderson & Co., be liable to pay as well as the said defendants?

I have no misgivings as to the case of *Colvin v. Newberry* (1), and I quite assent to the decision in that case. I do not think that in that case the signing of the bill of lading by the captain as agent for the defendants amounted to a new contract between the shipowner and the freighter, the freighter having previously arranged with the charterer that he should carry his goods upon agreeing the freight with him. I think that in such a case the rights and remedies of the freighter would be against the charterer, and that he would not have any further rights because he took a bill of lading from the shipowner. In such a case the shipowner receives the goods on board, and is bound to deliver them as directed, with no right to detain them for any

Wagstaff v. Anderson (App.), C.P.

other cause than the non-payment of the freight. I am aware that to call the bill of lading the contract is usual, and has been sanctioned by the introduction of the phrase into an Act of Parliament; that may be correct in many cases, but I do not think it is accurate in all cases to say that a new contract superseding or varying the former contract is made when the bill of lading is signed.

I am not desirous of giving utterance to what may be called an *obiter dictum*, knowing, as those who sit here must know, the remarks and criticisms which such *dicta* have to undergo; but I am by no means persuaded that if this were to be construed as a contract for carriage between the plaintiffs and the charterers, the charterers would be liable for the misfeasance of the captain, although acting within the scope of his authority; but I am not desirous of giving an opinion on this point. It might be that the owner, as was held in *Ewbank v. Nutting* (6) would be liable, the charterer being bound in the interest of the freighters to seek his remedy over, and then to account to those with whom he had contracted, though not liable, as he is sought to be made here, as though the misfeasance had been his or that of his agents acting within the scope of his authority.

I think that this appeal must be dismissed.

BAGGALLAY, L.J.—I am of the same opinion, and have but little to add. The first question is, what was the relation between the plaintiffs and the defendants. The answer is to be found in the construction which ought to be put on the agreement of the 26th of June. That was an agreement made by certain loading brokers on behalf of the owners of the ship, whoever they may be. It was a limited contract, and as Denman, J., says in his judgment: "It appears to me that it merely amounts to a contract that the owners of the ship shall receive the goods on board and enter into contract by bills of lading to carry them at certain rates of freight, and that the ship shall sail on or about a certain day named, and that the

defendants will pay certain demurrage if the barges are delayed."

If, however, there is anything in the nature of a latent ambiguity in the contract or agreement, then reference can be made to the letter of June 24th, which makes the agreement plain, and shews that Moss and Mitchell entered into the contract as brokers and not as principals. That letter was written on one of the printed forms, and was merely an offer of room at a certain charge. The only right therefore that the plaintiffs can have against the brokers in respect of any breach of contract must be a right to sue for damages for misrepresentation of authority, if as a fact they were not authorised to make this agreement as agents for the shipowners. The defendants cannot be put in the position of owners of the ship so as to make them responsible for the acts of the captain. If they did agree to receive the goods, then it cannot be said they have not performed that agreement.

It is urged by the plaintiffs that the brokers Moss and Mitchell had become *quasi*-owners of the ship for this voyage, and therefore that they are liable. I am however of opinion that the charter-party completely negatives this contention. The whole effect of the charter-party is that the shipowners accept the lump sum of 2,500*l.* for the freight, which was to be earned on that particular voyage, leaving the brokers to make a gain or incur a loss according as the event of the voyage might turn out, and in every respect leaving the owner and the master of the ship to act as though there had been no arrangement come to. The charter-party has been already fully discussed, but it appears to me that it bears out the view that the defendants are not to be considered as owners of the ship, that the contention of the plaintiffs must therefore fail and that this appeal must be dismissed.

THESIGER, L.J.—I am of the same opinion. The appellants contend that the master was acting as the agent of the defendants in selling the goods at Monte Video, and they further say that, being

Wagstaff v. Anderson (App.), C.P.

such agent, he was acting within the general scope of his authority as agent, and that although the sale was unjustifiable, still that the defendants are liable under the rule of law laid down in *Ewbank v. Nutting* (6). This contention involves several propositions. The first is that the master of the ship was the agent of the defendants, and I do not think that has been made out. The goods, the sale of which is the subject of dispute, were on board this ship under a bill of lading, so that *prima facie* the master in signing the bill of lading would be acting for the shipowners, and the shipowners would *prima facie* be responsible for the carriage of those goods. It is however possible to negative this probable liability of the shipowners in two ways. First, by shewing that the transactions between the defendants and the shipowners may have been such that the defendants were in effect put in the place of the shipowners for this particular voyage, as was the case in *Colvin v. Newberry* (1). Secondly, it may be that the charterers have so conducted themselves or so contracted as to make themselves personally responsible.

Is then the first of these suggestions borne out by the facts of the case? I do not think that it is. It may be that certain parts of the charter-party, such as the provision that the whole ship should be at the disposal of the charterers, and the provision as to the sum to be paid for the use and hire of the ship might seem, if taken by themselves, to involve the notion that the defendants were for that voyage to stand in the place of the shipowners. But if the whole document be considered, it is clear that this was not the intention of the parties. Indeed there is one clause in the agreement which negatives the idea that the defendants were to be put into the position of the shipowner, for it provides that the master and owners of the ship shall give the same attention to the crew, and be responsible to all whom it may concern as if the ship were loaded in her berth by and for the account of the owners, independently of the agreement; and then almost at the end of the charter-party there is a provision which perhaps by

itself would not necessarily negative the liability of the defendants as shipowners; but which is nevertheless important in favour of the views of the defendants when read with the clause to which I have just before referred, and that is, "that the charterer's responsibility under this charter-party, except for freight as provided, shall cease on the vessel being loaded."

In this case there is a foreign ship-broker who has a ship in the port of London; he is desirous of securing full cargo for that ship, he commences to deal with that view with a London broker, and enters into an agreement with him for the use of the ship for a lump sum to be paid as freight so as to limit the risk and to have the guarantee to that amount of some responsible brokers, and such an agreement appears to be a probable and a reasonable one quite apart from any question of custom, and none has been proved in this case, and it is an arrangement which was contemplated by the very wording of the agreement. In the second place it is necessary to consider whether the defendants have so conducted themselves or so contracted as to make themselves responsible in the place of the shipowners. I am of opinion that they have not. We begin with the negotiations between Messrs. Smith, Sundius & Co., the plaintiff's brokers, with Anderson & Co. and the defendants, on whose behalf jointly that charter-party was executed by Anderson & Co., and the terms of the letter of the 24th of June shew that Moss and Mitchell were acting as agents, and not on their own behalf. We can of course only look at that letter if the agreement of the 26th of June does not contain the complete contract of carriage; but it is clear that it is not a complete contract, it is an arrangement that Moss and Mitchell shall receive on board a certain cargo to be carried in the ordinary way under a bill of lading, which though possibly not the contract, is at all events evidence of the contract under which it was to be carried. It is not necessary to decide whether the agreement, signed as it is absolutely by Moss and Mitchell, would bind them or not. If it is binding on them it cannot be

Wagstaff v. Anderson (App.), C.P.

binding for anything which occurs after the goods are on board; if it is not binding, *cadit questio*. Therefore the result is that the goods were not carried under any contract under which Messrs. Moss and Mitchell or Anderson & Co. were personally liable; but they were carried under a bill of lading signed in the ordinary way.

It thus appears to me to be clear that the captain, whatever he did at Monte Video, was not acting for the defendants. I express no opinion as to whether the defendants could in any circumstances be held to be responsible for the acts of the captain. I agree that this appeal must be dismissed.

Judgment affirmed.

Solicitors—Parker & Co., for plaintiffs; Hollams, Son & Coward, for defendants.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1880.

March 11. }

CRUMP v. CAYENDISH.*

Practice—Writ specially Indorsed—*Leave to defend*—Offer to bring the Sum claimed into Court—*Shewing Cause*—Order XIV., Rules 1 and 3.

Upon an application to sign final judgment under Order XIV., the Court has a discretion to refuse leave to defend the action, although the defendant offers to bring the sum claimed into Court under rule 3 of that Order.

The plaintiff's writ of summons was specially indorsed with a claim for 39l., the price of goods sold and delivered to the defendant.

Upon an application to sign final judgment under Order XIV. a Master allowed the defendant to defend the action. On appeal from the Master's order to Field, J., in chambers, the defendant offered to bring the sum claimed into Court, but the learned Judge gave the plaintiff leave

to sign final judgment unless the debt and costs were paid within a week.

On appeal to the Exchequer Division the Court (Kelly, C.B., and Lopes, J.), were divided in opinion, and the order of Field, J., therefore stood.

The defendant appealed.

Reginald Brown, for defendant. — A plaintiff who proceeds under Order XIV., rule 1 may call on the defendant to shew cause why final judgment should not be signed, and may obtain final judgment "unless the defendant by affidavit or otherwise satisfy the Court or Judge that he has a good defence to the action on the merits, or disclose such facts as the Court or Judge may think sufficient to entitle him to be permitted to defend the action." Then by rule 3, "the defendant may shew cause against such application by offering to bring into Court the sum indorsed on the writ or by affidavit."

By offering to bring the sum claimed into Court the defendant must be taken to have shewn cause successfully; he has done that which is equivalent to disclosing facts by affidavit which entitle him to be permitted to defend, and the Court has no discretion to refuse leave. The provisions of Order XIV. are founded upon the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67). By section 2 of that Act a Judge "shall give leave" to defend the action "on the defendant paying into Court the sum indorsed on the writ, or upon affidavits satisfactory to the Judge which disclose a legal or equitable defence," &c. The principle is that the defendant's common law right to require the plaintiff to prove his case shall be preserved.

Poulter, for the plaintiff, was not required to argue.

BRAMWELL, L.J.—I am of opinion that this appeal should be dismissed. If the appellant's contention is right a man who could not say that he had any defence to the action, but knew that the plaintiff could not go to trial for months, might keep him out of his rights by merely offering to pay the sum claimed into Court. I do not think that the

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Theisiger, L.J.

Crump v. Cavendish (App.), Exch.

words of rule 3 of Order XIV. mean what has been contended for.

Rule 1, which it is admitted would not give the right if it stood alone, states that the Court or a Judge may allow final judgment to be signed unless the defendant by affidavit "or otherwise" satisfy the Court or a Judge that he has a good defence on the merits, or disclose such facts as the Court or Judge may think sufficient to entitle him to be permitted to defend the action. The meaning of rule 3 seems to me to be that the defendant may shew cause, that is, may urge as a reason or as a ground for being permitted to defend, that he is willing to bring into Court the sum endorsed on the writ. It is true the words of the rule are, "may shew cause by offering to bring, &c., or by affidavit," but those words do not, in my opinion, mean that he may successfully shew cause by doing the one thing or the other, but only that one of the ingredients of shewing cause, upon which he may be permitted to defend, is an offer to bring the sum claimed into Court. If a Judge thinks that though the defendant has brought money into Court, he has not disclosed facts which entitle him to defend, then the Judge may in his discretion allow the plaintiff to sign final judgment. If that is not the true construction, a striking injustice might be caused.

BAGGALLAY, L.J.—I am of the same opinion. I think the difference between the language of rule 1 and of rule 3, shews that the Legislature intended to give the Court or Judge a discretion in allowing the defendant to defend when he offers to bring the sum endorsed on the writ into Court. By rule 1 the defendant, in order to be permitted to defend, must "satisfy the Court that he has a good defence, &c." In rule 3, he may "shew cause" against an application for leave to enter final judgment in the manner pointed out.

THESIGER, L.J.—I am of the same opinion. The object of the Legislature in framing rule 1 of Order XIV. was to prevent a plaintiff being delayed in obtaining his just rights. If the appellant's

contention is correct, a defendant could bring about that delay although he could not deny the plaintiff's claim. If it was meant by the rules that the defendant on offering to bring the sum claimed into Court was to be absolutely entitled to defend, that meaning would have been expressed. It is not expressed in rule 3, which says only that the defendant may "shew cause" against an application to sign final judgment. That means, I think, that the Judge must form an opinion upon all the facts before him whether the cause shewn is sufficient. Under rule 1, leave to defend is only to be given if the Judge is "satisfied" that the defendant has a good defence on the merits, or has disclosed facts sufficient to entitle him to defend. In most cases the fact that the defendant was willing to bring the sum claimed into Court would be a strong indication that he had a defence, and I think that leave to defend ought generally to be given under such circumstances. But it obviously ought not to be given in all cases where the money is brought into Court. The result would be, as has been pointed out, to delay the plaintiff in obtaining his just rights.

Judgment affirmed.

Solicitors—Hunter & Downes, for plaintiff;
F. Heritage & Co., for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. { THE QUEEN (on the appli-
March 20. { cation of the Vestry of St.
Mary, Islington) v. PRICE.

Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49)—Court of Summary Jurisdiction—Proceedings for the Recovery of Poor Rates—Distress Warrant.

[For the Report of the above case, see 49 Law J. Rep. M.C. 49.]

[IN THE EXCHEQUER DIVISION.]

1880. { WATNEY AND COMPANY (ap-
March 9, 11. { pellants) v. MUSGRAVE,
SURVEYOR OF TAXES (re-
spondent).

Income Tax—Profits—Exhausted Capital—Brewers—Premiums for Leases of Public-houses—5 & 6 Vict. c. 35. s. 100, Schedule D., case 1, rules 1 and 3, s. 159.

Brewers claimed that, in computing for income-tax the balance of their profits, a deduction should be allowed for premiums paid by them in order to obtain leases of public-houses which they sub-let to tenants undertaking to buy beer of them alone:—Held, that such a deduction could not be allowed.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts, under 37 & 38 Vict. c. 16. s. 9, as to Income Tax assessment, under schedule "D."

1. At a meeting of the commissioners held for hearing income tax appeals for the year ending the 5th of April, 1879, James Watney and James Watney the younger, carrying on the trade and business of brewers under the style of Watney & Co., appealed against an assessment, made on them under schedule D of 16 and 17 Vict. c. 34, in respect of the profits of their trade.

2. At the hearing of the appeal the commissioners refused to allow a reduction of 4,466*l.* claimed by the appellants under the following circumstances.

3. The appellants made their profits in trade by brewing beer and by selling it to persons who might think fit to buy it; but, in order to increase their trade, it has for years been their practice to buy the leases, for various terms, of licensed public-houses and beerhouses, and then to let such houses to tenants who covenanted to buy of the appellants all the beer to be sold in such houses.

4. In order to obtain such leases, the appellants are obliged in many cases to pay large premiums and to covenant to pay a fixed rent for a term of years.

5. When the appellants have acquired such leases, they let the houses to tenants and make a profit by the sale of their

beer to such tenants, who, as before stated, covenant to buy beer solely of the appellants. The profits made by the sale of beer to these tenants are included in the assessment; and the appellants claim that, for the purpose of arriving at the just balance of the profits and gains of their said trade, it is necessary each year to make an allowance in respect of a portion of the amount which was paid by them to acquire the leaseholds, and without which they would not have been able to make any profits in respect of the same, and that such allowance represents only the portion of their capital exhausted during the year in the earning of the said profits.

6. The following instance has been stated on the part of the appellants as an example.

7. The appellants had recently bought the lease of a public-house for thirty years, for which they paid a premium of 1,300*l.*, and covenanted to pay the landlord a rent of 105*l.* a year. Such lease contained the usual covenants for the lessees to repair, &c. The appellants let such public-house to a tenant who, under his agreement, is bound to buy of the appellants all beer to be sold in the house, and assuming that their gross profit from such sale would amount to 60*l.*, which profit they could not have made unless they had expended the 1,300*l.* in purchasing the lease, they claimed that the balance of profits and gains on which they were to be assessed should be less than that sum by 43*l.*, being the portion of the said sum of 1,300*l.* which had been exhausted during the year by reason of one year of the term having run out, namely, 1-30th of the sum of 1,300*l.* (1). In the assessment to the income tax the 60*l.* profit from the sale of the beer was included.

8. The sum of 4,466*l.* consisted of the aggregate of various sums relating to the leaseholds in which capital of the appellants was invested as mentioned in paragraphs 4 and 5, and arrived at in the same manner as the sum of 43*l.* mentioned in the last paragraph.

9. But for the expenditure of the capital to pay the premiums, the leaseholds out of which profit is made as

Watney v. Musgrave, Exch.

mentioned above could not have been acquired nor such profit made, and each year a portion of the premium paid is exhausted.

10. The commissioners were of opinion that the claim to reduce the assessment ought not to be allowed.

11. The question for the opinion of the Court is whether the commissioners were right.

Grantham (Poland with him), for the appellants.—The deduction claimed, being a deduction for capital exhausted in earning the profits assessed, ought to have been allowed. The case is within the principle of *Andrew Knowles and Sons (Limited) v. McAdam* (2).

The Attorney-General (Sir J. Holker) (Dicey with him), for the respondent, was not heard.

KELLY, C.B.—I am clearly of opinion that the Crown is entitled to the judgment of the Court. The claim made by the appellants is a claim to deduct expenditure incurred after production of the article in which they deal in order to promote the sale of the article, not expenditure incurred in the production of the article. I know of no statute or other authority to justify the deduction. The costs of production are the costs which are to be deducted. Thus, in the present case, the annual rent paid by the appellants for the premises where the beer is produced, the cost of the hops and malt purchased by them for the purpose of the production, the cost of the labour employed in it—these and other costs of production are the costs which may properly be deducted. The claim to deduct money expended after the production of the article produced, in order to increase its sale, is, so far as I am aware, made for the first time. Such an expenditure is like expenditure incurred in advertising an article in order to increase its sale, and no attempt has ever

been made to deduct such advertising expenses. *Andrew Knowles and Sons (Limited) v. McAdam* (2) was a totally different case. The cost there allowed to be deducted was part and parcel of the cost of production. If it is right that deduction should be allowed of something more than the mere costs of production, the Legislature can interfere.

HAWKINS, J.—I am also of opinion that the Crown is entitled to our judgment. The assessment is upon profits of trade; and the Act prescribes regulations as to the deductions which may and may not be made. In the provisions made by the Act I find nothing which would justify our holding that a premium paid by brewers in order to obtain a lease of a public-house to be let by them to a tenant agreeing to buy of them all the beer to be sold in such house is to be regarded, in estimating the balance of profits, as a trade deduction proper to be allowed. The house seems to me to be a thing wholly apart from the trade. As at present advised, I am far from saying that the cost of conveyance of the beer to the customer ought not to be allowed to be deducted. It is natural that there should be a difference of price between beer delivered at the brewery and beer delivered at the customer's house; and it may well be proper that the additional cost incurred by the brewer in order to earn the higher price should be taken into account in estimating the brewer's profits. The question arising here is a very different one. The houses which the appellants have acquired may be valuable adjuncts to their trade for the purpose of increasing the sale of their beer; but they are not connected with that trade. Incomings by rent, &c., from these houses are not part of the profits of the trade, and outgoings, in respect of these houses, do not constitute expenses of the trade. If a brewer were to build dwelling houses and let them to tenants who bound themselves to buy beer of him alone, and the rents of some of those houses failed to be paid, I do not see how the loss incurred by the brewer in respect of those rents could be deducted

(1) Upon the argument, the rent paid to the appellants by the tenant was taken to be 105*l.* a year.

(2) 47 Law J. Rep. Exch. 139; *nom. Knowles v. McAdam*, Law Rep. 3 Ex. D. 23.

Watney v. Musgrave, Exch.

in estimating the profits of his trade; and I see no difference between such a case and the present.

Appeal dismissed.

Solicitors—Pownall, Son, Cross & Knott, for appellants; the Solicitor of Inland Revenue, for respondent.

[IN THE COURT OF APPEAL.]

1880. }
Feb. 26. } HINCHCLIFFE v. BARWICK.*

Warranty—Sale of Horses—Condition that Horse not answering Warranty shall be returned within a fixed Time—Construction of Condition.

In an action for breach of warranty of a horse, the statement of defence alleged that the horse was sold by the defendant to the plaintiff at a public auction held at the Royal City Repository, subject to a condition that "horses warranted quiet in harness, &c., not answering such warranty must be returned before five o'clock, the day after the sale, shall then be tried by a competent person to be appointed by the proprietor of this establishment, and the decision of such person shall be final;" and that the plaintiff did not return the horse before five o'clock the day after the sale in compliance with the condition:—

Held, on demurrer, that the defence was a good answer to the action because the condition substituted the right of returning the horse within the time fixed for the general remedy for breach of warranty which the buyer would otherwise have had.

This was an appeal from an order of Pollock, B., overruling a demurrer. The claim was for damages for breach of a warranty that a horse sold by the defendant to the plaintiff was "a good worker."

Paragraph 3 of the statement of defence alleged "that the horse was sold by

the defendant to the plaintiff as being the highest bidder for it at a public auction held at the Royal City Repository in the city of London, subject to certain conditions of sale, and amongst them the following condition: "Horses warranted quiet in harness, or quiet to ride, or good workers, or in any other respect (whether sold by private treaty or public auction) not answering such warranty must be returned before five o'clock the day after the sale; shall then be tried by a competent person to be appointed by the proprietor of this establishment, and the decision of such person shall be final; the expenses of time, namely, ten shillings, shall be paid by the party in error; horses returned not answering the warranty will be charged for at the rate of five per cent. upon the sum realised at sale;" that even if the horse was warranted at the sale to be a good worker, the plaintiff did not return the horse before five o'clock the day after the sale in compliance with the conditions.

Demurrer. On the ground that the condition only related to the return of the horse, and did not debar the purchaser from claiming damages for any breach of warranty.

Pollock, B., overruled the demurrer, and the plaintiff appealed.

Digby Seymour and R. M. Bray, for the plaintiff.—The condition referred to in paragraph 3 of the statement of claim gives the buyer his general remedy for breach of warranty, or a limited right to annul the contract within a certain time. If the buyer fails to return the horse within the time, he is still not estopped from bringing his action on the warranty. His right to return the horse is in addition to and not in substitution for his general remedy. They referred to *Fielder v. Starkin* (1); *Towers v. Barrett* (2); *Head v. Tattersall* (3); *Bywater v. Richardson* (4); *Smart v. Hyde* (5);

(1) 1 H. Black. 17.

(2) 1 Term Rep. 133.

(3) 41 Law J. Rep. Exch. 4; Law Rep. 7 Exch. 7.

(4) 1 Ad. & E. 508.

(5) 8 Moe. & W. 723; 10 Law J. Rep. Exch. 479.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

Hinchcliffe v. Barwick (App.), Exch.

Chapman v. Gwyther (6); *Mayer v. Isaac* (7); *Adam v. Richards* (8); *Meenard v. Aldridge* (9).

A. Charles and C. Hall, for the defendant, were not heard.

BRAMWELL, L.J.—I think the judgment of the Exchequer Division is right. The condition no doubt is informal. It says the horse must be returned, but not what are the consequences of not returning it. The defendant says that the consequences are that the plaintiff had no remedy. The plaintiff says that the consequences are that you may not return it, but that you still have your remedy. I am of opinion that the rational interpretation is, that all the right and remedy which the plaintiff had under the condition, if he bought with a warranty, was to return the horse within the time fixed. If he did so, and the matter was adjudicated upon in the manner provided in the conditions, the plaintiff received back his money, and that was all. I cannot help thinking that the provision is a useful one. If the warranty is given fraudulently, the purchaser need not rely on it at all. If there is no fraud, why should not two people make an agreement like this? "I am willing to pledge myself that this horse is sound; only, if it is not, you must return it within a certain time, and the matter must be adjudicated upon as herein provided." I think the judgment should be affirmed.

BAGGALLAY, L.J.—I am of the same opinion. The sale here was in a well-known repository, where great numbers of horses are constantly sold under these conditions. If the horse is sold with a warranty and its soundness is objected to, it is to be returned before five o'clock on the following day. Then there is a provision for the examination of the horse by a competent person, and his decision is to be final. I think the object of the condition was to provide a ready mode of determining the controversy between the parties.

(6) 35 Law J. Rep. Q.B. 142; Law Rep. 1 Q.B. 463.

(7) 6 Mee. & W. 605; 9 Law J. Rep. Exch. 225.

(8) 2 H. Black. 573.

(9) 3 Esp. 271.

THESIGER, L.J.—I agree that the judgment of Pollock, B., is right. In sales between individuals directly, the parties make such bargains as they think proper. But it is established that at law, if a warranty has been given, the only remedy is an action for breach of warranty. There is no other method unless some special bargain is made between the parties. At auction marts horse sales are effected between parties unknown to one another, and it is naturally an object that the dealings should be carried out in such a way as to ensure as little litigation as possible. The manner in which this object is carried out at nearly all auction marts is, that where there is a warranty which is not complied with, or where the horse does not answer the description he is sold by, the horse is returned in a given time. He is tried and examined by a competent person, who comes to a decision between the parties, and if the horse is found to be unsound, the auctioneer takes him back, and the purchaser's money is returned to him.

The consequence is that extremely few disputes occur. Bearing in mind this practical view of the matter, what have the parties said here? The condition is adopted by the auctioneer, as the condition upon which one man buys and the other sells, the buyer and seller stand on equal terms within it. I do not think the words of it are clear, but on the whole it is intelligible. It does not say that the horse "may," but that it "must" be returned within the given time. It says it "shall" then be tried by a competent person, and his decision shall be final. I think those words are quite strong enough to shew that the purchaser agrees that the return of the horse is to be his only remedy, and that construction is in accordance with what seems to me the reasonable and practical view of the question.

Appeal dismissed.

Solicitors—Torr, & Co., for plaintiff; Keene & Marsland, for defendant.

[IN THE COURT OF APPEAL.]

1880. } DEBENHAM AND ANOTHER
 March 20, 24. } v. MELLON.*

Husband and Wife—Wife's Authority to pledge Husband's Credit for Necessaries—Secret Revocation of Authority—Effect of—Presumption of Agency.

Where husband and wife live together, and the husband has privately forbidden her to buy goods on credit, he is not liable for the price of articles of dress, although suitable to her rank in life, supplied to her by a tradesman with whom she has not dealt before, but to whom the fact that she was so forbidden has not been communicated.

Jolly v. Rees (15 Com. B. Rep. N.S. 628; 33 Law J. Rep. C.P. 177) followed.

Appeal from a judgment of Bowen, J. The action was to recover 42l., the price of various articles of dress supplied by the plaintiffs, who were linendrapers, to the defendant's wife, for the use of herself and her children. The goods were ordered by and supplied to the wife whilst living with her husband, and were admitted to be necessities in the sense that they were suitable to the position in life of the parties. The wife had not dealt with the plaintiffs before she ordered the goods in question, and shortly before she did so the defendant had forbidden her to buy goods on his credit, but had not in any way made public the fact that he had so forbidden her. Bowen, J., at the trial, left to the jury the question whether or not there had been a revocation by the husband of the wife's authority to buy goods on his credit. The jury found that there had; and Bowen, J., gave judgment for the defendant.

The plaintiffs appealed.

Benjamin and A. L. Smith (Wilberforce with them), for the plaintiffs.—Where husband and wife are living together, a presumption founded upon the cohabitation is raised that she is his general agent to provide all ordinary household necessities, and can contract, so as to bind his credit in respect of them. If the

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

VOL. 49.—Q.B., C.P. & EXCH.

husband wishes to limit or revoke the wife's authority, he must, as in all cases of principal and agent, communicate his intention to persons with whom she deals. These propositions are established by a long series of authorities—*Manby v. Scott* (1); *First, Second and Fourth Resolutions of the Judges*, pp. 451, 452; *Dyer v. East* (2); *Tod v. Stokes* (3); *Etherington v. Parrot* (4); *Waithman v. Wakefield* (5); *Holt v. Brien* (6); *Boulton v. Prentice* (7); *Montagne v. Benedict* (8); *Seton v. Benedict* (9); *Reed v. Legard* (10). *Ruddock v. Marsh* (11) is directly in point, and strongly favours the construction of the appellants. There the husband, who was a dock labourer, was held liable for groceries ordered by the wife on his credit, though he had supplied her with money to keep the house. Pollock, C.B., in delivering the judgment of the Court (Pollock, C.B., Alderson, B., Bramwell, B., and Watson, B.), said—"A partner is a particular kind of agent, who has a general authority to bind his partner by contracts made in the course of business, and in like manner a wife has authority with reference to such matters as are usually within the control of the wife."

[BRAMWELL, L.J.—I think that the notion in the mind of the Court in that case was that there existed a custom to run bills on credit for groceries amongst persons in the situation of the parties, and that the goods were supplied in accordance with that custom, the husband's complaint being that his wife had improperly spent her allowance. I may say that I have never looked back with much satisfaction on that case.]

In *Johnson v. Sumner* (12), the husband

- (1) 2 Sm. L. Cas., 7th edit. 428.
- (2) 1 Mod. 124.
- (3) 12 Mod. 418.
- (4) 2 Ld. Raym. 1,006.
- (5) 1 Campb. 120.
- (6) 4 B. & Ad. 252.
- (7) 2 Str. 1214 (note by editor), and *Selwyn's Nisi Prius*, 18th edit. 238.
- (8) 2 Sm. L. Cas. 7th edit. 475; 3 B. & C. 673.
- (9) 2 Sm. L. Cas. 7th edit. 475; 5 Bing. 28.
- (10) 6 Exch. Rep. 636; 20 Law J. Rep. Exch. 309.
- (11) 1 Hurl. & N. 601.
- (12) 3 Hurl. & N. 261; 27 Law J. Rep. Exch. 341.

Debenham v. Mellon (App.), Q.B.

and wife were living apart, but Pollock, C.B., in giving judgment, states the principle here contended for thus:—"Now the principle seems to be merely that of agency . . . If a man and his wife live together, it matters not what private agreement they may make, the wife has all usual authorities of a wife. If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity," &c.

In *Jolly v. Rees* (13), which is strongly relied on for the respondent, the facts differed from those in the present case. There the goods were not sent to the defendant's house, and the defendant, after he had forbidden his wife to pledge his credit, himself ordered goods for his house from the tradesmen in the neighbourhood. It is admitted that the Court laid down propositions as matter of principle in that case, which are directly against our contention here. Byles, J., however, differed from the rest of the Court, and it is submitted that his view was the right one, that "the wife's power to bind her husband may repose, not merely on her actual authority, but on the apparent authority with which the husband invests her by cohabitation," and that "no private revocation of authority, or private agreement between husband and wife, not communicated to a tradesman honestly dealing with the wife, by supplying necessaries for the family in the ordinary course of domestic affairs, can affect the tradesman's right to rely on the apparent authority of the wife." The question of apparent authority is not dealt with by the rest of the Court. It is against reason and public convenience, that a secret revocation of the wife's authority should take away the husband's liability. The ordinary principle of agency ought to be applied that a revocation of an agent's ostensible authority must be made known to the party who contracts with the agent, in order to absolve the principal from liability. In the present case, the question left to the jury assumes that there was an existing authority for the wife to

pledge her husband's credit. It would be a wrong to tradesmen if, under such circumstances, goods having been supplied on the faith of the wife's apparent authority to contract, a husband could escape from liability by setting up a private conversation with his wife, in which he forbade her to pledge his credit.

M'Oall, for the defendant, was not heard, the Court, however, stating that they would postpone giving judgment for a few days.

Cur. adv. vult.

The following judgments were (on the 24th of March) delivered by

THE SINGER, L.J.—The state of facts upon which the judgment of the Court is to proceed I take to be as follows:—A husband and wife living together; the husband able and willing to supply the wife with necessaries or the means of obtaining them; an agreement between them, not made public in any way, that the wife shall not pledge her husband's credit; a tradesman, without notice of that agreement, and without having had any previous dealings with the wife, supplying her upon the credit of her husband, but without his knowledge or assent, with articles of female attire suitable to her station in life; an action brought against the husband for the price of such articles.

The question for us is whether the action is maintainable. I agree with the other members of the Court and with Mr. Justice Bowen that it is not. The appellant's counsel have brought under our notice a considerable number of authorities with the view of establishing that the law as laid down in *Jolly v. Rees* (13) is erroneous. I think that the authorities have a contrary effect. They establish beyond controversy that the liability of a husband for debts incurred by his wife during cohabitation is based upon the ordinary principles of agency. It follows that he is only liable when he has expressly or impliedly, by prior mandate or subsequent ratification, authorised her to pledge his credit, or has so conducted himself as to make it inequitable for him to deny or to estop him from denying her authority.

In the present case express authority

. (13) 15 Com. B. Rep. N.S. 628; 33 Law J. Rep. C.P. 177.

Debenham v. Mellon (App.), Q.B.

is out of the question, and there is no evidence that the defendant even assented in any way to the act of his wife in pledging his credit to the plaintiffs.

But it is said that there is a presumption that a wife living with her husband is authorised to pledge her husband's credit for necessities; that the goods supplied by the plaintiffs were, and it is admitted they were, necessities; and that as a consequence an implied authority is established. This contention is founded upon an erroneous view of what is meant by the term "presumption" in cases where it has been used with reference to a wife's authority to pledge her husband's credit for necessities. There is a presumption that she has such authority in the sense that a tradesman supplying her with necessities upon her husband's credit and suing him, makes out a *prima facie* case against him upon proof of that fact and of the cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husbands' credit in respect of matters coming within those departments. Such a presumption or *prima facie* case is rebuttable, and is rebutted, when it is proved in the particular case, as here, that the wife has not that authority. If this were not so, the principles of agency upon which *ex hypothesi* the liability of the husband is founded would be practically of no effect.

Feeling this difficulty the appellants' counsel shift their ground and contend that, although under the circumstances of this case, the wife may have had no authority in fact or in law to pledge her husband's credit, yet the defendant must be taken to have held out his wife as having authority to pledge his credit to all persons supplying her with necessities without notice that she had not authority in fact, and consequently is estopped as between him and the plaintiffs from denying her authority. This contention appears to me to have no better ground of support than the one with which I have just dealt. If a tradesman has had dealings with the wife upon the credit of the husband,

and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognised continues. The husband's quiescence is in such case tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume, just as it would forbid his denying the authority of a servant who had been in the habit of ordering goods for him from tradesmen, and whose authority he had secretly revoked. But what, in the case of a tradesman dealing with his wife for the first time, has the husband done or omitted to do which renders it inequitable for him to deny his wife's authority? For the tradesman it is said that the mere relationship of husband and wife entitles him to assume, in the absence of notice to the contrary, that the wife has authority to pledge her husband's credit for necessities. But this is a fallacy; the tradesman must be taken to know the law; he knows (for the present argument proceeds upon that supposition) that the wife has no authority in fact or in law to pledge the husband's credit even for necessities unless he expressly or impliedly gives it her, and that what the husband gives he may take away. How, then, can the tradesman dealing with the wife for the first time, and without any communication with or knowledge on the part of the husband, say that he is induced or invited either by the law or by the husband, or by both combined, to deal with the wife upon the faith and in the belief of her being in fact authorised to pledge her husband's credit? If he be so induced or invited it can only be upon the footing of the law making a husband absolutely liable for necessities purchased by his wife to any person dealing with her, although for the first time, without notice that her authority is limited; but if the law does so make him liable there is no need for any estoppel, and we are driven back upon the exploded notion that the husband's liability is founded upon some law other than that which governs in general the relations of principal and agent. It is urged that it is

Debenham v. Mellon (App.), Q.B.

hard to throw upon a tradesman the burden of enquiring into the fact of a wife's authority to buy necessities upon her husband's credit. I assent to the answer that, while the tradesman has at least the power to enquire or to forbear from giving credit, it is still harder, and is contrary, if not to public policy, yet to general principles of justice, to cast upon a husband the burden of debts which he has no power to control at all except by a public advertisement that his wife is not to be trusted, and in respect of which, even after such advertisement, he may be made liable to a tradesman who is able to swear that he never saw it.

It appears to me that the decision of the majority of the Court in *Jolly v. Rees* (13) has put the law as regards this matter upon a proper footing, and that there is no ground for disturbing the judgment in this case, which the defendant has obtained.

BRAMWELL, L.J.—The question in this case is, whether a husband is liable to pay for necessities obtained by the wife without his authority. The articles supplied were necessities in the sense that they were suitable to her condition in life, but not necessities in the sense that she stood in actual need of them. The question was, and is always, necessarily argued on technical grounds; there is no statute on the subject; the husband is in these cases charged as a debtor and as liable on a contract. Prior to the Judicature Acts the action was founded on *assumpsit*, and now the action is with regard to the Statute of Limitations, founded on an express contract. The case was argued so as to shew that the wife is the agent of her husband to pledge his credit. No doubt there are cases where the wife has authority to pledge her husband's credit, and is in fact, as of necessity, her husband's agent for that purpose. If the husband turns his wife out of doors, or if she is obliged, owing to his conduct, to leave the house, then he is bound to maintain her, and if he fails to do so, she has power to provide herself with necessities, and authority to pledge his credit for them. So if she is living with her husband, and he gives her shelter and nothing more, then

she has a right to provide herself with food and clothes. There may also be other cases, as, for instance, where a husband and wife are living together, and the articles are such as in the usual course, regard being had to the style in which the parties live, are had upon credit. One may instance the joint supplied by the butcher, for which people do not usually, when they live in a certain style, pay on delivery, but for which bills are run. In such a case I think that the wife would presumably have authority to pledge her husband's credit, and if he desires to negative this authority he should give distinct intimation to that effect to the tradespeople. Nor would such an authority be presumed to exist in the wife alone; but a sister who was living with him, or his housekeeper, could also pledge his credit in respect of such matters.

It was on such considerations that the judgment in *Ruddock v. Marsh* (11) was founded. Whether we were then right in drawing the conclusions we drew I doubt; but unless those were the considerations upon which we drew them that judgment cannot be supported. But there the authority was to act as persons in a certain position, and living in a certain locality generally do act. Such is not the case here. It cannot be pretended that there is any practice, convenience or usage as to such articles as those in question in this case being supplied on credit. There is no reason of convenience; there is no usage, there is no authority, there is on the contrary a prohibition. The question is whether a tradesman can in such circumstances trust somebody, and whether a wife can pledge her husband's credit. The question is not whether she has authority to spend ready money; probably if her husband lets her have the money he cannot afterwards and when it has been spent claim to recover the money from the tradesman; although if the wife spend that ready money on articles evidently unsuited to her position, I am not sure that the husband might not, on offering to return the goods, recover that money. But the question is not whether a wife may or may not spend money if she has got it, it is one of credit.

Now, first, why should the wife have

Debenham v. Mellon (App.), Q.B.

this authority? The husband can give it if he desires she should have it; there is no need for the law to imply it or to give it. The tradesman need not trust or give credit, he can say that his business is a ready money business, or he can enquire whether she has her husband's authority, or he can trust her individually and trust that she will get the money somehow. If she says that she has her husband's authority when she has not, the tradesman has this security that then she is liable to be indicted for obtaining goods by false pretences. I do not say a conviction would follow; but at all events she must commit a crime in order to obtain the goods. Or the tradesman might ask for the authority in writing or might get it direct from the husband. If it be said that such a proceeding would offend the customer, I answer that that may be an excellent reason why the tradesman should not ask the question; but it is no reason for seeking to make the husband pay because the question is not asked. There is no reason, convenience or usage for so making him liable; there is no authority for it, and the law is the other way. I think that this judgment should be affirmed, and that the law would be mischievous if it were different from that which it is, and if it were possible for a foolish wife and a tradesman eager for business to injure a husband contrary to his orders and without his authority.

BAGGALLAY, L.J.—I have had an opportunity of reading the judgment of The-siger, L.J., and I agree with it and desire to adopt it as my judgment in this case. I do not wish to imply that I do not agree with the observations of Bramwell, L.J., which appear to me to be just.

Judgment affirmed.

Solicitors—Boyes & Ridley, for plaintiffs; Button, Grove & Co., for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } NISSLER AND ANOTHER v. THE
Feb. 24. } CORPORATION OF HULL.

Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), ss. 68, 69—Slaughter of foreign Animals before landing—Claim for Compensation from local Authority.

By the Contagious Diseases (Animals) Act, 1869, ss. 68, 69, compensation is payable by a local authority for animals slaughtered in pursuance of the Act:—Held, that no compensation was payable under these sections in respect of foreign animals stopped while afloat in an English port, and slaughtered before being landed, inasmuch as a local authority had no authority to order the slaughtering of such animals.

This was an action brought by the plaintiffs against the defendants, as being the local authority of the borough of Kingston-upon-Hull, within the meaning of the Contagious Diseases (Animals) Act, 1869 (1), to recover compensation

(1) By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 65:—"Every local authority shall cause all animals affected with cattle plague within their district to be slaughtered." By section 66, "a local authority may, if they think fit, cause to be slaughtered any animal that has been in the same shed or stable, or in the same herd or flock, or in contact with any animal affected with cattle plague within their district." By section 67, "where an animal is affected with disease suspected to be cattle plague, the local authority may cause the animal to be slaughtered in order to ascertain the nature of the disease." By section 68, "where an animal affected with cattle plague or affected with disease suspected to be cattle plague, is slaughtered in pursuance of this Act, the local authority (except as otherwise provided in this Act) shall, by way of compensation for the animal, pay to the owner thereof such sum, not exceeding 20*l.* and not exceeding one half of the value of the animal immediately before it was affected with cattle plague, as to the local authority seems fit." By section 69, "where a local authority causes an animal to be slaughtered on account of it having been in the same shed or stable, or in the same herd or flock, or in contact with an animal affected with cattle plague, the owner of the animal so slaughtered may either dispose of the carcase on his own account with a license from some officer appointed in that behalf by the local authority, or may require the local authority to dispose of the same, in which latter case the local authority shall pay to the owner thereof,

Nissler v. Corporation of Hull, Q.B.

for the slaughtering of certain animals under the circumstances in the following Case stated:—

CASE.

1. The plaintiffs are cattle merchants, residing at Lincoln, and the defendants were at the time of the happening of the matters hereinafter mentioned the local authority of the borough of Kingston-upon-Hull under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 9, and 2nd Schedule to Act.

2. On the 16th of July, 1872, the screw steamship *Joseph Somes*, of Hull, belonging to Messrs. Brown, Atkinson & Co., sailed from Cronstadt, bound for Hull, having on board, amongst other things, fifty-eight head of oxen, the property of the plaintiffs.

The said oxen appeared at the time of shipment and of the sailing of the said steamship to be in good health and sound condition.

3. On the 19th of July, 1872, the Right Honourable the Lords of Her Majesty's Privy Council, under and by virtue of the powers and provisions contained in the Contagious Diseases (Animals) Act, 1869, section 16, issued an order containing, among other things, the following provisions:—

"1. This order shall take effect from and immediately after the 19th day of July, 1872, and words in this order have the same meaning as in the Act of 1869.

"2. Cattle brought from any place in the dominions of the Emperor of Russia shall not be landed at any port or place in Great Britain."

The said order was published in the

by way of compensation, such sum not exceeding 30*l.* as may equal three-fourths of the value of the animal slaughtered." By section 75, "The Privy Council may from time to time make such orders as they think expedient . . . for the better execution of the Act, or for the purpose of in any manner preventing the introduction or spreading of contagious or infectious diseases among animals in Great Britain . . . and may in any such order direct or authorise the slaughtering of animals that are affected with any contagious or infectious disease, or that have been in contact with animals so affected, and may in any such order direct or authorise the local authority to pay compensation for any animals so slaughtered."

London Gazette on the 19th of July, 1872.

4. On the 20th of July, 1872, the making of the said order and its provisions came to the knowledge of the plaintiffs' agent at Hull, whereupon he at once telegraphed to one of the plaintiffs, Wilhelm Nissler, who was at Cronstadt at the time, arranging for the shipment of cattle to England, telling him that an Order of Council had been made on the previous day, prohibiting importation of cattle from Russia, and to stop all shipments. The plaintiff, Johann Adam Nissler, also telegraphed to Wilhelm Nissler to the same effect from Lincoln on the same day.

5. The *Joseph Somes* having, as hereinbefore stated, left Cronstadt on the 16th of July, it was impossible to stop her at any intermediate port. The shipment of all further cattle by the plaintiffs was, however, immediately stopped, and in one instance a steam-tug was sent in pursuit of a steamer which had already left with cattle on board, and the cattle were taken out.

6. The plaintiffs' agent at Hull, on learning from the plaintiffs that the *Joseph Somes* had left so long before his telegram arrived, and that there was no means of stopping her, at once communicated with the collector of customs at Hull, asking for instructions, and requesting permission to land the cattle from the *Joseph Somes* immediately upon her arrival, taking all possible precautions to guard against infection, and undertaking to slaughter all the cattle immediately upon their landing, and that within an enclosed area. No communication was made to the defendants, unless the aforesaid notice to the collector is to be taken as notice to them.

7. The plaintiffs' agent also communicated with Dr. Shorten, who was the inspector and veterinary surgeon appointed by the Privy Council under the provisions of the Contagious Diseases (Animals) Act, 1869, to take charge of the inspection and passing of foreign cattle, who in turn communicated with the Board of Trade and the Privy Council, and received instructions to examine the cattle upon their arrival and report thereon.

Nisler v. Corporation of Hull, Q.B.

The said Dr. Shorten was stationed at the port of Hull, and at the same time, namely, when the occurrence in this case took place, the Privy Council had also a general veterinary inspector for the department—Professor Brown. Both these officers were appointed and paid by the Privy Council, and were in no way (except so far as they are so made under the provisions of the Act or Orders) connected with or responsible to the defendants.

8. On the 25th of July the *Joseph Somes* arrived at Hull, with fifty-six cattle on board, having experienced very bad weather, during which the other two cattle had died from the effects of the voyage.

9. Upon the arrival of the *Joseph Somes* such order of the Privy Council of the 19th of July, 1872, being in force, the cattle could not be landed, and the plaintiffs' agent again applied to the veterinary department of the Board of Trade and to the said Dr. Shorten for leave to land the cattle. Dr. Shorten, upon receiving the plaintiffs' application, went on board the *Joseph Somes*, and examined the cattle, and came to the conclusion that some of them were affected with cattle plague, and reported to the Privy Council that two of them were affected with disease suspected to be the cattle plague. The vessel was left in charge of the customs officer. The said Dr. Shorten telegraphed to the Privy Council in London for instructions in the following words:—" *Joseph Somes* arrived. Two cattle red spots on tongue, dull tears from eyes. Consignee undertakes to have them slaughtered within twelve hours if allowed to land." A reply was received by Dr. Shorten from the Privy Council office to the effect that Professors Brown and Symonds (inspectors appointed by the Privy Council under the said Act) would come from London to Hull the same night, in order to inspect the cattle. The general inspector, Professor Brown, being absent from London at the time, was telegraphed by the Privy Council officers to proceed to Hull, and Professor Symonds (the principal of the Royal Veterinary College) was at the instance of the Privy Council sent

to Hull. These two gentlemen arrived in Hull within a few hours of each other, and met on the 25th of July.

10. All the beasts were therefore kept on board the *Joseph Somes* until the morning of the 26th, when it was found that others of the cattle were then diseased. On the morning of the 26th, Professors Brown and Symonds, with the Privy Council inspector at the port, examined the cattle, and pronounced twenty-two of them to be infected, and said that under the circumstances it was necessary that the whole number, namely, fifty-six, must be slaughtered, and the carcasses destroyed. No certificate as to the existence of the disease, as required by section 33, was however given in this case.

11. On the morning of the 27th of July, 1872, Professors Brown and Symonds sent for James Freeman (the inspector for the defendants appointed under section 12 of the Act), and gave him directions that the cattle should be slaughtered, and their carcasses placed in lighters and towed out to sea, and that the lighters should be there scuttled and sunk. The said James Freeman wrote the following letter to Messrs. W. Brown & Co., of Hull, for lighters:—

"Messrs. W. Brown & Co.

"Please provide two lighters, or more if necessary, to receive the carcasses of fifty-six beasts on board the *Joseph Somes*, brought from Cronstadt, and convey them to sea beyond three miles of the shore of Great Britain, and sink the lighters and carcasses together. Please further provide sufficient steam power for the above purpose. Please charge all expenses to the Hull local authorities.

"(Signed) James Freeman,

"Vety. inspector to the local authority.

"July 27, 1872."

12. The said James Freeman having thus engaged lighters, the cattle, by order of Mr. Freeman, were killed, their carcasses placed on board the lighters, and towed out to sea, where the lighters were scuttled and sunk.

13. Save as hereinbefore appears, the defendants had no notice of the matters hereinbefore mentioned.

Nissler v. Corporation of Hull, Q.B.

14. The value of the said beasts was 25*l.* per head. As hereinbefore stated, on the 25th of July two only of the beasts were infected. On the 26th twenty others, from having been in contact with the others in the same herd, were found to be infected. The residue, that is to say, thirty-six, never were infected.

The plaintiffs claimed 1,037*l.* compensation as follows—that is to say, 25*l.*, being half the value of two beasts, actually infected under the 68th section, and 1,012*l.*, being three-fourths the value of fifty-four beasts under the 69th section.

The question for the opinion of the Court is whether under the circumstances above stated the plaintiffs were entitled to recover any and what compensation from the defendants in respect of the animals so slaughtered (1).

Beasley, for the plaintiffs.

Cave (*Benjamin* and *A. P. Stone* with him), for the defendants.

LUSH, J.—This is an action brought to recover compensation from the defendants in respect of certain beasts slaughtered by them under the circumstances stated in the Special Case, and the question we are called upon to decide is whether the action can be maintained. Now, I am of opinion that the claim cannot be supported. The liability, if it exists at all, must be found in part 5 of the Contagious Diseases (Animals) Act, which deals with the authority of local bodies in ordering animals to be slaughtered within this district. The 65th and two following sections enumerate the different cases in which the local authority is empowered to take action. Then comes the 68th section which provides for the giving of compensation. That section does not say that the compensation payable by the local authority is to be payable when the animal has been slaughtered by the order of the local authority, but I think it is clearly implied. It provides for cases arising under the 65th section. Then comes the 69th section which deals with cases arising under the 66th section. So that there is a short code giving authority to

a Local Board under certain circumstances to cause animals to be slaughtered, and to give compensation to a certain amount in respect of the animals so slaughtered. These particular animals were brought from Russia, and were stopped while afloat, and were ordered to be slaughtered, and were never landed within the district of the local authority at all, and if there were no other clause in the Act, I should say *prima facie* that it could not be taken to apply to the animals now in question. But it is to my mind abundantly clear that this view is the correct one when we come to consider the provisions contained in the statute which relate to foreign animals. With respect to animals which have not been landed, the Privy Council have by section 17 power to apply the regulations in the schedule 4, as to the landing of animals coming from abroad. Large powers are conferred on the Commissioners of Customs by these regulations with reference to foreign animals, and the Privy Council have power to send down their officer with instructions to deal with them. Now it is true that the Privy Council have power to give compensation in respect of animals slaughtered by the authorities under the terms of the 75th section. These animals were, it appears, slaughtered by the direction of two gentlemen sent down by the Privy Council to inspect and examine these animals. Whether they had authority or not to order this to be done, it is admitted that the Privy Council had made no order directing the local authority to pay compensation, and therefore they do not come within the 75th section.

This claim, therefore, if it can be sustained at all, must be brought within the 68th and 69th section, and the only remaining question is, whether these animals were slaughtered by the order of the local authority, that is to say the Corporation of Hull. Now, I do not think the corporation had any power to order these beasts to be slaughtered. But suppose the corporation had no such authority, yet if they had in fact ordered them to be slaughtered, a different question might, perhaps, have arisen. I see, however, no evidence of any such order.} The inspector's duties

Nissler v. Corporation of Hull, Q.B.

were to inspect, examine and report, and he was instructed by the Privy Council to execute the orders of the Council as to the slaughtering of the cattle. He had no authority from the corporation to order these animals to be slaughtered, and I think it clear that the case does not come within the compensation sections, first, because the animals were not slaughtered within the district of the body corporate, and secondly, because they were slaughtered without their authority.

MANISTY, J.—I am of the same opinion. It is sufficient to say that no authority express or implied was given by the corporation to Freeman to order the animals to be slaughtered. The inspector is an officer appointed only for the purpose of inspecting and reporting, and the language of the 66th section clearly shews that the authorities are themselves to exercise a discretion with regard to animals which are not affected with cattle plague, but have been in contact with animals affected with it. No order or direction was given here except by Freeman acting under the authority and direction of the officers of the Privy Council. But if these animals were slaughtered by the order of the officer of the Privy Council, no order of the Privy Council was given directing compensation to be given. Our judgment must, therefore, be for the defendants.

Judgment for the defendants.

Solicitors—Rollit & Sons, agents for Rollit & Sons, Hull, for plaintiffs; Collyer-Bristow & Co., agents for C. S. Todd, Hull, for defendants.

infra 800.

[IN THE EXCHEQUER DIVISION.]

1880.
March 15.

THE METROPOLITAN INNER
CIRCLE COMPLETION RAIL-
WAY COMPANY v. THE ME-
TROPOLITAN RAILWAY COM-
PANY AND ANOTHER.

Practice—Notice of Trial—Entry for Trial—Close of Pleadings—Order XXXVI. rules 3, 14, 17.

The defendants delivered a statement of defence and counter-claim; the plaintiffs replied, their reply not closing the pleadings, and at the same time gave notice of trial. Next day they entered the action for trial—Held, that the action must be struck out of the cause list, on the ground, per KELLY, C.B., that the entry for trial was irregular, and, per STEPHEN, J., that the notice of trial and consequently the entry were irregular.

This was a motion on appeal from the order of Pollock, B., dated the 3rd of March, 1880, refusing to strike out the action from the cause list, upon the suggestion of irregularity in the entry for trial.

The statement of claim, delivered on the 29th of October, 1879, alleged that the plaintiffs were entitled to recover a sum of 50,000*l.*, due on the award of an arbitrator.

The statement of defence and counter-claim, delivered on the 22nd of December, 1879, set out certain facts, with the object of shewing that the arbitrator had exceeded his jurisdiction, and the same facts were relied on by way of counter-claim.

On the 2nd of February, 1880, the plaintiffs delivered their reply, and at the same time gave notice of trial. On the 3rd of February, 1880, the plaintiffs entered the action for trial in London.

Graham, for the defendants.—The action was irregularly entered, as the reply was not the close of the pleadings, which could not be closed until the defendants delivered their rejoinder. The practice at Chambers has been to allow entry of trial to take place at this stage, but it is submitted that the practice is wrong. Order XXXVI. rule 3, provides that,

§ T

Metropolitan &c. Rail. Co. v. Metropolitan Rail. Co., Exch.

"subject to the provisions of the following rules, the plaintiff may with his reply, or at any time after the close of the pleadings, give notice of trial of the action." No doubt, in terms, this rule allows notice to be given with reply, but the draftsman had a simple case in his mind, and did not provide for counter-claims. By rule 17 of the same Order, as altered by the Rules of December, 1875, it is provided that "the party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the Judge." It is impossible for this to be done unless the pleadings are closed. It may be that notice of trial may be given with the reply, but entry for trial cannot take place until the pleadings are closed.

A. L. Smith, for the plaintiffs.—If the notice of trial was regular, the entry for trial was regular, under Order XXXVI. rule 14, which provides that, "if the party giving notice of trial for London or Middlesex omits to enter the action for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last rule, within four days enter the action for trial." This clearly implies that the party giving the notice of trial may enter it on the day or the day after giving the notice. The object of enabling the plaintiff to enter the cause with his reply was to prevent defendants setting up frivolous counter-claims, and so delaying the action.

KELLY, C.B.—I understand it to be admitted that the record in this action is not complete. It would be very much to be regretted if, on the one hand, the plaintiffs should be delayed in their action, and equally on the other, if the defendant in any action, whatever the amount claimed, should be embarrassed in pleading anything which he may *bona fide* wish to plead. By Order XXXVI. rule 3, the plaintiffs may give notice of trial with their reply. I agree that they had a perfect right to do so. They also entered the cause at the same time. There is nothing entitling them to do

so, but under certain circumstances a plaintiff perhaps might do so, if the pleadings are not at all complicated. I am not prepared to say that the plaintiff is not right in giving notice of trial with his reply, but he has no right to enter the cause. If he does so, he does it at his peril. I do not lay down a general rule, but I think in this case the plaintiffs had no right to enter the cause for trial, because the effect might be—and but for the number of cases for trial in London would have been in this case—that the cause would have proceeded to trial before the record was complete, so that it would have been impossible for the Judge and jury to try the case at all. I find no provision that at the time of giving notice of trial the plaintiff may at once enter the cause for trial. Rule 14 has been cited as shewing that the plaintiff is entitled to enter the cause immediately on giving the notice of trial, but I think neither he nor the defendant, on his default, can enter for trial until the record is complete. It is absurd to suppose that the Legislature would ever have contemplated depriving parties of the right to plead whatever they may be entitled to plead, and allowing the cause to come on prematurely. This appeal must therefore be allowed.

STEPHEN, J.—I am of the same opinion, although I arrive at it by a somewhat different route. It appears to me that the proper meaning of Order XXXVI. rule 3 is, that the plaintiff may give notice of trial of the action with the reply, if the reply closes the pleadings, or at any time after the close of the pleadings if they are more protracted. That seems to me the correct way of interpreting rule 3, and it would appear to make all the other rules quite consistent, and to arrive at the natural result that notice of trial should not be given until the pleadings are completed. It has been argued, on the other hand, that a practice has grown up at chambers giving a different meaning to this rule, relying upon the words "with the reply," and it has been pointed out that the practice is convenient, because it discourages defendants who plead or counter-claim in an evasive manner, from unduly spinning out proceedings. Al-

Metropolitan &c. Rail. Co. v. Metropolitan Rail. Co., Excu.

though it is pretty plain how this practice has come to pass, I do not think that Rules and Orders ought to be construed in that way. The reasonable view seems to be that notice of trial should not be given until the pleadings are complete. This rule may give rise to inconvenience on account of giving an opening to defendants who wish to avoid just claims, but the inconvenience is not separable from the whole principle of the Judicature Acts. No doubt, these Acts do give considerable openings to persons, by pleadings and summonses, to evade the payment of just claims, but all I can say is that it is the system which the Legislature has selected, and I do not feel disposed to deviate from it.

Appeal allowed, and cause struck out.

Solicitors—Newman, Stretton & Hilliard, for plaintiffs; Burchells, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. } CHESWORTH v. HUNT.
May 6. } HARRISON (Claimant).

Bill of Sale—Mortgage of Land—Consolidation of Mortgages.

The rule that the mortgagee of two estates belonging to the same mortgagor may consolidate them, so that one cannot be redeemed without the other, will not be extended so as to enable the grantee of a bill of sale who has realized his security to appropriate any remaining surplus of the goods assigned, and so defeat the right of an execution creditor thereto, on the ground that the grantee is also mortgagee of land of the grantor, and has a right to consolidate the two securities.

Special Case stated by order of the district registrar for Liverpool, of which the following are the material particulars:—

By an indenture of May 1, 1879, the defendants mortgaged to the claimant certain leasehold and freehold premises subject

to certain prior mortgages for securing certain sums of money then due from the defendants, and still unpaid, and also further advances.

On the 25th of December, 1879, the previous mortgage still existing, in consideration of 40*l.* advanced by the claimant, the defendants, by bill of sale duly registered, assigned to the claimant all the machinery, plant, stock in trade, and other articles then in or about the yard and shop of the defendants, numbered 133, Grafton Street, in Liverpool.

The defendants remained in possession of the goods comprised in the bill of sale, and on the 1st day of October, 1879, the same were seized by the sheriff of Lancashire under a writ of *fi. fa.* issued upon a judgment obtained by the plaintiff in this action. The writ was endorsed all levy the sum of 49*l.* 19*s.*, including all costs of levy.

The claimant thereupon claimed the goods as his by virtue of the bill of sale, and the sheriff took out an interpleader summons, which was heard before the district registrar. The registrar, in exercise of the power conferred by section 13 of the Common Law Procedure Act, 1860, ordered that the sheriff should sell the goods by auction, and that after deducting expenses of sale, he should pay 40*l.* and interest to the claimant, and the balance of the sale moneys into Court, and that the plaintiff and claimant should proceed to state a special case for the opinion of the High Court of Justice as to whether the claimant was at the time of the levy entitled to a lien, or charge, or right to consolidate upon the goods seized in respect of his security other than the bill of sale.

The sheriff accordingly sold the goods, and out of the proceeds of the sale paid to the claimant the sum of 40*l.* 2*s.* 3*d.* (being the amount of the advance of 40*l.* and interest thereon), and after deducting expenses of sale, paid into Court the balance amounting to 44*l.* 8*s.* 6*d.*

The question for the opinion of the Court is, in what manner ought the proceeds now in hand of the sale of the goods comprised in the bill of sale to be applied as between the claimant and the plaintiff?

Chesworth v. Hunt, C.P.

Arthur Leach, for the claimant.—The rule that a mortgagor cannot redeem one mortgage without redeeming all other mortgages which the mortgagee holds upon his property, and which he has a right to consolidate, is well established. See *Marsh v. Lee* (1); *Mills v. Jennings* (2); and a mortgage of personalty may be tacked to one of realty, *Watts v. Symes* (3); *Farebrother v. Woodhouse* (4); *Selby v. Pomfret* (5); *Spalding v. Thompson* (6); *Fisher on Mortgages*, 639, 3rd edition. An execution creditor stands in the same position as a subsequent mortgagee, *ib.* 666; *Langton v. Horton* (7). There is nothing in the Bills of Sale Act which expressly or impliedly overrules the doctrine. The general policy of an Act cannot override an equitable doctrine, for general words do not take away the privilege which the law gives to any person, 2 *Coke Inst.* 395, and there are many instances in which the words of an Act have been held not to overrule a doctrine in equity—*Le Neve v. Le Neve* (8); *Spackman v. Miller* (9).

French, for the plaintiff, the execution creditor, was not called upon.

DENMAN, J.—Our judgment must be for the plaintiff. We have heard an able and clear argument from Mr. Leach, and I have no doubt he has brought forward all authorities in his favour, but notwithstanding we give judgment against the claimant. The claimant's title is under a registered bill of sale, and he claims all the goods and chattels in the possession of the debtor at the date of the execution. These goods are more than sufficient to satisfy his bill of sale, but he is not content, and claims a right to receive out of

the proceeds of these goods further satisfaction for money advanced by him some years before on mortgage of freehold and leasehold estate granted by the debtor. It appears to me this cannot be done without setting at naught the policy and provisions of the Bills of Sale Act. Had there been no bill of sale the claimant would have had no right to touch these goods, but it is contended that there being a bill of sale, the equitable doctrine of consolidation of mortgages is in his favour, and tacks the prior mortgage to the bill of sale, so that one cannot be redeemed without the other.

If we were to allow such a contention to prevail, we should be defeating the operation of the Act, and it suffices to say that on this ground I decline, in the absence of authority, to extend the doctrine of consolidation of mortgages to such a case as this.

LINDLEY, J.—I am of the same opinion. Without discussing the doctrine of consolidation of mortgages, which we must take to be established, I think it is necessary to be cautious in complying with any request to extend it, especially when the effect of such compliance would be to defeat the operation of the Bills of Sale Act. The doctrine is founded on the principle that he who comes into equity must do equity, and if therefore there is a mortgage of 600*l.* on one estate and of 500*l.* on another estate of the same mortgagor, and the time for redemption has passed, the mortgagee of the two estates may refuse to part with one estate before he has been paid off on both. By logical reason this doctrine has been extended step by step to startling and unjust conclusions. We are asked to extend it to a case where a person has executed and enforced a bill of sale duly registered, and the security is worth more than the sum for which the bill of sale is granted, so as to prevent the execution creditor from reaping the benefit of his execution in respect of the surplus, because the grantee of the bill of sale is mortgagee of other property. This contention appears to me to be contrary to the scope of the Act, and I decline to accede to it except under the direction of superior authority, and no such authority has been produced. With-

(1) 1 White and Tudor's Leading Cases in Equity, 611, 4th edit. 494, 2nd edit.

(2) 49 Law J. Rep. Chanc. 209; Law Rep. 13 Ch. D. 639.

(3) 1 De Gex, M. & G. 240.

(4) 23 Beav. 18.

(5) 3 De Gex, F. & J. 595.

(6) 26 Beav. 637.

(7) 1 Hare, 549.

(8) 2 White & Tudor's Leading Cases in Equity, 85, 4th edit.

(9) 12 Com. B. Rep. N.S. 669; 31 Law J. Rep. C.P. 309.

Chesworth v. Hunt, C.P.

out hesitation, therefore, I say that the claimant ought not to be allowed to defeat the claim of the execution creditor to the goods after the bill of sale has been satisfied. It would be contrary to the scope and policy of the Bills of Sale Act were we to allow such a claim to prevail, and we should be making the Act of no avail.

Judgment for execution creditor.

Solicitors—Prior, Bigg & Co., agents for J. B. Wilson, Liverpool, for plaintiff; Gregory & Co., agents for Bartlett & Atkinson, Liverpool, for claimant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. }
May 3. } THE QUEEN v. GASKARTH.

Public Health—Election of Members of Local Board—Disqualification of Member—Lease of Sewage Farm by Local Board to Member—38 & 39 Vict. c. 55 (Public Health Act, 1875), ss. 27 and 29, and Schedule II. rule 64.

A lessee of lands from a local board under a lease, by which he covenants to cultivate them as a sewage farm, and use upon them all the sewage to be supplied, the board covenanting to deliver to him all the sewage of their district, is not disqualified from being elected or continuing a member of the board within the meaning of rule 64 of Schedule II. of the Public Health Act, 1875.

In this case a rule *nisi* for a mandamus had been obtained, directed to the chairman of the Local Board of Altrincham, in his capacity of returning officer, calling upon him to shew cause why the writ should not issue commanding him to certify Mr. John Newton as duly elected a member of the Local Board at the last annual election.

It appeared that there were eight candidates for the four vacancies to be filled up by the election of members of the Local Board of Altrincham at the election to be held at the beginning of April, 1880. Newton was one of the

candidates, and was duly nominated. When the votes were counted on the 8th of April Newton's name stood third, as having obtained the third largest number of votes. The returning officer, who had previously objected to Newton's candidature on the ground of his being disqualified as having a contract with the board to take the sewage, returned as elected only the two persons highest on the list.

The board, in 1876, had taken on lease some land for the purpose of using it in the disposal of their sewage, and on the 29th of September, 1876, they demised this land to Newton for a term of five years, at a rent a little below that which they themselves paid for it, and the demise contained the following covenants. The lessee covenants "to use and cultivate the said premises as a sewage farm, according to the best approved method of cultivation in the neighbourhood, and the rules of good husbandry, and the stipulations hereinafter contained, and will use all the sewage to be supplied as hereinafter mentioned upon the said premises, and will not turn, or allow to be turned, into the brooks or watercourses in the said premises, any sewage except in case of overflow caused by storm, but shall use the same entirely for fertilising the land, and will indemnify the board from all actions, &c., in respect of any nuisance caused by any improper usage of sewage, or owing to sewage matter being allowed to run into the brooks or watercourses of the said premises except in the case of overflow as aforesaid." The board covenants "to deliver on the said premises all the sewage made in the district, free of expense, to the said John Newton, or such quantity thereof as the present 21-inch pipe will deliver."

Rule 64 of Schedule II. to the Public Health Act, 1875, provides, under the head of "Disqualification of Members"—"Any member who accepts or holds any office or place of profit under the Local Board of which he is member, or in any manner is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, or of any work done under the authority of this Act in or for the district, shall, ex-

The Queen v. Gaskarth, Q.B.

cept in the cases next hereinafter provided, cease to be such member, and his office as such shall thereupon become vacant: Provided that no member shall vacate his office by reason of his being interested in the sale or lease of any lands, or in any loan of money to the Local Board."

Lumley Smith and C. A. Russell shewed cause.—The first ground on which this mandamus is asked for is that there is no duty in the returning officer to decide whether the candidate is disqualified or not, but that he ought to certify as elected those candidates who have obtained the greatest number of votes. But the Court would not issue a mandamus when satisfied that the disqualification existed, for it could have no effect—*Re The Bristol and North Somerset Railway Company* (1).

[FIELD, J.—Might he not give up his contract on being elected?]

It is contended that, by virtue of rules 42 and 52 of Schedule II. (2), a person is only to be certified as elected if duly qualified; and at the time of the return Newton was disqualified. Then if he were returned as elected, and did not choose to act, there would be no remedy under rule 70, which only applies to an unqualified person acting, and by section 253 no one but a person aggrieved can sue for penalties. The second point is that the contract to take the sewage is not a disqualifying contract. But it clearly is, within the words of rule 54, a bargain or contract entered into by the board; and it cannot be brought within the exception a "lease of lands to the

board." Even if the exception be not limited to a lease to the board, but includes one by them, yet here the contract is the principal thing, and the letting of the land only an incident.

E. S. Wright, in support of the rule.—There is a distinction between an incapacity for being elected and a disqualification after election. The Act and rules were modelled on the Municipal Corporations Act, under which it has been held that the words "shall cease to be member" do not cause an immediate vacation of the office.

But the main contention here is that there is no disqualification. This is a lease of lands, and so within the exception. That exception is to be read as if there were a stop after lands; and it applies to any sale or lease of lands by or to the board. Referring to sections 27 and 29 of the Act, the powers of the board as to taking and granting leases for the purpose of disposing of sewage will be seen. This is just like an ordinary farming lease, with covenants as to manure.

He referred to *Le Feuvre v. Lancaster* (3).

LUSH, J.—If we had been of opinion that Mr. Newton came within the disqualification enacted in the 64th rule we should not, in the exercise of our discretion, let this rule go, because, even assuming that Mr. Newton might be a candidate, and might be returned as elected, he would, by virtue of that rule, immediately after election become disqualified, and cease to be a member. But upon further consideration of his position I do not think that he comes within the disqualifying effect of rule 64 at all; for there is a proviso to that rule creating certain exceptions to the general enactment. We must, then, go back to sections 27 and 29 of the Act to see the meaning of this proviso. Now section 27 enacts that, "for the purpose of receiving, storing, disinfecting, distributing or otherwise disposing of sewage, any local authority may contract for the use of, purchase, or take on lease, any land," &c. In the present case it appears that

(1) 47 Law J. Rep. Q.B. 48; Law Rep. 3 Q.B. D. 10.

(2) Public Health Act, 1875, Schedule II. rule 42—"If the number of persons nominated and not withdrawn is the same or less than the number of persons to be elected, such persons (if duly qualified) shall be deemed, and shall be certified by the returning officer under his hand, to be elected."

Rule 52—"The candidates to the number to be elected, who, being duly qualified, have obtained the greatest number of votes, shall be deemed, and shall be certified by the returning officer under his hand, to be elected, and to each person so elected the returning officer shall forthwith send or deliver notice of his election."

(3) 3 E. & B. 530; 23 Law J. Rep. Q.B. 254.

The Queen v. Gaskarth, Q.B.

the local board had taken on lease a considerable quantity of land. Then section 29 says that "any local authority may deal with any lands held by them for the purpose of receiving, storing, disinfecting or distributing sewage in such manner as they deem most profitable, either by leasing the same, for a period not exceeding twenty-one years, for agricultural purposes, or by contracting with some person to take the whole or part of the produce of such land, or by farming such land, and disposing of the produce thereof."

So the local authority by these sections is empowered to purchase or lease lands, and then to lease them out again, for the purpose of their being used as a sewage farm. I think that this at once gives the key to the meaning of rule 64, which provides that "no member shall vacate his office by reason of his being interested in the sale or lease of any lands." I am of opinion that the comma put in the old Act at this point properly indicated the meaning of the section, and of this rule framed from the section, and what is meant is a lease of lands within the meaning of section 29, and that such is not to be considered as a bargain or contract entered into with the board so as to create a disqualification. The words must comprehend a lease by as well as to the board. Now the lease here is strictly, in my opinion, one within section 29. On the one hand the lessee covenants to cultivate the premises properly as a sewage farm and take all the sewage, and the board, on the other hand, covenants that they will deliver on the premises all the sewage made in the district. That seems to me exactly what was intended by section 29, and it follows that Mr. Newton is not a person interested in a contract, but is a lessee of lands, subject, like all lessees, to covenants. I think, therefore, the rule should be made absolute.

FIELD, J.—I have arrived at the same conclusion, and without any doubt. The disqualification is alleged to rest on the words in rule 64—"A person who is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, or of any work done under

the authority of this Act, in or for the district." Mr. Newton is, in fact, concerned in a lease of lands, and that lease involves a contract with the board. But it is said on his behalf that, having a lease, he comes within the exception of the rule. Now the words in the exception are general—"interested in the sale or lease of any lands"—but they must of course mean connected with the local board. But one of the most important duties of the board, of disposing of sewage, may be carried out, as appears from section 29, by leasing land to some one for agricultural purposes; so that by such lease they get rid of the whole of the sewage. That is exactly what has been done by the local board in the present case, and it is impossible to say that this is not a lease of land to Mr. Newton. I think, therefore, that he is within the exception, and is not disqualified, and the rule he asks for must be made absolute.

*Rule absolute for a peremptory
mandamus.*

Solicitors—Edwin Andrew, for the prosecution;
Bower & Cotton, agents for Nicholls, Hinde &
Co., Altrincham, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]
1879. }
Dec. 3. } THE QUEEN v. PADBURY.

Bastardy Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4—Order of Affiliation—Mistake in drawing up Order—Omission of Words "Maintenance and Education"—Amendment—12 & 13 Vict. c. 45. s. 7.

[For the report of the above case, see
49 Law J. Rep. M.C. 55.]

[IN THE COMMON PLEAS DIVISION.]
 1880. } THE SHANKLIN LOCAL BOARD v.
 April 30. } MILLER.

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257—Apportionment of Expenses incurred in paving Street—Deposit of Plans.

An apportionment of expenses duly incurred by a local board under section 150 of the Public Health Act, 1875, in the paving, &c., of streets was served on the owner of premises fronting the same. The apportionment mixed up the expenses of more than one street, but the owner not having objected within the three months provided by section 257, it was held that it was too late to raise an objection to the apportionment which thenceforward became valid and binding.

The deposit of plans and estimate of the works intended to be executed under section 150, and by that section directed to be made for the inspection of all persons interested, is not a condition precedent to the validity of all subsequent proceedings.

Cook v. The Ipswich Local Board, 40 Law J. Rep. M.C. 169; Law Rep. 6 Q.B. 451.

Special Case stated on appeal from the County Court of Hampshire holden at Ryde.

SPECIAL CASE.

1. This is an action to recover a sum of 6*l.* 1*1s.* 1*d.* The following is a copy of the plaintiffs' particulars of claim annexed to the summons.

"Amount of your proportion (as settled by the surveyor to the said local board, and of which you have had due notice) of the expenses incurred by the plaintiffs in the execution of the works mentioned or referred to in certain notices, under the provisions of section 150 of the Public Health Act, 1875 (1), duly served upon

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150. After giving power to the urban authority by notice to the owners and occupiers of premises fronting a street, to require them to sewer, level, pave, &c., the same within a time to be specified in such notice, provides that "plans and sections of any structural works intended to be executed, and an estimate of the probable cost thereof, to be made under the direction of the surveyor . . . shall be deposited in the office of the

you on the 6th of March, 1877, to level, pave, metal and channel parts of certain streets called Osborne Road and Palmerston Road within the district of the said local board, upon which certain premises of which you are the owner, front, adjoin or abut, and which notices were not complied with by you" (2).

2. The action was tried before P. M. Leonard, Esq., the Judge of the said County Court, at the Court held at Ryde on the 15th day of August, 1879, when judgment was reserved.

3. At the trial the following facts were proved or admitted:—

(1) The settlement of the boundaries of the district in 1863.

(2) The adoption of the Local Government Act.

(3) That at the time of the adoption of the Act the streets in question had not been formed.

(4) That the bye-laws provide that the office of the board shall be open on Mondays and Thursdays from 10 till 3.

(5) That on the 6th of March, 1877, the plaintiffs served upon the defendant two notices; one to kerb, channel, metal, &c., in respect of premises, fronting, &c., on Osborne Road, and the other in respect of premises, fronting, &c., on Palmerston Road.

4. That previous to the serving of the notices a plan in accordance with the terms of section 150 of the Public Health Act, 1875, was deposited at the offices of the plaintiffs. There was also at the time deposited an estimate of the probable cost.

urban authority, and shall be open at all reasonable hours for the inspection of all persons interested therein during the time specified in such notice.

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act."

(2) The notice of apportionment was served on the defendant as "owner of certain premises, fronting, &c., upon certain streets or highways called Osborne Road and Palmerston Road."

Shanklin Local Board v. Miller, C.P.

5. That the defendant failed to comply with the notices, and that the plaintiffs in the months of September and October, 1878, executed a certain portion only of the works required by the notices to be executed.

6. That the board's surveyor then made the apportionment of the expenses incurred by the board for levelling, paving, metalling and channelling Osborne Road, Palmerston Road, Park Road and Park Cross Road, or some or one of them, situate in the district of the local board of Shanklin.

7. That notice of the apportionment of the expenses incurred so far as the defendant was concerned was duly served on the defendant.

8. That no notice of his intention to dispute such apportionment was given by the defendant, and that no memorial had in pursuance of section 268 of the Public Health Act, 1875, been addressed by the defendant to the Local Government Board.

At the hearing it was proved by the witnesses called on behalf of the plaintiffs that the estimate deposited with the plan was not prepared under the direction of the surveyor to the plaintiffs, and that the plaintiffs laid down a sewer and executed certain repairs from time to time in Palmerston Road, and that such road had been for some years used as a public thoroughfare.

Judgment was given for the defendant on the following grounds.

That no estimate prepared under the direction of the surveyors of the plaintiffs of the probable cost of the works required to be executed was deposited, with the plans and sections, at the office of the plaintiffs. That by section 150 of the Public Health Act, 1875, the deposit of such an estimate is a condition precedent to the plaintiffs' right to recover, and that the plaintiffs were not relieved from proving their compliance with the direction of that section by the fact of the defendant not having appealed to the Local Government Board under section 268 of the Act. That the estimate which had been deposited with the plan and sections was an estimate prepared by Mr. Francis Newman without the direc-

tion and authority of the surveyor of the local board, and was moreover an estimate of the cost of proposed works upon five roads, including Palmerston Road.

That the said Francis Newman was not the surveyor of the local board.

That the apportionment, being an apportionment of the expenses incurred in repairing five or more roads was bad in law.

That the opportunities afforded to the defendant of inspecting the documents deposited were not, in the opinion of the County Court Judge, reasonable.

That Palmerston Road had been a thoroughfare for some years.

That the plaintiffs had constructed and maintained a main sewer through it, and had repaired the road from time to time, and having exercised such rights, the road had become dedicated to the use of the public and adopted by the plaintiffs.

Archibald for the plaintiffs.

J. F. Olerk, for the defendant, relied on two grounds to support the judgment of the County Court. First, that the apportionment was a nullity, being an apportionment in respect of the expenses of several streets. Secondly, that the opportunities afforded to the defendant of inspecting the documents were unreasonable. The following authorities were cited:—

Hesketh v. The Atherton Local Board (3); *Nesbitt v. The Greenwich Board of Works* (4); *Oook v. The Ipswich Local Board* (5).

DENMAN, J.—This case might give rise to difficulty if it were before a Court of superior jurisdiction, but in deciding the objections raised by the defendant, we are guided by the decision of Courts of co-ordinate jurisdiction. The first objection raised by the defendant to the right of the plaintiffs to recover in this action is that the apportionment is invalid because the expenses of more than

(3) 43 Law J. Rep. M.C. 37; Law Rep. 9 Q.B. 4.

(4) 44 Law J. Rep. M.C. 119; Law Rep. 10 Q.B. 485.

(5) 40 Law J. Rep. M.C. 169; Law Rep. 6 Q.B. 451.

Shanklin Local Board v. Miller, C.P.

one street are mixed up, and it is contended that in accordance with *Cook v. The Ipswich Local Board* (5) such an apportionment is a nullity. But after fully considering that case, and the judgment of the Lord Chief Justice, I come to the conclusion that all that there is decided is that the apportionment was so far a nullity, that it did not stand in the way of a subsequent apportionment, but the case does not seem to me to decide that if the apportionment is not objected to, and no steps are taken to set it aside, then it may be treated as a nullity.

The present case turns on sections 150 and 257 of the Public Health Act, 1875. Section 257 (6) shews the apportionment to be binding and conclusive, unless certain things are done which have not been done in the present case, and there being no authority to shew that the apportionment was absolutely a nullity so as to be treated as a nullity at a later stage, I am of opinion that the first objection raised by the defendant fails. Where an apportionment has been made which may be properly objected to within a certain time, the owner on whom it is made cannot, after having let that time go by, turn round and dispute the apportionment on the ground that it is a nullity.

The other objection raised by the defendant is, that the opportunities afforded to the defendant of inspecting the documents deposited were not in the opinion of the County Court Judge reasonable. The answer to this objection turns on section 150 of the Public Health Act, 1875. Without saying there may not be extreme cases in which the Act is not complied with by reason of some misconduct on the part of the authorities, it appears to me there is no such non-compliance in the present case. The County Court Judge does not expressly

(6) Section 257. Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of such notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same.

find the opportunities to have been reasonable or unreasonable, but has drawn a conclusion that there should have been greater opportunities than were afforded. Such a finding does not call on the Court to pronounce the whole proceedings a nullity. It may be there should be larger opportunities, but suffice it to say that the dictum of Blackburn, J., in *Cook v. The Ipswich Local Board* (5), in which that learned Judge lays down that the deposit of plans is not a condition precedent, but a matter of discretion, is binding on us. The dictum was as applicable to that case as it is to this, and consequently the mere finding of the County Court Judge that the opportunities were in his opinion unreasonable, is not sufficient ground to authorise the party objecting to upset the whole proceedings. There is no finding that the defendant was prejudiced, and it seems rather as if he chose to lie by without taking proper objection to the whole proceedings, because he felt he had no merits on which he could object. In my judgment the apportionments should be binding unless properly objected to within the conditions of section 257, and the judgment of the County Court Judge was wrong and must be reversed.

LOPES, J.—I also think the plaintiffs are entitled to judgment. The defendant relies on two grounds; first, that the apportionment was a nullity. This objection appears to me to be taken too late. It is not necessary in my judgment to pronounce whether the apportionment was a nullity or not, but I will assume it was a nullity.

Then the question depends upon section 257. In my opinion the words of that section are conclusive and binding on us, and the objection to have been duly taken should have been taken within the three months of the service of notice. The policy of the Legislature obviously is to prevent such matters from being reopened after the expiration of three months.

The other point raised by the defendants is, that the opportunities of inspection were not reasonable. Here again it is unnecessary to decide whether the opportunities were reasonable or not, but

Shanklin Local Board v. Miller, C.P.

I will assume they were unreasonable. Then the objection could have no effect unless it were a condition precedent. In *Cook v. The Ipswich Local Board* (5) Blackburn, J., says, "It appears to me to be only directory, there is nothing to make the deposit of plans a condition precedent so as to make void the notices and prevent the expenses from being recoverable." It is true, as was pointed out, that this is a dictum, but I have no hesitation in saying I entirely agree with it.

On these grounds I think the plaintiffs are entitled to succeed.

Judgment for plaintiffs. Leave to appeal.

Solicitors — F. Needham, agent for J. Marsh, Ventnor, for plaintiffs; Wood, Latham & Biggs, agents for W. H. Wooldridge, Sandown, for defendant.

Whitecross Lane Sanit. Bd v. L & L 417
Sunderland v. Wallace 52 L.R. 394
 [IN THE COURT OF APPEAL]
 1880.
 Feb. 23, 24, } ATTWOOD AND OTHERS v.
 25, 26. } SELLAR.*
 March 24. }

Ship and Shipping—Marine Insurance—General Average Contribution—Port of Refuge—Expenses of Warehousing and Reshipping Cargo—Pilotage and Port Charges—Practice of Average Adjusters inconsistent with Law.

Where a ship is compelled to put into port to repair damage occasioned by a general average sacrifice, the expenses of warehousing and re-shipping cargo, necessarily unloaded in order to repair, and the port and pilotage charges and other expenses on leaving the port, are the subject of a general average contribution.

Judgment of the Queen's Bench Division affirmed.

Appeal from a judgment for the plaintiffs of the Queen's Bench Division on a Special Case.

The case in the Court below is fully

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

reported, and the Special Case set out, 48 Law J. Rep. Q.B. 465.

For the purposes of this report the facts and arguments are sufficiently stated in the judgment of the Court of Appeal (*post*).

Oohen and J. O. Mathew, for the plaintiffs.

Butt and Fullarton, for the defendants.

In addition to the authorities mentioned in the judgment, the following were cited:—*Newman v. Oaselet* (1), *Simonds v. White* (2), *Mavro v. The Ocean Marine Insurance Company* (3), *Wilson v. The Bank of Victoria* (4), *Blasco v. Fletcher* (5).

Our. adv. vult.

THESIGER, L.J. (on March 24), delivered the judgment of the Court as follows:—

The question raised by this appeal is whether, in the case of a vessel going into port in consequence of an injury which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and the expenses incurred for pilotage and other charges on the vessel leaving the port, are also the subject of general average.

The matter came before the Court below in the form of a Special Case, and upon it the Court decided in favour of the plaintiffs, who assert that the expenses in question are the subject of general average.

The Special Case states a long continued practice of British average adjusters in adjusting losses, in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, the expense of warehousing it as

(1) Park. Ins. 8th edit. 900.

(2) 2 B. & C. 805.

(3) 43 Law J. Rep. C.P. 339; Law Rep. 9 C.P. 595.

(4) 36 Law J. Rep. Q.B. 89; Law Rep. 2 Q.B. 203.

(5) 14 Com. B. Rep. N.S. 147; 32 Law J. Rep. C.P. 284.

Attwood v. Sellar (App.), Q.B.

particular average on the cargo, and the expense of the re-shipment of the cargo, pilotage, port charges and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. It has not, however, and could not reasonably be contended that the practice could be put so high as a custom impliedly incorporated in the contract between the parties, and during the course of the argument we intimated our opinion, founded upon the language of the Special Case with regard to the practice, and especially the language of the 5th paragraph, that the question between the parties must be decided in accordance with legal principle and authority which the practice of the average adjusters professes to follow. The law governing the case is admittedly English law, for the expenses in dispute arose upon a voyage, the proper and actual termination of which was an English port. As a matter of principle we are clearly of opinion that the judgment of the majority of the Court below in favour of the plaintiffs was right. The principle which underlies the whole doctrine of general average contribution is that the loss immediate and consequential caused by a sacrifice for the benefit of cargo ship and freight should be borne by all. This principle is in the abstract conceded by counsel for the appellants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods, for the purpose of doing the necessary repairs to the vessel to enable it to proceed on its voyage, to be the subject of general average contribution; but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded, and that general average ceases at the point of time when the common danger is at an end. The proposition is, as will appear later, sound when applied to cases in which a ship is damaged by a peril of the sea, and in which, before any voluntary sacrifice, such as putting into an intermediate port, is made, the goods are unshipped and in

safety, but its application to a case like the present is not admissible. A vessel which has put into port to repair an injury occasioned by a general average sacrifice may be and generally is when in port in perfect safety, and if by the expression "common danger" he meant danger of actual injury to vessel and cargo, there is no more danger to the goods when on board the vessel being in port than when stowed in a warehouse on shore; and indeed in many cases only a portion of the goods is removed from the vessel in order to do the repairs to her while the remainder of the goods is left on board. If on the other hand by "common danger" he meant the danger of the vessel with her cargo being prevented from prosecuting her voyage, then there is no more reason why the expenses of warehousing and reloading, and the expenses incurred for pilotage and other charges, paid in respect of the vessel leaving port and proceeding upon her voyage, should not constitute general average, than there is reason for saying that unloaded and warehoused goods should not contribute, as it is clear in a case of voluntary sacrifice that they must, to the expenses of the necessary repairs to the vessel. Both classes of expenses are extraordinary expenses consequent upon the voluntary sacrifice and are necessary for the due prosecution of the voyage by the vessel with her cargo. Neither class can as a general proposition be said to be incurred exclusively for the benefit of either vessel or cargo. In some cases it might be for the interest of a shipowner to terminate the voyage at the port where his vessel puts in to repair a disaster, while it would be all important for the goods owner to have his goods carried on by the same vessel; in other cases the position of the parties in this respect might be reversed. But however this may be, the going into port, the unloading, warehousing and reloading of the cargo, and the coming out of port, are at all events parts of one act or operation contemplated resolved upon and carried through for the common safety and benefit, and properly to be regarded as continuous. The shipowner is at least entitled to reship the goods and pro-

Attwood v. Sellar (App.), Q.B.

secute his voyage with them, and the expenses necessary for that purpose, being "*ex hypothesi*" consequent upon a damage voluntarily incurred for the general advantage, should legitimately be the subject of general average contribution, or, to use the language of Lord Tenterden in his work on shipping—"If the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal."

But it is said for the appellants that if this be so, and the principle be carried out to its logical consequences, expenses incurred for wages of crew and provisions should equally form the subject of general average, and that, inasmuch as it is as they suggest undeniable that they do not, the principle itself must either be faulty or at least not recognised in English law. As a matter of fact it is extremely doubtful whether the expenses for wages of crew and provisions in a port of refuge have ever been disallowed by our Courts as constituting a claim for general average in a case where a ship has put into the port to repair damage itself belonging to general average; but even if the assertion were correct the conclusion drawn would by no means follow.

That the principle in question is not faulty we have endeavoured to shew in the observations already made, and the view we have taken upon the point is strongly confirmed by the fact that it is recognised and carried to its so called logical consequences as regards the wages of crew and provisions in all other countries than our own.

That the principle is not recognised in English law is not proved by shewing that expenses incurred for wages of crew and provisions have been under certain circumstances disallowed as the subject of general average, unless it be at the same time shewn, which it has not been to us, that they have been disallowed upon grounds that negative the principle, and is disproved if it be found that the expenses in question in this case have been allowed. All that in such a case can be said is either that the Courts

have made a mistake in limiting the application of the principle, or that its limitation is due to some real or supposed rule of public policy. If then the question before us stood only upon principle, we should have no hesitation in deciding it according to the principle we have stated, and it at least may fairly be asked, what other principle, if it be not correct, is to be substituted in its place? But the authorities remain to be considered, and it is the more necessary that they should be examined with attention seeing that the practice of the average adjusters professes to follow them. In *Plummer v. Wildman* (6) a ship put back into port to repair damage partly caused by a collision with another ship, and partly by a cutting away of part of the rigging of the bowsprit to which the master was compelled in consequence of the previous injury due to the collision, and which it was contended for the shipowner was a general average cause. The cargo was necessarily landed and warehoused in order that such temporary repairs might be done as would enable the ship to prosecute her voyage, and such repairs having been done, and a portion of the cargo sold to defray expenses, the remainder of the cargo was reloaded and the ship proceeded to her port of destination. Among other expenses claimed as general average were the expenses of repair necessary to enable the ship to prosecute her voyage, the expenses of unloading and reloading the cargo, the master's expenses at five dollars *per diem* during the unloading, repairing and reloading, and expenses for crimpage to replace deserters during the repairs. The question for the Court was whether the case was one of general average, and if so to what extent.

It is a little difficult to gather from the judgments in the case what was the exact view of the different members of the Court who delivered judgment as to the separate heads of claim. Lord Ellenborough appears to have decided that only the captain's expenses in port and crimpage were to be disallowed. Le Blanc, J., said that the unloading might be general

Attwood v. Sellar (App.), Q.B.

average if it were necessary in order to repair the ship, but leaves it in doubt whether the expenses of reloading would or would not follow. Bayley, J., deals only with the question how much of the repairs should be allowed as general average, which was the principal question as regards items. Lord Ellenborough, however, laid down that, if the return to port was necessary for the general safety of the whole concern, the expenses unavoidably incurred by such necessity might be considered as the subject of general average, and that it was not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements or the collision with another ship, as whether the effect produced was such as to incapacitate the ship from further prosecuting her voyage, without endangering the whole concern, unless she returned to port and removed the impediment. But in the same year as that in which *Plummer v. Wildman* (6) was decided, the case of *Power v. Whitmore* (7) came before the same Court. In that case the cause of damage was a peril of the sea, and the ship having in consequence of it been compelled to go into port for the safety of ship and cargo, a claim to have the wages and provisions of the crew during the stay in port, and the expenses of repair treated as general average, was made. The claim was, however, disallowed, and Lord Ellenborough, in delivering the judgment of the Court, took occasion to qualify the proposition laid down in *Plummer v. Wildman* (6), and to explain and justify the decision in that case upon the ground that there the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he had sacrificed. The judgment, then, in *Power v. Whitmore* (7) must be taken to recognise that there is in reference to port of refuge expenses claimed as general average, a distinction between the case of a vessel putting into port to repair in consequence of a voluntary sacrifice, and the case of a vessel so putting into port in consequence of an ordinary peril of the

seas, although in both cases the putting into port itself may equally give rise to a claim for general average contribution. In *Hallett v. Wigram* (8), Cresswell, J., in speaking of *Power v. Whitmore* (7), said that Lord Ellenborough had there stated the rule according to what had always been and still was understood to be the law as to general average. Wilde, C.J., in the same case quoted the following passage from the 8th edition of *Abbott on Shipping*, p. 478—"Thus if it be necessary to unload the goods in order to repair the damage done to a ship by a tempest or by collision with another vessel, so as to enable her to prosecute and complete her voyage, it has been held that the expense of unloading, warehousing and reshipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary for the completion of the voyage;" and added that the reason there assigned might be applicable to the case the author had in his mind—*Plummer v. Wildman* (6); but that as a general proposition it was too large. The Chief Justice then pointed out that the decision in *Plummer v. Wildman* (6) had been explained in *Power v. Whitmore* (7) upon the ground that the expenses were consequent upon a voluntary sacrifice, and quoted, apparently with approval, the following passage from Abbott, 8th ed. p. 497—"It seems to result from these decisions that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages and provisions during the stay, are to be considered as general average, but if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner 'to keep his vessel tight, staunch and strong' during the voyage for which she is hired." The actual decision in *Hallett v. Wigram* (8)

(8) 9 Com. B. Rep. 580; 19 Law J. Rep. C.P. 281.

(7) 4 M. & S. 141.

Attwood v. Sellar (App.), Q.B.

was that a claim to general average does not arise where a part of the cargo is sold to raise money at a port to which a ship has put back for the repair of damage incurred by ordinary perils of the sea. That case was decided in 1850, *Power v. Whitmore* (7) in 1815, and we have, therefore, the law as laid down by the Courts for a considerable portion of the period over which the practice of average adjusters stated in the Special Case extends running counter to that practice by recognising, as regards port of refuge expenses, a distinction between cases where a ship puts into a port of distress for repair of damage caused by a voluntary sacrifice, and cases where it so puts in for repair of damage caused by peril of the seas, and admitting in the former cases, as a matter of principle, if not of express decision, expenses such as those in question in this case to be the subject of general average contribution.

This distinction in principle is to be found asserted by Benecke, who was a member of Lloyds, in his valuable work on the principles of Indemnity in Marine Insurance, published in 1824. At page 191 he says, "If, setting aside all laws and received opinions, the case is examined merely according to the fundamental maxims which regulate general and particular average, it will in the first instance appear evident that not only all the port charges, such as pilotage, harbour dues, lighterage, &c., but also the charges of unloading and reloading, repairs and crews' wages, will be general average if the ship put into port for the mere purpose of repairing a damage voluntarily incurred for the general advantage. For all these expenses being the necessary consequences of a measure taken for the general benefit belong to general average;" and then turning to the case where the port is entered in consequence of a particular damage sustained by which the vessel is rendered unfit to prosecute her voyage, as when masts, sails, or other requisite apparel are lost in a storm, or the vessel has sprung a dangerous leak, he adds, "All the expenses of entering the port are a subject of general average, being the consequence of a measure voluntarily taken for the preservation of the whole. But as soon as the object of

putting the vessel and her cargo in safety is accomplished the cause for general contribution ceases; for whatever is subsequently done is not a sacrifice for the benefit of the whole or for averting an imminent danger, but is the mere necessary consequence of a casual misfortune." Benecke thus claims the allowance even of wages of crew and provisions where the putting into port is the consequence of a damage belonging to particular average. On the other hand, he contends for the disallowance even of the expenses of unloading cargo where it is the consequence of a damage belonging to particular average. In *Stevens on Average* and *Bailey on Average*, the distinction referred to is not adopted, except as regards the repairs of the ship, but both writers assert as a matter of principle that where a ship necessarily puts into a port to repair damage, whether the original cause of damage be a voluntary sacrifice or an ordinary peril of the sea, and the expenses of warehousing and reloading, as well as those of unloading the cargo, and the outward as well as inward port charges should be the subject of general average contribution. See *Stevens*, p. 22, and *Bailey*, p. 119. They look not to the more remote damage, which undoubtedly was a particular average loss, but to the proximate act of putting into port for the safety of ship and cargo which would belong to general average, and in answer to the argument that their views, if logically carried out, would lead to the allowance as general average of the cost of repair of the ship, *Bailey* (at p. 119) replies that the damage which necessitated that repair being caused by a peril of the sea, the repair should be treated as particular average, but that the ship does not put into the port of refuge because she wants repairs, but because the voyage cannot be continued until she is repaired, or a total loss of ship and cargo will follow if she does not go into port. He adds, "The immediate cause for putting into the port of refuge is the impossibility of completing the voyage in her then state, or the expected loss of ship and cargo; the damage which the ship has sustained is the remote cause only, for under other circumstances the crew are not justified in

Aitwood v. Sellar (App.), Q.B.

putting into port although the vessel may have sustained damage which it will be necessary ultimately to repair."

The views thus expressed are substantially those which are recognised in American law and practice, and they are carried out to the length of including the expense of wages of crew and provisions at the port of refuge in the amount to be contributed for in general average, in all cases where a vessel puts into port for the common safety, whether owing to injury from a peril of the sea or a voluntary sacrifice. See *Phillips on Insurance*, 3rd ed. secs. 1322, 26, 28. To return to the text writers of this country, Mr. Arnold in his work upon Marine Insurance, 3rd ed., vol. ii., p. 789, after discussing the principles relating to general average, says, "From these principles it follows that where a ship has either cut away her masts and rigging, or has been so damaged by a storm that it is necessary for the safety both of ship and cargo to put into a port of distress for repairs, all the expenses inseparably connected with the act of first putting into, and afterwards clearing out of such a port of distress, give the shipowner a claim to a general average contribution; and this upon the plain ground that these expenses are a necessary consequence of an extraordinary measure taken for the general preservation." Neither of the already cited cases of *Whitmore v. Power* (7) and *Hallett v. Wigram* (8), is a direct authority against the proposition just quoted, except so far as the disallowance of the expenses for wages of crew and provisions in the former case can be said to be such; for, as pointed out, the main subject of contention in those cases was the claim for expenses of repair made notwithstanding that such repair was in each case rendered necessary in consequence of injury caused by ordinary perils of the sea; and neither the expenses of unloading, warehousing, reloading cargo, or port or pilotage charges came in question. The case of *Hall v. Janson* (9), decided in 1855, is, on the contrary, direct authority in favour of the proposition that the expense of reloading as well as of unloading cargo

constitutes a claim to general average contribution, even though the original cause of putting into port was a particular average loss. There, in an action upon a policy of marine insurance, a count of the declaration stated that the ship had been damaged by stormy weather, and forced to go into a port for repair in order to enable her to prosecute her adventure and proceed on her voyage, and had there incurred expenses, *inter alia*, in and about unloading and reloading cargo which was necessarily unloaded for the repair of the ship. This count was upon demurrer held good as shewing the accruing of a general average loss, and Lord Campbell, in delivering the considered judgment of the Court of Queen's Bench upon the point, said, "Now the expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship that she may be capable of proceeding on the voyage, have been held to give a claim to general average contribution; for the acts which occasion these expenses become necessary from perils insured against, and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo and the freight;" and after citing *The Copenhagen* (10), *Plummer v. Wildman* (6) and *Stevens on Average*, as authorities in support of the proposition, he added, "This doctrine is quite consistent with what is laid down in *Power v. Whitmore* (7), and the other cases relied upon by Mr. Wilde." It is not necessary for us to decide in the present case whether *Hall v. Janson* (9) was rightly decided, and whether the expenses in dispute in the present case would properly belong to general average if the original cause of damage to the ship had only been a cause belonging to particular average. If, however, the Court of Queen's Bench, in the judgment just quoted, and the several text writers other than Benecke, from whom we have quoted, are right in the proposition affirmed by them, and the expenses would in such a case belong to general average, it follows, *a fortiori*, that they would so belong when, as is the fact here, the original cause was a voluntary sacrifice, while

(9) 4 E. & B. 500; 24 Law J. Rep. Q.B. 97.

(10) 1 C. Rob. 289.

Attwood v. Sellar (App.), Q.B.

on the other hand, even if the proposition laid down in *Hall v. Janson* (9), and supported by the text writers referred to, were too wide, there would still be left a consensus of opinion to the effect that in such a case as the present at least the expenses in question must be treated as constituting a claim to general average contribution. In either case the practice of average adjusters as stated in the special case would be erroneous, and it is to be gathered from a recent edition of a modern work on the Law of General Average, by Mr. Lowndes, himself also an average adjuster of experience (2nd ed. p. 107), that as regards port of refuge expenses, where the bearing up into port is necessitated by a sacrifice, the principle that they should be treated as general average is, apart from his own practice which gave rise to the present action, at least beginning to be recognised in the practice of adjusters and underwriters. The two cases of *Job v. Langton* (11) and *Walthev v. Mavrojani* (12) do not really touch the point. In each of those cases a vessel having been accidentally stranded so that the damage thereby caused was only a particular average loss, was got off and taken into port for repair at considerable expense after the cargo had been unshipped, landed and warehoused in safety. It was attempted unsuccessfully to make the cargo contribute to such expense as general average. There can be no doubt as to the correctness of the decisions in those cases, for the whole basis of any general average claim was gone as soon as the cargo was unshipped. The vessel was got off and put into port for repair, not to avert a loss to the whole adventure, but to repair the particular average damage. Lord Campbell delivered the judgment of the Court in *Job v. Langton* (11), and in the course of the judgment said, "That the stranding was fortuitous, arising directly from perils of the sea, and that the expenses must, therefore, in order to constitute general average, be brought within the category of extraordinary expenses incurred for the joint benefit of ship and cargo." And it

is obvious from the whole judgment that Lord Campbell not only did not consider that his observations would be applicable to the case of a voluntary sacrifice, but also did not consider that there was any conflict between his then decision and his former judgment in *Hall v. Janson* (9). There is nothing in the judgments in *Walthev v. Mavrojani* (12) which alters the case.

The result of this review of the authorities is to confirm the opinion which, apart from authority, we entertain and have already expressed upon the questions submitted to us.

The practice, then, of the average adjusters, as stated in the special case, appears to us to be neither founded upon true principles nor to be in accordance with the views of the text writers, and so far as there is case authority upon the matter it appears to us to be opposed to legal decisions.

It is a practice, too, which has not been, as the practice in *Stewart v. The West India and Pacific Steamship Company* (13) was, made a part of the contract between the parties, and therefore it constitutes no impediment to our giving effect to the objections to its validity; and in deciding, as we do, that the judgment of the majority of the Court below was right and should be affirmed, it is satisfactory to us to know that the law as laid down in the judgment of the Court below and of this Court is placed upon a footing which more nearly assimilates it, in matters in which assimilation is desirable, to the law obtaining in other mercantile and maritime communities.

Judgment affirmed.

Solicitors—Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiffs; Parker & Clarke, for defendants.

(11) 6 E. & B. 779; 26 Law J. Rep. Q.B. 97.

(12) 39 Law J. Rep. Exch. 81; Law Rep. 5 Exch. 116.

(13) 42 Law J. Rep. Q.B. 84, 101; Law Rep. 8 Q.B. 88, 362.

Mingworth v. Bulmer 53 L.J. M.C. 60.

[IN THE COURT OF APPEAL]

(Appeal from the Queen's Bench Division.)

1879. } THE QUEEN, on the prosecution
Dec. 6. } of J. HINTON, v. THE SWINDON
1880. } NEW TOWN LOCAL BOARD.*
April 30. }

Practice—Appeal—Case reserved by Quarter Sessions for the Opinion of a Superior Court—Leave to Appeal—Judicature Act, 1873, s. 45—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269, sub-sect. 7.

The Public Health Act, 1875, provides in certain cases for an appeal from petty sessions to quarter sessions, and provides that the quarter sessions may state the facts specially for the determination of a superior Court.

In a case under this Act an appeal was brought to quarter sessions, which quashed the order appealed from, subject to a case reserved. A *certiorari* issued, a rule calling on the prosecutor to shew cause was granted, was argued in, and discharged by the Queen's Bench Division. Leave to appeal was not given:—

Held, that the case so reserved fell within the provisions of s. 45 of the Judicature Act, 1873, and that no appeal could be brought from the decision of the Divisional Court upon it unless special leave to appeal were granted.

Appeal from the Queen's Bench Division. The case is reported 48 Law J. Rep. Q.B. 119.

The Swindon New Town Local Board, acting as the urban sanitary authority of Swindon New Town, duly required by notice James Hinton to do certain works pursuant to the provisions of the Public Health Act, 1875, and as he failed to comply with the notices the local board executed the works, and took proceedings before justices to recover the amount so expended. The justices made an order for payment, whereon J. Hinton appealed to the quarter sessions, when the order of the justices was quashed, subject to a case reserved. A *certiorari* issued, and a rule

nisi to quash the order of quarter sessions was obtained.

Against this rule cause was shewn in the Queen's Bench Division, and the rule was discharged, so that the order of quarter sessions was confirmed. Leave to appeal was not given.

The local board appealed.

Mellor (with him Goldney), for the prosecution, took a preliminary objection. —The local board cannot appeal, as the Divisional Court did not give special leave to appeal, so that the condition imposed by section 45 of the Judicature Act, 1873, has not been complied with (1). This appeal was by a case stated under the Public Health Act (2); it was not an appeal by means of the exercise of the original jurisdiction of the Queen's Bench Division over inferior Courts by which orders are brought up, nor was it a case stated for the opinion of the Queen's Bench Division, so that it does not come within the principle of *The Overseers of Walsall v. The London and North Western Railway Company* (3), in which case, however, leave to appeal was given. The present case is not within section 19 (4),

(1) The Judicature Act, 1873, s. 45, provides: 'All appeals from petty or quarter sessions, from a County Court, or from any other inferior Court . . . may be heard and determined by Divisional Courts of the said High Court. . . . The determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard.'

(2) 38 & 39 Vict. c. 55, provides by section 269 an appeal from the decision of the justices to quarter sessions, and by sub-section 7 enacts that 'The decision of the Court of Appeal shall be binding on all parties: provided that the Court of Appeal may, if such Court thinks fit, state the facts specially for the determination of a superior Court.'

(3) 48 Law J. Rep. M.C. 65; Law Rep. 3 Q.B.D. 457.

(4) The Judicature Act, 1873, provides by section 19 that 'The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as herein-after mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.'

* *Coram* Coleridge, C.J.; Brett, L.J.; and Cotton, L.J.

The Queen v. Swindon New Town Local Board (App.), Q.B.

but within section 45 of the Judicature Act (1); it is the case of an appeal from an inferior Court given by a particular statute.

Charles (with him *Ravenhill*), for the local board, the appellants.—No leave to appeal was requisite; the present case is within the principle of *The Overseers of Walsall v. The London and North Western Railway Company* (3). There is in the present case a rule or order of the Queen's Bench Division, and that rule or order may be the subject of an appeal by virtue of section 19 of the Judicature Act, 1873. The present case, like *The Walsall Case* (3), comes within section 19 and not within section 45 of the Judicature Act, for it is not an appeal by either party from the decision of an inferior Court; it is a case stated by the Court of Quarter Sessions for the opinion of the Queen's Bench Division, and it was thus heard by that Divisional Court in the exercise of its original jurisdiction over the Courts of Quarter Sessions. The proceedings in this case were the same as in all other cases: there was the usual writ of *certiorari*, the usual rule calling on the prosecutor to shew cause why the order should not be quashed; and the machinery thus used is wholly different from that which is used in the case of appeals from inferior Courts, such as County Courts, which are the appeals to which section 45 (1) applies.

Mellor, in reply.—The machinery to which reference has been made may have been used in this case, but it was unnecessary, and cannot alter the plain enactment of the statute. The Queen's Bench Division is a superior Court within section 269, sub-section 7, of the Public Health Act (2). The determination of the appeal is to be by a superior Court, and as these cases are now distributed amongst the three Common Law Divisions, it is but an accident that this appeal was heard in the Queen's Bench Division.

Our. adv. vult.

The judgment of the Court was (on April 30, 1880) delivered by

Corron, L.J.—In this appeal the only question was whether or no the provisions

of section 45 of the Judicature Act, 1873 (1), applied so as to prevent the parties from being competent to bring an appeal, inasmuch as no leave had been given by the Queen's Bench Division, before whom the case was heard upon appeal from the quarter sessions, which had quashed an order of justices for the payment by the appellant to that Court, of certain expenses incurred by the local board, the now appellants, under the Public Health Act, 1875. The Court of Quarter Sessions made this order subject to a case which they reserved for the opinion of a superior Court, under the provisions of the Public Health Act, 1875 (4). That case was argued before the Queen's Bench Division, and judgment was given confirming the order of quarter sessions. No leave to appeal was granted by the Divisional Court.

It was objected, on the opening of the appeal here, that it was not competent to the appellants to bring any appeal, inasmuch as section 45 (1) of the Judicature Act, 1873, forbids any appeal being brought on appeals from quarter sessions unless special leave to appeal shall be given by the Divisional Court by which the appeal from the superior Court shall have been heard.

This appeal is *prima facie* an appeal from quarter sessions. The case stood over in order that we might consider whether the case of *The Overseers of Walsall v. The London and North Western Railway Company* (3) must be considered as an authority that section 45 of the Judicature Act does not apply to such a case as the present, not because the actual decision in that case was to that effect; but because certain expressions in the speeches of some of the Lords who moved the judgment of the House on that occasion appeared to tend to that conclusion.

The circumstances of that case were, however, different. There the Divisional Court had given leave to appeal; there the Divisional Court was held to be exercising an original and not merely a consultative jurisdiction; and the facts of the case were held to bring it within section 19 (4), and not within section 45 of the Judicature Act (1).

Can that be said to be the case here?

The Queen v. Swindon New Town Local Board (App.), Q.B.

We think not. In the present case the Queen's Bench Division was not exercising its well-known jurisdiction of supervising the orders of inferior Courts, but the case came before that Division as it were by accident; that is, the case could, under the provisions of sub-section 7 of section 269 of the Public Health Act, 1875 (2), have been heard and decided in any of the Common Law Divisional Courts, so that this case was an appeal from an inferior Court within section 45 of the Judicature Act. It was therefore an appeal to the High Court; it has been determined in one of the Divisional Courts of the High Court, and the determination of such an appeal by such a Court is by the statute final, unless special leave to appeal is given. No such leave has been given in this case; the preliminary objection must therefore prevail, and this appeal must on that ground be dismissed.

Appeal dismissed.

Solicitors—Clarke, Woodcock & Ryland, agents for Kinneir & Tombs, Swindon, for appellant; W. Meen, agent for J. C. Townsend, Swindon, for respondents.

Dallon v. Garrold 53 L.J.C.L. 528
 [IN THE COURT OF APPEAL.]
 (Appeal from the Common Pleas Division.)
 1880. }
 May 26. } SHIPPEY AND ANOTHER v. GREY.*

Lien of Solicitor—Garnishee Order—Priority—Solicitors Act (23 & 24 Vict. c. 127), s. 28.

The plaintiffs were the solicitors for W. in an action in which he recovered a sum of money. The defendant was a judgment creditor of W., and obtained ex parte, on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day the plaintiffs for the first time learned of the defendant's claim, and then gave notice, to the defendant in the action in which W. was plaintiff, of their claim of lien, and within five days applied

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Irtett, L.J.

for an order declaring that they were entitled to a charge on the money recovered by W.:—

Held, affirming the decision of the Common Pleas Division, that the plaintiffs had a lien for their costs on the sum recovered by W., that they were entitled to the order sought for; and that the garnishee order obtained by the defendant did not take priority over that lien.

Appeal from the Common Pleas Division.

Issue in the form of a Special Case.

The plaintiffs were the solicitors on the record for G. Washington in an action brought by him against the Lancashire and Yorkshire Railway Company. That action was tried before Pollock, B., on the 15th of January, 1878, when a verdict passed for the plaintiff for 400*l.*

Judgment was signed in that action on the 23rd of January, and on the same day the defendant in the present action took out a summons for leave to issue execution against Washington for the balance of a sum recovered by him in an action against Washington in 1871, which judgment had been revived; an order to that effect was made and served on the 24th of January.

On the 25th of January the defendant obtained, *ex parte*, the ordinary garnishee order against the Lancashire and Yorkshire Railway Company, attaching all debts due from them to Washington, and calling on them to shew cause on the following day against such order.

On the same day before noon the defendant served a copy of this order on the railway company and on their solicitors, and later on in the same day the solicitors attended to tax their costs in the action, when the plaintiffs for the first time heard of the claim of the defendant against Washington.

The plaintiffs thereupon, on the same day, gave the railway company notice that they claimed a lien on the damages recovered by Washington in his action against them.

The defendant did not know until the 26th of January that the plaintiffs claimed any such lien.

On the 30th of January the plaintiffs

Shippey v. Grey (App.), C.P.

applied to a district registrar for an order declaring that they were entitled to a charge upon the damages recovered by Washington. The district registrar refused to make the order. A similar application was made to the Judge who had tried the cause, and it was also refused on the ground of want of jurisdiction.

On the 1st of February a summons to the same effect was taken out, and on the 8th of February Field, J., made an order that the railway company should, after deducting a specified sum for costs, pay out of the residue of the 400*l.*, a sum of 323*l.* to the defendant Grey, and the balance into Court to abide the event of a special case.

The question for the Court was whether, on the above facts, the plaintiffs were or are entitled as against the defendant, who had obtained the garnishee order, to a charge under a claim of lien, to be paid out of the money recovered by Washington in his action against the railway company the amount of their costs as the solicitors in such action.

The Common Pleas division gave judgment for the plaintiffs.

The defendant appealed.

Ambrose (Orompton with him), for the appellant.—The question is, whether the garnishee order made in favour of the defendant or the lien of the plaintiffs, the solicitors, is entitled to priority. It is contended on behalf of the judgment creditor that a solicitor can have no lien at Common Law on the proceeds of a judgment, and if he would have a right under section 28 of 23 & 24 Vict. c. 127 (1), still that in this case he has not obtained the necessary order.

(1) 23 & 24 Vict. c. 127. s. 28—"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any Court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and, upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges

The lien of a solicitor is upon money or papers actually in his hands; he can have no lien on a judgment, at the most he can only have a right to the equitable interference of the Court in his favour, for a lien can only be claimed in respect of something which must actually be in the possession of the person claiming it. The doctrine, therefore, does not apply to a judgment, even though the parties should collude to deprive a solicitor of his lien—*Barker v. St. Quintin* (2).

The attachment of a judgment debt under the Common Law Procedure Act overrides the lien of the solicitor—*Hough v. Edwards* (3). *Shaw v. Neale* (4) decided that a solicitor only has a lien on papers in his hands, and in *Mercer v. Graves* (5) it was held that the fact that a solicitor had obtained a judgment for a client, did not raise the relation of trustee and *cestui que trust* between him and his client.

As a matter of fact no order was made under the statute (1), but even if it had been, the section does not give the solicitor an absolute lien, it only gives him a remedy which he can pursue by a specified course of procedure. An order of the Court is necessary, and such an order must be made in the branch of the Court to which the cause is attached, or before the Judge who tried the cause. The act of the Court in making the order is not merely ministerial—*Heinrich v. Sutton* (6); *Higgs v. Schrader* (7). The appli-

and expenses of or in reference to such suit, matter or proceeding, and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges and expenses out of the said property as to such Court or Judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely null and of no effect as against such charge or right"

(2) 12 Mee. & W. 441; 13 Law J. Rep. Exch. 144.

(3) 1 Hurl. & N. 171; 26 Law J. Rep. Exch. 54.

(4) 6 H.L. Cas. 581; 27 Law J. Rep. Chanc. 444.

(5) 41 Law J. Rep. Q.B. 212; Law Rep. 7 Q.B. 499.

(6) Law Rep. 6 Ch. App. 865.

(7) 47 Law J. Rep. C.P. 426; Law Rep. 3 O.P. D. 252.

Shippey v. Gray (App.), C.P.

cation, therefore, to Field, J., was too late and can have no effect.

[BRETT, L.J.—But we are to make the order if it ought to have been made under the circumstances of the case. BAGGALLAY, L.J.—Is not the case of *Faithfull v. Ewen* (8) an authority against you?]

That case cannot stand with *Shaw v. Neale* (4).

Henn Collins, for the plaintiffs.—This money was paid into Court under the order of Field, J., to abide the decision of this special case; and if Pollock, B., before whom the case was tried, ought to have made an order in favour of the plaintiffs, the Court ought now to make such an order, and it appears from *Oatlow v. Oatlow* (9) that the Divisional Court had authority to make it.

Where the work done by a solicitor is the meritorious cause of the recovery of a sum, the claim of the solicitor is entitled to priority—*Bichall v. Pugin* (10).

[BRETT, L.J.—There the solicitor had given notice.]

But no notice is necessary under the statute—*Pickering v. The Ilfracombe Railway Company* (11). The lien of a solicitor on a fund recovered by his exertions cannot be affected by the assignment of the fund by the client—*Haymes v. Cooper* (12), for the lien of a solicitor is founded on an equitable right which exists against those benefited by the fund produced by his exertions—*Fisher on Mortgages*, 163.

[BAGGALLAY, L.J.—Has not a person who attaches a judgment debt notice by the very fact of its being a judgment debt of certain consequences?]

That seems to be laid down in *Faithfull v. Ewen* (8). *Shaw v. Neale* (4) only decided that a solicitor has no lien on real property; a garnishee order only gives the judgment creditor such rights as the debtor had, and there was here an equity in the solicitor which cannot be overridden

by the order. *Ex parte Oleland* (13) and *Welsh v. Hall* (14) were also cited.

Ambrose in reply.

BRAMWELL, L.J.—I think that this appeal must fail on the ground that the case is concluded by the decision of this Court in *Faithfull v. Ewen* (8). That decision is in point, and we cannot overrule it. If there was any difference between a Court of Equity and a Court of Common Law before the Judicature Act, then that difference is abolished by the provisions of sub-section 11 of section 25 of that Act, which, I may observe, did not lay down that when the rules of equity and law differed those of equity were always right; but as the Act was passed to amend the judicature and not the law, it was thought convenient that the rules of equity should prevail.

BAGGALLAY, L.J.—I agree. I think that *Faithfull v. Ewen* (8) is in point. If I had any doubt of the correctness of that decision, I should be glad to reconsider the question, but I am of opinion that it was rightly decided.

BRETT, L.J.—I am of the same opinion, and even if the case of *Faithfull v. Ewen* (8) had not been decided, I should still have come to the same conclusion. In this case the money was earned by the act of the solicitor, and unless something has occurred to take away his right, he has a right in law or in equity to an order in his favour, so that the money so earned may not be paid away to anyone without his costs being reserved. What happened was this: the defendant obtained an *ex parte* garnishee order, before the solicitors could tax their costs, and before they could do anything, and before they could take any steps to preserve their right. It was admitted by the counsel for the appellant that by no means could the plaintiffs have prevented the defendant from making his right override theirs, and that whatever they did the defendant must have prevailed; that is, on the assumption

(8) 47 Law J. Rep. Chanc. 457; Law Rep. 7 Ch. D. 495.

(9) Law Rep. 2 C.P. D. 362.

(10) 44 Law J. Rep. C.P. 278; Law Rep. 10 C.P. 397.

(11) 37 Law J. Rep. C.P. 118; Law Rep. 3 C.P. 235.

(12) 38 Beav. 433; 33 Law J. Rep. Chanc. 488.

(13) 36 Law J. Rep. Bankr. 33; Law Rep. 2 Ch. App. 808.

(14) 1 Dougl. 237.

Shippey v. Grey (App.), C.P.

that the argument for the appellant is right. Such a proposition is so extravagant that the very statement of it seems to refute it. If, indeed, before a solicitor takes any steps the money in question has been disposed of in some way beyond the power of the Court, so that the Court has no longer any jurisdiction over it, then the right of the solicitor would be at an end, for the Court would be powerless to interfere. If, for instance, an execution had issued and been carried out so that the execution creditor had received the money, in such a case an application by the solicitor would be too late; or, again, if the client should have received the money and paid it over to some creditor of his, in such a case the right of the solicitor would be at an end. But the facts of this case are wholly different; the garnishee order was obtained *ex parte*, and I adhere to what I said in *Bichall v. Pugin* (10). The garnishee order is not effective without a subsequent order, for cause may be shewn against it. In such a case as this a Court of Equity considers that that which the solicitor has a right to have done is done, and I am of opinion that Field, J., could have made the order under the equitable power of the Court, or that Pollock, B., could have made it under the statute, and that perhaps even the Divisional Court could have made it. This judgment must be affirmed.

Judgment affirmed.

Solicitors—Johnson & Weatheralls, for plaintiffs;
Pritchard, Englefield & Co., agents for E.
Storer, Manchester, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880.
March 8, 15.

THE YORKSHIRE RAILWAY
WAGGON COMPANY v. THE
NEWPORT AND ABERCAERN
COAL COMPANY.

*Practice—Costs—Third Parties—Order
XVI. rules 18, 21.*

A Master has no jurisdiction when applied to for directions under Order XVI. rule 21, admitting a third party who has been served with notice to come in and defend, to order the costs to be in the discretion of the Judge at the trial. The only discretion as to costs given by the rule is as to imposing them or not upon the party so coming in, and there are no means for giving him his costs.

This was a motion to set aside two orders of Lush, J., made upon the trial of an action, and ordering that the defendants should pay the costs of other parties who had been brought in.

The action was brought by the plaintiffs to recover from the defendants possession of some waggons.

The defendants, who had purchased the waggons in question from the Gloucester Waggon Company, gave notice to them that they claimed to be entitled to indemnity under Order XVI. rule 18, whereupon the Gloucester Waggon Company appeared, and upon directions being applied for by the defendants as to the mode of having the question in the action determined, the Master, under Order XVI. rule 21, made an order, admitting the Gloucester Waggon Company, and providing that all the costs occasioned by their coming in should be in the discretion of the Judge at the trial.

The Gloucester Waggon Company then, in their turn, gave a similar notice to Beynon & Co., and the latter again gave a similar notice to Eli Bayley; and as these fourth and fifth parties respectively appeared, the Master made orders in each of their cases identical with that made in the case of the third party, and providing for all costs being in the discretion of the Judge.

The action came on for trial before Lush, J., when the defendants obtained a verdict on the evidence mainly of Bayley,

Dawson & Shepherd 49 L. J. 530.

See note.

Yorkshire Railway Waggon Co. v. Newport, &c., Coal Co., Q.B.

the fifth party, who appeared, together with the fourth party. The Gloucester Waggon Company, the third party, did not appear at the trial.

Application was made to Lush, J., by the fourth and fifth parties to act upon the discretion given him by the terms of the Master's order, and the learned Judge accordingly made an order that the third party should pay the costs of the fourth and fifth parties.

Subsequently, on application by the third party, the learned Judge made a further order that the defendants, who had given notice to and brought in the third party, should pay their costs, including, as they did, those of the fourth and fifth parties.

Against these orders this appeal was brought, when

Fullarton argued for the defendants.—The Master had no jurisdiction to make the order by which the costs of the third party were made, in the discretion of the Judge, payable by the defendants. There are no rules by which a defendant can obtain relief against another person not a party to the action by serving him with notice. The power to frame such rules was created by section 24, sub-section 3 of the Act of 1873, but the power has not been carried into effect. This is clear from the judgment of Mellish, L.J., in *Treleaven v. Bray* (1). *Baker v. Oakes* (2) shows there is no power to make an order as to costs, except at the trial. Then it was *ultra vires* in the third party to call in the fourth and fifth parties—*Walker v. Balfour* (3).

J. Edge, for the fourth and fifth parties, argued, that they, having been served with a notice by the third party, became in the position of defendants, just as the third party himself did within the definitions of "defendant" and "party" in section 100 of the Judicature Act, 1873—*Fowler v. Knoop* (4).

Finlay, for the third party.—The Master had jurisdiction—he could permit the appearance of the third party on such

terms as he thought fit. The Master's orders being good, the Judge's were also good (5).

COCKBURN, C.J.—I think this rule must be made absolute.

The Master had not authority to admit the parties to whom notice was given to come in on any other terms than that they should or should not be liable for costs. The terms which he can impose are those on parties seeking to come in and defend the title of the parties to whom they have given title.

As the law now stands on this subject, the legislation with reference to it is to be found partly in the statute itself, and partly in the rules; and, so far as the latter have been framed up to the present time, though there are provisions as to costs, they are between the parties only.

I can find nothing which relates to costs which arise between a defendant who wants other parties to come in, and assist him in resisting the plaintiff, and those parties when they do come in, and I am not sure that there ought to be, because I think that such a proceeding is optional, for he has his remedy over.

The defendant says, "If you like to come in, you will be relieved afterwards from having to make my title good, as against the plaintiff." The party so invited considers whether he will avail himself of this optional privilege. If he does so, I do not see why he should call on the defendant to pay his costs. On the other hand, there ought to be no costs, if the verdict goes the other way,

(5) Order XVI. rule 21. "If a person not a party to the action, served under these rules, appears pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined, and the Court or Judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the Court or a Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question."

(1) 45 Law J. Rep. Chanc. 113.

(2) 46 Law J. Rep. Q.B. 246.

(3) 25 W. R. 611.

(4) 36 Law Times, 219.

Yorkshire Railway Waggon Co. v. Newport, &c., Coal Co., Q.B.

against him. Independently, then, of the Master's order, giving or assuming to give a discretion to the Judge at the trial over the costs, they would follow on success. I think there was no jurisdiction, and the orders must be set aside.

LUSH, J.—The authority on which I acted was the order of the Master, which was an order in each case, allowing the party to come in, and each such order contained a clause giving the Judge at the trial discretion over the costs. I read that as giving the Judge a discretion to say whether the party coming in should pay or receive costs.

I now see that that was an order *ultra vires*, if such was its meaning. The only rule under which the Master could act was Order XVI. rule 21, by which the Court or a Judge may give the person served with a notice "liberty to defend, on such terms as shall seem just."

There is not a word there said about costs, and the authority to give them must be included, if it exist, in the words "on such terms." But that, I think, must be on the terms of *his* paying costs—not of imposing them on the person calling him in.

MANISTY, J., concurred (6).

Orders reversed.

Solicitors—Singleton & Tattershall, agents for Gill & Hall, Wakefield, for plaintiffs; H. Gething, for defendants; Doyle & Son, agents for Taynton & Sons, Gloucester, for third parties; Hunt & Sons, agents for C. R. Lyne, Newport, Monmouthshire, for fourth and fifth parties.

[IN THE COURT OF APPEAL]

(Appeal from the Exchequer Division.)

1880. } DAWSON v. SHEPHEED.
June 9. } GRIER Third Party.*

Practice—Costs of Parties brought in under Order XVI.—Judicature Act, 1873, s. 24, sub-section 3—Rules of Court, Order XVI., rules 18, 21.

There is power to order a defendant to pay costs to a third party who appears in

(6) See next case—*Dawson v. Shepherd. Grier third party.*

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

VOL. 49.—Q.B., C.P. & EXCH.

consequence of being served by the defendant with a notice under Order XVI. rule 18.

The Yorkshire Waggon Company v. The Newport and Abercarne Coal Company (Law Rep. 5 Q.B. D. 268, *ante*, p. 527) explained.

Appeal from the Exchequer Division.

The defendant being sued by the plaintiff served Grier with a notice as third party under Order XVI., rule 18 (1), and Grier appeared.

An order was then made under rule 21 (1), giving Grier leave to attend at the trial, to cross-examine and examine witnesses, and directing that he should be bound by the result of the trial. The order concluded with the words "costs

(1) Rules of Court, Order XVI., rule 17. "Where a defendant is or claims to be entitled to contribution or indemnity or any other remedy or relief over against any other person . . . the Court or a Judge may, on notice being given to such last mentioned person, make such order as may be proper for having the question so determined."

"Rule 18. Where a defendant claims to be entitled to contribution, indemnity or other remedy or relief over against any person not a party to the action, he may by leave of the Court or a Judge issue a notice to that effect . . . A copy of such notice shall be . . . served on such person . . . The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by a Court or a Judge, be served within the time limited for delivering his statement of defence . . ."

"Rule 20. If a person not a party to the action, who is served as mentioned in rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing he shall be deemed to admit the validity of the judgment obtained against such defendant. . . ."

"Rule 21. If a person not a party to the action served under these rules appears pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined, and the Court or Judge upon the hearing of such application may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just; and may direct such pleadings to be delivered . . . and generally may direct such proceedings to be taken, and give such directions as to the Court or a Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question."

3 Y

Dawson v. Shepherd, Exch.

reserved;" this order was afterwards varied by another order which directed that all pleadings should be delivered to the third party, and by this order costs were also reserved. Grier also had inspection of documents. Notice of trial was given, but before the action came on for trial it was settled without any notice being given to the third party. When the settlement was finally arranged the third party was informed of the fact, and he learned that the defendant had paid to the plaintiff some portion of his claim.

He then applied to Manisty, J., for an order directing the defendant to pay to him his costs.

Manisty, J., refused this order. Grier appealed, and the Exchequer Division, in deference to the case of *The Yorkshire Waggon Company v. The Newport and Abercarne Coal Company* (2), although not agreeing with that decision, affirmed the decision of Manisty, J.

Grier appealed.

Finlay, for Grier.—It is submitted that there is power to give Grier, the third party, his costs; for he was served with a notice, and by section 100 of the Judicature Act, 1873, it is enacted that the word "defendant shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceeding," so that the third party is in fact a defendant, and is as such entitled to his costs. Either the order at chambers reserving the costs was rightly made, or the costs were in the discretion of the Court under Order LV., and then the third party is here entitled to them. The costs of the third party were reserved in *Treleven v. Bray* (3), which shews that the rules were drawn so as to carry out the provisions of section 24, sub-section 3, of the Judicature Act, 1873, and in *Benecke v. Frost* (4), the costs were provided for by anticipation.

Henn Collins, for the defendant.—There is no provision in the rules by

which a third party can have his costs, nor is it reasonable that he should; he gets a benefit by being brought in; he is able to contest the claim of the plaintiff, and if he should not wish to do this he can simply appear and need not take any further steps, in which case no further costs will be incurred. It may be observed that Manisty, J., said at chambers that the decision in *The Yorkshire Waggon Company v. The Newport and Abercarne Coal Company* (2), was only a decision on the particular order which had been made on the especial facts of that case, and that it was not intended in that decision to lay down any general rule as to the power of the Court to make such an order as is here asked for.

Finlay did not reply.

BRAMWELL, L.J.—I think that this appeal should be allowed. After what we have heard it is clear that no one is bound by the case in the Queen's Bench Division to the extent to which it was supposed, for it was not a decision on a general principle. I doubt whether the Master cannot make an anticipatory order as to the costs; but I have no doubt that if he has not that power, still there is in the Judge or the Court a power over the costs, and that there is a power to give the third party his costs. Then the question is, should the defendant here pay the third party his costs? It is said no, because the third party has got a benefit. A strange benefit in truth; he appears to save himself from the opposite of a benefit, from a loss. A third party is under compulsion to come in; he comes in to avoid something worse.

BAGGALLAY, L.J.—I agree that this appeal must be allowed. I am pleased to learn that the decision in *The Yorkshire Waggon Company v. The Newport and Abercarne Coal Company* (2) was only a decision on the particular facts of the case, and that, therefore, we are not obliged to differ from it.

BRETT, L.J.—I think the opinion of Manisty, J., at chambers, shews that the case cited is not binding on any one as a decision on a general principle. I do not

(2) *Ante*, p. 527; Law Rep. 5 Q.B. D. 268.

(3) 45 Law J. Rep. Chanc. 113; Law Rep. 1 Ch. D. 176.

(4) 45 Law J. Rep. Q.B. 693; Law Rep. 1 Q.B. D. 419.

Dawson v. Shepherd, Exch.

now say whether a Master can or cannot make an anticipatory order; but I am clear that a Judge at the trial or the Court can under Order LV. deal with the costs, and can give them to the third party brought in, and that the third party ought in this case to have them.

Appeal allowed.

Solicitors—C. G. Scott, for plaintiff; Bower & Cotton, for defendant; W. Foster, for third party, Grier.

Response of Helman & Arthur St. L. & Co.

[IN THE COURT OF APPEAL]

1880. } IRVINE AND CO. v. WATSON AND
June 11. } SONS.*

Principal and Agent—Sale of Goods—Undisclosed Principal—Payment to Broker when a Discharge to the Principal.

Where a broker acting within the scope of his authority buys goods for his principal, and the vendor knows that the goods are bought for a principal, but does not know the name of the principal, the principal cannot discharge himself from liability to pay the vendor by settling with the broker, unless there has been conduct on the part of the vendor which justifies the buyer in concluding that the vendor looks to the agent and not to the principal for payment, and which estops the vendor from enforcing the debt against the principal.

So held by the Court of Appeal.

Appeal from a judgment of Bowen, J., given on further consideration. The case is reported *ante*, p. 239.

The plaintiffs sought to recover from the defendants the price of eleven casks of oil, bought for the defendants by Conning & Co. as brokers, who told the plaintiffs that they required the oil for a principal in the country. The contract note was as follows:—"March 12, 1879.—Messrs. J. Conning & Co.: We have this day sold you the following goods [the goods were specified]. Customary

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

allowances and public sale conditions; payment cash, or before delivery if required, allowing 2½ per cent. discount. Per pro. Jas. Irvine & Co., W. Geikie."

The public sale conditions provided that "Brokers purchasing shall be responsible as principals unless they declare the name of the principals," and "Payments to be made as at present customary, and, if required, before delivery."

Delivery of eight of the casks was given by the plaintiffs to Conning & Co., on the 13th of March, and of the remainder on the 15th of March. On the 14th of March Conning & Co. drew a bill for a large amount, which included the price of the oil, on Watson & Co., who accepted the same, and the acceptance was duly honoured. About the 18th of March the plaintiffs applied, without effect, to Conning & Co. for payment. On the 27th of March Conning & Co. stopped payment, and on the 28th of March the plaintiffs for the first time applied to the defendants for payment. The defendants replied that they had paid Conning & Co., and repudiated all further liability.

Bowen, J., the jury having been discharged, and he having power to draw inferences of fact, found that Conning & Co. had the defendants' authority to bind them, and held that the defendants were not exonerated from their liability to the plaintiffs, and gave judgment for the plaintiffs.

The defendants appealed.

Gully and Crompton, for the defendants.—It is not desired to dispute the first finding of the learned Judge, that the defendants gave Conning & Co. authority to bind them; but it is submitted that the facts of the case bring it within the decision in *Armstrong v. Stokes* (1). Messrs. Conning & Co., the brokers, had a right to receive payment, and the defendants in paying them had a right to consider themselves relieved from all further liability. Moreover, the plaintiffs have by their conduct led the defendants to believe that they were safe in paying the brokers. The terms of the contract

(1) 41-Law J. Rep. Q.B. 253; Law Rep. 7 Q.B. 598.

Irvine v. Watson (App.), Q.B.

were cash, and there are not any days of grace in dealings such as these, as there are in matters connected with bills of exchange. The possession of the goods by the brokers shews that the plaintiffs looked to them for payment. The principle is that if the buyer is led to believe by the ordinary course of business that the seller is looking to the broker for payment, then the buyer has a right to settle with the broker.

[BRAMWELL, L.J.—The argument is, that a broker has no right to receive payment unless he has paid the vendor; that the vendor ought not, the terms being cash, to part with the goods unless he has been paid; that the broker having the goods in his possession is a circumstance which may justly lead the purchaser to assume that he has paid for them. That may be true, but ought a purchaser to assume and suppose, when he can ascertain and make sure?]

The remarks of Tenterden, C.J., and Bayley, J., in *Thomson v. Davenport* (2), cited and not disapproved of in *Armstrong v. Stokes* (1), are in favour of the defendants; they have paid their agent, so that, to use the words of Lord Tenterden, omitting the negative, "the state of the account between the principal and the agent is altered to the prejudice of the principal."

[BRETT, L.J.—Does not the conclusion of the judgment in *Armstrong v. Stokes* (1) tell against the defendants? Blackburn, J., there says, It might be hard "if the rigid rule were applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit." Does not that seem as though the rule of Parke, B., ought to be applied in all other cases?]

In *Heald v. Kenworthy* (3) Parke, B., held that the buyer ought to be exonerated by a payment to the agent where the conduct of the seller would make it unjust to hold otherwise; and in *Smetthurst v. Michell* (4) it was said that the

plaintiff by improperly lying by had induced the defendant to alter his position, and that therefore he could not recover. It was also suggested by Hill, J., during the argument, that there may be a distinction between a case where the seller knows there is a principal, and a case where he does not. In *Smyth v. Anderson* (5) it is said that the right of the seller to sue the principal is limited by the state of accounts between the agent and the principal.

W. R. Kennedy (the Solicitor-General, Sir F. Herschell, with him), for the plaintiffs.—The conduct of the plaintiffs has not been such as to mislead the defendants. [He was stopped by the Court as to this point.] The observations cited from *Thomson v. Davenport* (2) are but *dicta*, and they do not apply to brokers when this word is used in its strict sense; they apply to agents, and not to brokers; they do not affect the general rule that a man cannot relieve himself by paying his own broker or one who is agent for himself alone. The intermediaries in *Armstrong v. Stokes* (1), in *Smyth v. Anderson* (5), and in *Smetthurst v. Michell* (4), were not in the same position as the brokers in this case. Mere payment by the purchaser will not suffice, there must also be other circumstances to justify the payment to the broker. No equity can be raised in favour of the purchaser, unless he has been misled or induced to alter his position. [He was stopped by the Court.]

Gully, in reply.

BRAMWELL, L.J.—I am of opinion that this judgment should be affirmed. The facts are, that the plaintiffs sold certain goods; that Conning & Co. were on the face of the contract the purchasers; that the plaintiffs knew that they had a right against two persons; that the defendants knew that Conning & Co. bought as brokers, and that the real sellers had either a remedy against themselves alone, or that the sellers knew, as indeed the fact was, that they had their remedy against the broker and against the de-

(2) 9 B. & C. at pp. 86 and 88.

(3) 10 Exch. Rep. 739; 24 Law J. Rep. Exch. 76.

(4) 1 E. & E. 622; 28 Law J. Rep. Q.B. 241.

(5) 7 Com. B. Rep. 21; 18 Law J. Rep. C.P. 109.

Irvine v. Watson (App.), Q.B.

defendants themselves. I will assume that the acceptance of the bill was equivalent to payment, and that the defendants gave money to the broker in anticipation of the debt which would arise if the brokers paid the plaintiffs.

It is impossible to say that the defendants are discharged from their debt, it is undeniable that the defendants are liable to the plaintiffs. But it is said that the plaintiffs misled the defendants. I think they did not. It is said that the plaintiffs parted with certain goods without payment, when by the contract there was to be payment on or before delivery. I cannot see how the defendants could be misled; they were debtors to the plaintiffs, and the only way in which they say that they are discharged is that they allege that they gave the money to the broker. The argument on behalf of the defendants cannot prevail, in my opinion, and I do not know that it is necessary to say more. With regard to the authorities, I would add that I do not think the *dicta* of Lord Tenterden and Bayley, J., in *Thomson v. Davenport* (2) can be taken literally, because the consequences might operate unjustly and unreasonably as regards the seller; but those *dicta* have not been overruled, nor perhaps is it necessary to say they have been qualified, for I think they were uttered with the intention with which Parke, B., delivered the qualification contained in *Heald v. Kenworthy* (3).

If, however, those *dicta* were to be taken literally, then I should incline to say that the opinion of Parke, B., is preferable, and I agree that there is not "authority for saying that a payment made to the agent precludes the seller from recovering from the principal, unless it appears that he had induced the principal to believe that a settlement had been made with the agent." If that were so, then the holder would be precluded from recovering, as it would be unjust for him to do so.

One word as to *Armstrong v. Stokes* (1). I think that is a remarkable case. It seems to me as though the Court was there influenced by a feeling that it would be unreasonable to hold that Ryder & Co. had not authority, and so they held that

they had authority given to them by the defendants. I think that Ryder & Co. had such authority. Ryder & Co. were in fact and practice intermediaries for either party, and not mere agents for the defendants. There is therefore a clear distinction between that case and the one now before us, and Blackburn, J., expressly says that the Court did not there intend to decide "anything as to the case of a broker who avowedly acts for a principal, though not necessarily named." Now that is the state of facts in this case; but Blackburn, J., continues, "Confining ourselves to the present case, which is one in which . . . the plaintiff sold the goods to Ryder & Co., supposing at the time of the contract he was dealing with a principal," and that marks the distinction between the two cases, for that is not the state of the facts of the case with which we are now dealing, as the plaintiffs knew that Conning & Co. had a principal.

One would think indeed from reading the judgment in *Armstrong v. Stokes* (1) that the rights and duties of a buyer would depend upon what the vendor knew. It is difficult to see how his rights and duties can be affected by that which the vendor alone knows. The liability of the defendants in this case cannot be regulated by the plaintiffs knowing or not knowing that they were the principals. Here the defendants empowered a broker to buy for them, and they knew that the broker would pledge their credit either with or without giving their names, and that he might or might not pledge his own credit, and knowing that they paid the money to the broker at their peril. It is not necessary, therefore, to consider the other questions raised in *Heald v. Kenworthy* (3).

I may add that one date seems to me to be important to shew that the defendants were not influenced by the conduct of the plaintiffs, and that is the 14th of March, for while eight casks were delivered on the 13th of March, and three on the 11th, the bill drawn by Conning & Co. and accepted by the defendants, was dated the 14th of March, at which time they could not tell whether or no the plaintiffs would insist on payment on

Irvine v. Watson (App.), Q.B.

delivery. The judgment of Bowen, J., is right and must be affirmed.

BAGGALLAY, L.J.—I concur. There were two questions before Bowen, J. One was whether Conning & Co. had authority to bind the defendants, and the second was whether the defendants were exonerated from their liability by the subsequent conduct of the plaintiffs. We have only to deal with the second. There might be a doubt whether the bill accepted by the defendants was a payment at all; but assuming that it was and that it can be so treated, it remains to consider what was the effect of that payment. It would seem indeed that if *Thomson v. Davenport* (2) is to be considered as an authority, such a payment would exonerate the defendants. But it is to be observed that the passages in the judgment in that case to which reference has been made are exceptions to the general liability of the buyer, and that the case then before the Court was held not to be within those exceptions, so that they are merely *obiter dicta*. The generality of those exceptions has been dissented from in subsequent cases, and I agree with those expressions of dissent. The first qualification is found in *Heald v. Kenworthy* (3), where Parke, B., sought to limit the generality of the terms in which those exceptions were expressed, and the limitation thus placed is even more clearly expressed by Bowen, J., when he says that the only case in which the seller is precluded from having recourse to the undisclosed principal when discovered, is when the seller has misled the principal into paying the agent. "The principal, such is the reasoning of the Court of Exchequer, has originally authorised his agent to create a debt, and the principal cannot be discharged from the debt unless the seller has estopped himself by his conduct from enforcing it against him."

It is suggested that the buyer is prejudiced if the seller purposely abstains from pressing the agent for payment, or if any knowledge communicated to the buyer, that is the principal debtor, leads to the inference on his part that the debt is discharged; but no such suggestion

can be sustained here, for there have not been any laches on the part of the plaintiffs, for all the goods to be supplied had not been delivered on the 14th of March when the bill was drawn. If the limitation of Parke, B., in *Heald v. Kenworthy* (3), to which I have referred, be right, then there has not been any payment here which could relieve the defendants from their liability.

It is however urged that the case of *Armstrong v. Stokes* (1) introduced a new limitation, and decided that the purchaser will not be liable if he has *bona fide* paid the agent. I do not think that can be held to be the real effect of that case, and I am of opinion that such a proposition goes beyond what *Armstrong v. Stokes* (1) decided. That was a case, as is shewn by Bowen, J., which was decided on special circumstances, and in which "at the time of the sale exclusive credit had been given by the seller to the agent who bought in his own name as principal," and that is really the view of Blackburn, J., who in his judgment expressly confines the decision of the Court to the facts of the particular case.

In giving judgment, therefore, in this case, we are not running counter to the authorities cited. It was not necessary in *Thomson v. Davenport* (2) to point out the limitations of the rules there suggested, but if those rules were to be referred to as being, without any qualifications, the law on this question, I should wish to express my dissent from them. I may add that Littledale, J., who also delivered a judgment in *Thomson v. Davenport* (2), did limit his judgment to the general principle of law, and did not deal with the qualification introduced by Lord Tenterden.

BRETT, L.J.—The facts which appear to me to be material are, that there was a contract of purchase and sale on which the plaintiffs sue. This contract was in fact made with the plaintiffs by Conning & Co., who were brokers, and who were moreover in no sense the brokers of the plaintiffs, but only of the defendants. The contract was for goods, payment cash, the goods were delivered in the ordinary course of business through Com-

Irvine v. Watson (App.), Q.B.

ning & Co., and the defendants paid Conning & Co. for them. Now on these facts the law cannot be doubtful unless the case can be brought within some exception. It cannot be doubted that a payment by the defendants to their agent is not a good payment to the plaintiffs. It is, however, urged that it is a good payment within the doctrine laid down by Tenterden, C.J., and Bayley, J., in *Thomson v. Davenport* (2).

It is, I think, material to consider what was the occasion on which that doctrine was laid down. The question there was whether the seller could sue the principals of the purchasing agent for the price of the goods. The main proposition is laid down by Lord Tenterden as follows:—"I take it to be a general rule that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal," and that, he it observed, was all that it was then necessary to lay down, but the learned Judge continued, "subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." That is certainly a wide proposition. Bayley, J., said, "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable, but he may do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable." If the learned Judge had stopped there, he would, it is clear, have introduced an equity, but he continued, "If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts would be an

answer to the action, brought by the seller where he had looked to the responsibility of the agent."

Now if the alternatives in these sentences be dislocated the sentence would read, "If the principal has paid the agent, the fact of such payment would be an answer to an action." Is it fair to do this, is it fair to read the sentence thus when it is clear that a qualification is being glanced at, when it is not assumed that it is necessary to treat the qualification with extreme accuracy?

Reliance is being placed on an equity, and when the *dictum* came before Maule, J., in *Smyth v. Anderson* (5), it is to be noted that the question again was whether the seller could sue the buyer, and the accuracy of the qualification was not then in question. In *Heald v. Kenworthy* (3) it was necessary to consider the accuracy of the qualification. Parke, B., then took notice that the qualification rests on equity, he asked what the equity could be unless it rested on the condition of the seller, and he then stated the qualification with greater accuracy and care, he gave then the true limitation and interpretation of the doctrine. The doctrine can never be applied by an agent in cases where the names of both principals are disclosed, it can only apply to a contract made in a particular way by an agent. I do not doubt but that the limitation of Parke, B., represents the true doctrine; it is, however, suggested that the limitation has been questioned or overruled by *Armstrong v. Stokes* (1). In the first place I would remark that I doubt whether the Court of Queen's Bench intended to do that. I think the Court intended to deal with that case as a separate case which did not admit of the application of the qualification laid down by Parke, B., notice was there taken of the peculiar customs obtaining in Manchester in relation to the business of commission merchants. Then, if that be so, where a vendor deals with an agent believing him to be the sole principal, and where the nature of the business is such that a purchaser ought to believe that a vendor would so deal, the purchaser, that is the defendant, has a right to suppose that the

Irvin v. Watson (App.), Q.B.

vendor deals solely with the agent as the principal. That is the utmost that *Armstrong v. Stokes* (1) decides. It may be that Blackburn, J., having to apply the doctrine of *Thomson v. Davenport* (2), and finding in that case a qualification which he thought he could not overrule or dissent from, confined it to the described case, and he declined in terms to apply it to such a case as that now before us. We, therefore, give no opinion as to whether we agree with that or not. But in any other view it is not inconsistent with the judgment of Bowen, J., and the qualification of Parke, B., may be adopted, being as it is the expression of the view taken by Tenterden, C.J., and Bayley, J., and then the facts of the present case do not bring it within the qualification. There was here no conduct of the plaintiffs to mislead the defendants, the only thing that can be urged is that the terms were expressed to be payment cash, and that the plaintiffs were not stern to enforce that, but it is not unusual not to insist on strict rights, and it is not to be expected that such a condition should in all cases be literally adhered to, so that the delay in exacting payment cannot be considered laches, and I am of opinion that there is no evidence that the plaintiffs have deceived, misled or induced the defendants to alter their position. The plaintiffs are, therefore, entitled to judgment and this appeal must be dismissed.

Judgment affirmed.

Solicitors—Field, Roscoe & Co., agents for Bateson, Liverpool, for plaintiffs; H. B. Clarke & Son, agents for Dunning & Kay, Leeds, for defendants.

[IN THE EXCHEQUER DIVISION.]

1879. } GILBERTSON (*appellant*) v.
Feb. 28. } FERGUSON, *Surveyor of*
March 1, 3. } *Taxes (respondent)*.
July 4. } *In re IMPERIAL OTTOMAN BANK.*

Income Tax—Profits of Foreign Corporation with English Agency and English Shareholders—Dividends partly from foreign Profits paid to English Shareholders out of English Profits—16 & 17 Vict. c. 34. s. 10—"Entrusted for Payment."

Dividends of a foreign corporation with an agency in England which were derived partly from foreign profits were paid to shareholders resident in England by the English agency out of money in hand from English profits. The Crown claimed from the English agency, in addition to income tax upon all the English profits of the corporation, income tax upon so much of the dividends paid to shareholders resident in England as was derived from foreign profits:—Held, by POLLOCK, B., and HUDLESTON, B. (KELLY, C.B., dissenting), that the claim must be allowed, under 16 & 17 Vict. c. 34. s. 10, notwithstanding that no portion of the foreign profits was actually remitted to England.

CASE stated under 37 & 38 Vict. c. 16 by the Commissioners for the Special Purposes of the Income Tax Acts.

1. The question for the opinion of the Court is, whether any portion of the profits made out of the United Kingdom by a Turkish corporation carrying on business in Constantinople, London and elsewhere, under the name of the Imperial Ottoman Bank, such profits not being actually remitted to the United Kingdom, is, as profits, or as forming part of dividends paid in the United Kingdom, assessable to income tax under schedule D of 16 & 17 Vict. c. 34, in the circumstances hereinafter appearing; and, if any, then whether either of the assessments for the year 1874-5 made on the appellant by the commissioners has been made upon the right principle, or upon what principle an assessment should have been made.

2. The commissioners conceive that it is convenient first to set forth the enactments, or the substance of the enactments,

Gilbertson v. Fergusson, Exch.

which have an especial bearing upon the question (1).

3. By 16 & 17 Vict. c. 34, certain duties are granted upon profits arising from property, professions, trades and offices (*inter alia*), section 2.

Schedule D.—For, and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment or vocation, whether the same shall respectively be carried on in the United Kingdom or elsewhere.

And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident in the United Kingdom, from any profession, trade, employment or vocation exercised within the United Kingdom.

4. By section 5, the duties are to be assessed under 5 & 6 Vict. c. 35, and the Acts therein referred to.

5. By 5 & 6 Vict. c. 35. s. 23, provision is made for the appointment of Commissioners for the Special Purposes of that Act, and such commissioners may in relation to their jurisdiction exercise all the powers of that Act as effectually as any other commissioners.

6. By section 40, all bodies corporate, companies or societies of persons, whether corporate or not corporate, are to be chargeable with such duties as any person would be chargeable with, and the chamberlain, or other officer acting as treasurer, auditor or receiver of such corporation, &c., is to be answerable for doing all such acts as shall be required by virtue of the Act, in order to the assessing such bodies corporate, &c., to the duties and paying the same.

7. By section 41, any person not resident in Great Britain, is to be chargeable in the name of his trustee, &c., or of his factor, agent or receiver, and every such trustee, &c., agent or receiver is to be answerable for the doing of all acts in order to the assessing of such person to the duties and paying the same.

8. By section 44, where any trustee,

agent, factor or receiver of or for any person is assessed in respect of such person, or where any officer of any corporation or society is assessed in respect of such corporation or society, every such person so assessed may out of the money which shall come to his hands as such trustee, agent, &c., retain sufficient to pay such assessment.

9. By various sections persons chargeable are required within the period, and in the manner specified, to deliver to the proper officer a statement or return for the purpose of assessment.

10. By section 51, every person in receipt of any money or value, or the profits arising from any of the sources mentioned in the Act, belonging to any other person, in whatever character received, for which such other person is chargeable or would be chargeable if he were resident in Great Britain, is, within the like period, to deliver, in manner before directed, a list containing a statement of all such money, value or gains, and the name and place of abode of every person to whom the same shall belong, together with a declaration whether such person is of full age, or a married woman, &c., or resident in Great Britain, in order that such person may be charged either in the name of the person delivering such list or in the name of the person to whom such property shall belong, and every person acting in such character jointly with any other person shall deliver a list of the names and places of abode of every person joined with him.

11. By section 53, every person acting for any other person, who by reason of incapacity, or of not being resident in Great Britain, cannot be personally charged, is also to deliver to the proper person a statement of the amount of the profits to be charged on him on account of such other person estimated during the period, and according to the rules contained in the respective schedules.

12. By section 54, every officer before described of any corporation, or society, is to deliver a statement of the profits to be charged on such corporation or society, computed according to the Act, and such estimate is to be made on the amount of the annual profits of such corporation, or

(1) The paragraphs in which the commissioners stated the enactments have been considerably shortened.

Gilbertson v. Fergusson, Exch.

society, before any dividend shall have been made thereof to any other persons, corporations or companies, and all such other persons and corporations or companies are to allow out of such dividends a proportionate deduction in respect of the duty.

13. By section 100, the duties in schedule D are to be assessed and charged under the following (amongst other Rules):—

The said duties shall be charged annually on the persons or societies, whether corporate or not corporate, receiving or entitled unto the property or profits charged.

First Case.—Duties to be charged in respect of any trade, manufacture, adventure or concern in the nature of trade.

Rule 1. The duty to be charged shall be computed on a sum not less than the amount of the balance of the profits or gains upon a fair average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, &c., shall have been usually made up, or on the 5th day of April preceding the year of assessment.

Rule 2. The said duty shall extend to every person, body corporate, company or society, and to every concern carried on by them respectively in Great Britain or elsewhere as therein aforesaid.

Rules applying to First and Second Cases.

Rule 3. The computation of duty in respect of any trade, concern or profession carried on by two or more persons jointly, shall be made and stated jointly and in one sum; and the return of the partner first named in the instrument of co-partnership (or of the partner named singly or with precedence in the usual name of such co-partnership, or where such precedent partner shall not be an acting partner, then of the preceding acting partner), who is thereby required to make such return, shall be sufficient authority to charge such partners jointly; Provided always that where no such partner shall be resident in Great Britain, then the statement shall be prepared and delivered by their agent, manager or factor resident in Great Britain.

14. By sections 111 and 113, all statements or returns of profits or gains described in schedule D (except statements for assessments by the Commissioners for Special Purposes) are to be laid before the "Additional Commissioners," and if the said commissioners shall not be satisfied with the statement delivered by any person, the said commissioners shall make an assessment on such person subject to an appeal as thereafter mentioned.

15. By sections 118—127, provisions are made for an appeal to the Commissioners for General Purposes from an assessment made by the Additional Commissioners.

16. By section 131, any person chargeable under schedule D may require all proceedings in relation to any assessment upon him to be taken before the Commissioners for Special Purposes, provided he shall deliver notice thereof, together with the statement of the profits, to the assessor, to be by him transmitted to the inspector or surveyor; and the inspector or surveyor shall assess the duties and deliver the assessment to the Commissioners for Special Purposes, who shall make or allow such an assessment as shall appear proper, subject to an appeal as in cases of appeal against assessments by the Additional Commissioners, and such appeal shall be determined by the Commissioners for Special Purposes.

17. By section 132, all powers and regulations which may be put in force by the Additional Commissioners, or by the Commissioners for General Purposes, with relation to the making or allowing of any assessment, or to the proceedings on any appeal before them, or to the collecting of the duties, may be put in force by the Commissioners for Special Purposes, with reference to any assessment to be made or allowed by them on any appeal.

18. By section 192, words in the Act importing the singular or the masculine only are to be understood to include several as well as one, females as well as males and bodies corporate as well as individuals, unless it be otherwise specifically provided, or there be something repugnant to such construction.

19. By 5 & 6 Vict. c. 80. s. 2, all per-

Gilbertson v. Fergusson, Exch.

sons entrusted with the payment of annuities or any dividends or shares of annuities payable out of the revenue of any foreign state to any persons, corporations, companies or societies in Great Britain, or acting therein as agents, or in any other character, are to deliver into the head office for stamps and taxes in England an account containing their names and residences, and a description of the annuities, dividends and shares entrusted to them for payment, within one month after the same shall have been required by notice in the *London Gazette*, and are also on demand by the inspector authorised for that purpose by the Commissioners of Stamps and Taxes to deliver to him for the use of the said Commissioners for Special Purposes true and perfect accounts of the amount of the annuities, dividends and shares payable by them respectively, and the said Commissioners for Special Purposes are to make an assessment thereon, giving notice of the amount of such assessment to the respective persons entrusted with such payments, who shall respectively pay the duty on the said annuities, dividends and shares on behalf of the persons, corporations and companies entitled unto the same out of the moneys in their hands.

20. By 16 & 17 Vict. c. 34. s. 10, the provisions of the last mentioned Act for the assessing and charging the duties on dividends and shares of annuities payable out of the revenue of any foreign state are extended to the assessing and charging of the duties by the now stating Act granted as well on such dividends and shares of annuities as aforesaid as on all interest, dividends or other annual payments payable out of or in respect of the stocks, funds or shares of any foreign company, society, adventure or concern, or in respect of any securities given by or on account of any such company, society, adventure or concern, and which said interest, dividends or annual payments have been or shall be entrusted to any person in the United Kingdom for payment to any persons, corporations, companies or societies in the United Kingdom; and all persons entrusted with the payment of any such interest, dividends or other annual payments as

aforesaid in the United Kingdom, or acting therein as agents, or in any other character, are to do all such acts in order to the assessing and charging and paying of the said duties on all such interest, dividends and other annual payments as aforesaid, as by 5 & 6 Vict. c. 80 persons entrusted with the payment of annuities or any dividends or shares of annuities are required to do.

21. By subsequent Acts the duties of income tax granted by 16 & 17 Vict. c. 34 have at various rates been continued. The Act imposing the duty for the year ending the 5th of April, 1875, was 37 & 38 Vict. c. 16.

22. In the year 1862 the Ottoman Bank of London, which was a banking company established in London, with a branch at Constantinople, arranged to transfer its business to the Imperial Ottoman Bank, a Turkish corporation incorporated according to the laws of Turkey by a firman of the Sultan.

23. The transfer was completed in 1863 by the issue of shares in the Imperial Ottoman Bank to the amount of 250,000*l.* to the shareholders of the Ottoman Bank of London; the remainder of the capital was subscribed in Constantinople, Paris, London and other places. Business was then commenced in London and Constantinople.

24. The affairs of the Imperial Ottoman Bank (hereinafter called the Bank) were regulated until the 17th of February, 1875, by a concession from the Government of Turkey and statutes of which a translation will be found in the Appendix (2). A new concession was granted, and new statutes were passed, on that day; but the question in this case is not thereby affected.

25. By the original concession, the bank is a state bank for the Ottoman Empire, and is established subject to the general laws of the Empire, with its seat at Constantinople, and power to establish branches and agencies at other places; and it is provided that the bank shall be administered at Constantinople by a board of two or three members, and

(2) The appendix is omitted, the tenor of the concessions and the statutes appearing sufficiently without it.

Gilbertson v. Fergusson, Exch.

a council of administrators of three members, both to be named by a committee, chosen by the London and Paris founders, and this committee is to have power in conformity with the statutes to guide, control and superintend the operations of the bank.

26. By the statutes, it is declared that the bank is formed to carry into effect the privilege of the bank as defined in the concession; and the operations to be undertaken are defined in accordance with the concession. The capital of the bank is divided into shares of 500 francs, or 20*l.* each, and the liability of the shareholders is limited to the amount of their shares. There is no register of shares, but, according to the provisions of the statutes, all the certificates of shares are made out to bearer, and the shares themselves are transferable by delivery of the certificates, and the dividends payable thereupon are payable at the option of the holders at Constantinople, Paris or London, by means of coupons attached to the certificates.

27. By the statutes the administration of the bank in Constantinople is confided to a director general, one or two assistant directors, and a council of administration of three directors. These are appointed by a committee of from twenty to twenty-five members, of whom ten at least must be English, or resident in England, and ten at least French, or resident in France, and each member of the council and of the committee must deposit in the treasury of the bank 100 shares therein, which are to remain unalienable during his continuance in office. This committee has the general guidance, control and superintendence of the operations of the bank, and its members are elected by the general meeting of shareholders. The statutes further require that the committee shall meet four times a year alternately in London and Paris, and the committee has, in fact, met and still does meet sometimes in London and sometimes in Paris. The execution of the decisions of the committee and the more immediate supervision of the affairs of the bank is assigned under the statutes to a sub-committee consisting of eight members, who are appointed by a general committee, and

of whom four are chosen from the English and four from the French section of the general committee.

28. It is provided by the statutes that the English members of the committee shall be charged, under the control of the sub-committee, with the management of the London agency of the bank, and the London business of the bank has always been carried on under the management of the English members of the committee in the City of London.

29. It is provided by the statutes that the annual general meetings of the shareholders and all extraordinary general meetings shall be held at such places as the committee shall fix, and at the annual general meetings the report of the committee is received, the accounts are discussed, approved or rejected, the dividends are declared and members of the committee are elected. The general meetings have always been held in London.

30. According to the translation furnished to the commissioners, articles 41 and 42 of the statutes are in the terms following:—

“Article 41. At the end of each of the company's years, a general inventory of the assets and liabilities is drawn up by the sub-committee and confirmed by the committee. The accounts are submitted to the general meeting who approves or rejects and fixes the dividends after having heard the report of the committee.

“Article 42. The net proceeds after deducting all expenses constitute the profits. Out of these profits there is taken, in the first instance, annually—

“1st. Five per cent. on the capital of the shares issued to be distributed among the shareholders by way of dividend on account.

“2nd. Ten per cent. of the profits for the reserve fund.

“The surplus is divided in the proportions of nine-tenths for the shares by way of dividend, the remaining one-tenth is divided into moieties, of which one for the founders and the other for the members of the committee and the administrative council.”

31. In relation to an assessment in respect of the profits of the bank for the year ending the 5th of April, 1872, it was

Gilbertson v. Fergusson, Exch.

contended on the part of the Commissioners of Inland Revenue that the bank, as a person residing in the United Kingdom, was bound to make a return of all its annual profits and gains, whether made in the United Kingdom or elsewhere, and was chargeable to income tax thereon under schedule D; but the Court of Exchequer held that the bank could not be regarded as residing in the United Kingdom.

The case is *The Attorney-General v. Alexander* (8).

32. On the 16th of November, 1875, two returns for income tax for the year ending the 5th of April, 1875, were made by the appellant, one being in respect of the English profits of the bank, and the other being in respect of the dividends of the bank.

The return in respect of the English profits was as follows:—

"The Imperial Ottoman Bank (London agency).

"Return for income tax on English profits for the year 1874-5.

"I hereby on behalf of myself and the other persons constituting the London agency make the following returns.

"The London agency act as agents for the bank, which resides at Constantinople, in the Empire of Turkey.

"The amount of profits and gains accruing to the bank from the trade of banker exercised within Great Britain, for the year ending the 5th of April, 1875, computed on a just and fair average of three years ending the 31st of December, 1873, the last mentioned day being the day on which the accounts of the bank have been usually made up, is 81,477l. 14s. 8d.

"The London agency do not make any return of the profits accruing to the bank from business carried on by the bank elsewhere than in the United Kingdom, the Court of Exchequer having decided that such profits are not chargeable. I declare that the foregoing declaration is true, and that the same is fully stated upon every description of property and profits in respect of which the London

agency is chargeable under schedule D of 5 & 6 Vict. c. 35, estimated to the best of my judgment according to the Acts relating thereto."

The return in respect of the dividends of the bank was as follows:—

"The Imperial Ottoman Bank (London Agency).

"Return of amount of dividends chargeable to income tax under 16 and 17 Vict. c. 34. s. 10, for the year 1874-5.

"In pursuance of the demand of Mr. J. Mayhew, the inspector authorised for that purpose by the Commissioners of Inland Revenue, and in pursuance of the statute 16 and 17 Vict. c. 34. s. 10, I hereby on behalf of myself and the other persons constituting the London Agency of the Imperial Ottoman Bank, deliver to the said inspector for the use of the Commissioners for Special Purposes, the underwritten account, being a perfect account of the matters of which an account is required by the above-mentioned section, for the year ending the 5th of April, 1875, that is to say—

"There were no interest, dividends or other annual payments payable out of or in respect of the stocks, funds or shares of the said Imperial Ottoman Bank, and (within the meaning of the said Act) entrusted to the said London Agency, for payment to persons, corporations, companies or societies, in the United Kingdom, and payable by the said London Agency, for the year ending the 5th of April, 1875."

33. The persons who are described in the above returns as the London Agency were and are the English members of the committee, and charged with the management of the London Agency of the bank.

34. When the above returns were transmitted to the respondent, the secretary of the London Agency furnished a statement, shewing how the sum of 81,477l. 14s. 8d., mentioned in the return in respect of the English profits, was arrived at, such statement being as follows:—

The English profits for the year ending—

(2) 44 Law J. Rep. Exch. 3; Law Rep. 10 Exch. 20.

Gilbertson v. Fergusson, Exch.

31st December, 1871, were	£69,118	1	0
" 1872, -	76,070	18	10
" 1873, -	99,244	4	4
	3	244,433	4 2
Return for 1874-5 -	£81,477	14	8

and a further statement of the amounts of dividends paid in England out of the profits of the bank in the course of the financial years 1871-72, 1872-73, 1873-74 and 1874-75, and such amounts were thereby shewn to be respectively 164,344*l.* 10*s.*, 189,694*l.* 10*s.*, 169,081*l.* 2*s.*, and 98,322*l.* 10*s.* It was also thereby shewn that in the year 1871-72 there was in the hands of the London Agency money derived from profits made in England amounting to 69,118*l.* 1*s.* which the Agency applied towards payment of the said dividends, and that the amount to make up the said sum of 164,344*l.* 10*s.*, namely, 95,226*l.* 9*s.*, was remitted from abroad out of the foreign profits of the bank; that in the year 1872-73 the amounts so applied and remitted respectively were 76,070*l.* 18*s.* 10*d.* and 113,623*l.* 11*s.* 2*d.*; that in the year 1873-74 the amounts so applied and remitted respectively were 99,244*l.* 4*s.* 4*d.* and 69,836*l.* 17*s.* 8*d.*, and that in the year 1874-75, the amount of English profits being in excess of the amount required for the dividends payable in England, no remittance from abroad out of foreign profits was required or made towards payment of the said sum of 98,322*l.* 10*s.*

The secretary also furnished copies of the annual reports for the years 1871, 1872, 1873 and 1874.

35. The Commissioners for Special Purposes first made an assessment for the year 1874-75 (hereinafter called the assessment on English profits) in respect of the profits of the bank upon the sum of 81,477*l.* 14*s.* 8*d.* for the English profits in conformity with the return, and duty was charged upon that sum accordingly. This assessment was not objected to and no question arises upon it.

The commissioners then proceeded to consider the return in respect of the dividends of the bank, and were of opinion that in making that return the appellant had taken an erroneous view of the liability of the English committee with reference to section 10 of 16 & 17 Vict.

c. 34; and, having no information as to the proportion of the said sum of 98,322*l.* 10*s.* paid in dividends in England in the year 1874-75 which represented English profits, and had been included in the assessment on English profits, they made an assessment (hereinafter called the assessment on dividends) upon the whole of the said sum of 98,322*l.* 10*s.* In giving notice to the appellant of the assessment on dividends, the commissioners left the English members of the committee to prove upon appeal what amount should be deducted as having been included in the assessment on the English profits.

36. The appellant, on behalf of the London Agency, appealed against the assessment on dividends to the commissioners for special purposes. Upon the hearing of the appeal, the commissioners said that in case section 10 of 16 & 17 Vict. c. 34, was inapplicable to the bank or did not in the circumstances warrant any assessment on dividends, they should make an assessment under the third rule applicable to the two first cases of schedule D in section 100 of 5 & 6 Vict. c. 35, in addition to the assessment on English profits, so as to cover the foreign profits to the extent to which in the opinion of the commissioners they were liable. It was, therefore, arranged that the hearing of the appeal should be adjourned, and that the commissioners should forthwith make such assessment in respect of foreign profits as they should think proper as an alternative assessment, and that an appeal therefrom, and the adjourned appeal should come on for hearing on the same day.

37. On the 20th day of January, 1876, the commissioners for special purposes made an assessment (hereinafter called the assessment on general profits) upon the sum of 115,935*l.*, which they ascertained to be the amount on an average of the three preceding years of the proportion of the foreign profits distributed in dividends in England, and which sum, with the addition of the said sum of 81,477*l.* 14*s.* 8*d.*, the amount of the assessment on English profits, amounted to a total assessment in respect of profits of 197,412*l.* 14*s.* 8*d.*

Gilbertson v. Fergusson, Exch.

The way in which the commissioners arrived at the foregoing result is shewn by the following statement of account:—

1871. Total dividend paid in England and abroad . . . £273,375

Dividend paid in England . . . 164,344

English profits . . . 69,118

As £273,375 : 69,118 ::

164,344 : 41,551

Subtract the 4th term 41,551

Portion of English dividend composed of Foreign profits . . . 122,793

Composed of (4) English profits . . . 69,118

Total profits assessable . . . £191,911

1872. Total dividend paid in England and abroad . . . £283,500

Dividend paid in England . . . 189,694

English profits . . . 76,070

As 283,500 : 76,070 ::

189,694 : 50,899

Subtract 4th term 50,899

Portion of English dividend composed of foreign profits . . . 138,795

English profits . . . 76,070

Total profits assessable . . . £214,865

1873. Total dividend paid in England and abroad . . . £202,500

Dividends paid in England . . . 169,081

English profits . . . 99,244

As 202,500 : 99,244 ::

169,081 : 82,865

Subtract 4th term 82,865

Portion of English dividend composed of foreign profits . . . 86,216

English profits . . . 99,244

Total profits assessable . . . £185,460

(4) *Sic* in case; but the words "composed of" seem to have been inserted by a clerical error.

Total profits assessable for 1871 £191,911

" " " 1872 214,865

" " " 1873 185,460

3) 592,236

Average for assessment £197,412

In making the said assessment, the commissioners regarded all the shareholders in the bank who were resident in England as carrying on business in England and abroad jointly with the shareholders resident abroad, and the English committee as the accountable and chargeable persons, under the third rule applicable to the two first cases of schedule D, in sec. 100 of 5 & 6 Vict. c. 35, in respect of the profits of the bank, so far as they were liable to income tax.

38. The Commissioners for Special Purposes sent a notice of the assessment on general profits to the appellant and the other English members of the committee in the following terms:—

"Take notice that the Commissioners for the Special Purposes of the Income Tax Acts have made an assessment on you, as representing the London agency of the Imperial Ottoman bank, and on the part of yourselves and all other the shareholders or members, in or of the said bank, for the profits of the said bank arising in the United Kingdom, and so much of the profits of the said bank arising out of the United Kingdom as is subject to income tax under the said Acts, in the sum of 197,412*l.* 14*s.* 8*d.*

"The above sum includes the sum of 81,477*l.* 14*s.* 8*d.* returned for assessment on the part of the London agency, and the duty now charged, in addition to the duty previously charged in respect of the said sum of 81,477*l.* 14*s.* 8*d.*, amounts to 966*l.* 2*s.* 6*d.*"

39. Upon the receipt of the said notice, the appellant signified his intention to appeal to the Commissioners for Special Purposes, and on the 26th day of January, 1876, that appeal and the adjourned appeal against the assessment on dividends came on for hearing.

40. At such hearing, it was stated on the part of the appellant that no technical objection would be taken to the assess-

Gilbertson v. Fergusson, Exch.

ments, or the mode in which they had been made, but that objection was taken upon the simple ground that the whole liability of the appellant and the other English members of the committee, either as representing the London agency of the bank, or on the part of themselves and the other shareholders in the bank, in respect of income tax upon the profits of the bank had been discharged by the assessment for the English profits and the payment of income tax upon that sum. In support of that objection, it was alleged that it was decided by the Court of Exchequer in the case of *The Attorney-General v. Alexander* (3) that the bank was chargeable to income tax in respect of the English profits only, and that the bank could not be regarded otherwise than as a person residing out of the United Kingdom and carrying on business in the United Kingdom through an agent. It was further urged that the bank having a foreign incorporation must be regarded as a corporate body or entity for all purposes connected with the income tax, and that the Commissioners for Special Purposes had no power to make any assessment upon the shareholders in the bank in respect of these dividends or shares of the profits thereof. It was further urged that the provisions of the Income Tax Acts, with the exception of sec. 10 of 16 & 17 Vict. c. 34, were such as to restrict the obligation of the agent of a foreign corporation to make a return of profits of the corporation to a return of the profits made in the United Kingdom, and consequently to restrict the charge of income tax to the profits so made. It was further urged that, inasmuch as all dividends paid in the United Kingdom in the year 1874-5 were paid out of English profits retained by the English members of the committee for the purpose, no dividends payable on the shares of the bank were entrusted to such members or any person for payment in the United Kingdom, and that consequently no return could be called for and no assessment could be made by reference to sec. 10 of 16 & 17 Vict. c. 34.

41. It was submitted on the part of the respondent that, in the case of *The*

Attorney-General v. Alexander (3), the Court of Exchequer decided only that the bank was not chargeable as a person residing in the United Kingdom.

With respect to the assessment on general profits it was urged on the part of the respondent that, where persons (some of whom reside while the others do not reside in the United Kingdom) carry on a concern jointly in the United Kingdom and elsewhere, the annual profits arising to such persons from the concern are chargeable under schedule D of 16 & 17 Vict. c. 34, and the third rule applicable to the two first cases of schedule D, in sec. 100 of 5 & 6 Vict. c. 35; and that the fact of such persons having been incorporated by a firm of the Sultan does not diminish their liability or deprive the Crown of the income tax which would have been payable if there had been no such incorporation. It was also urged that, whatever may have been the effect of the Turkish incorporation, it did not bring the bank within the meaning of the expression "bodies politic or corporate," in sec. 40 or sec. 192 of 5 & 6 Vict. c. 35, or make the bank chargeable as a company or corporation under the general provisions of the Acts.

With respect to the alternative assessment, namely, the assessment on dividends made with reference to sec. 10 of 16 & 17 Vict. c. 34, it was urged, on the part of the respondent, that the appropriation by the English members of the committee of the whole of the English profits to the payment of dividends to a certain class of shareholders, namely, those whose dividends were paid in London, could not have the effect of depriving the Crown of income tax upon so much of the foreign profits as must be considered to have formed part of such dividends. It was also submitted that the construction of the said sec. 10 for which the appellant contended, namely, the limitation of the expression "dividends intrusted" to moneys actually remitted by the bank from abroad for distribution in dividends in London, was manifestly opposed to the intention of the Legislature.

Gilbertson v. Fergusson, Exch.

42. The Commissioners for Special Purposes concurred in the views of the respondent, and, upon the general question involved in the alternative assessments, were of opinion that the contention of the appellant that the assessment on English profits was to be regarded as satisfying the whole liability of the appellant and the other members of the English committee in every aspect of the case could not be supported.

The commissioners therefore were of opinion that one of the two assessments (namely, the assessment on dividends, and the assessment on general profits) was right, and, inasmuch as the persons who represented the appellant and the Crown desire that all the points should be brought before the Court upon a case to be stated, they confirmed the two alternative assessments.

43. The appellant thereupon expressed his dissatisfaction with the determination as erroneous in point of law, on the ground that, in the circumstances herein stated, no portion of the foreign profits is the subject of assessment to income tax on the appellant and the other English members of the committee for the year ending 5th April, 1875, and required the commissioners to state and sign a case, now accordingly stated and signed.

The case was twice argued; the second argument being on the 28th of February and the 1st and 3rd of March, 1879, by *H. Matthews (Bosanquet with him)*, for the appellant; and *Sir John Holker, Attorney-General (Dicey with him)*, for the respondent.

Cur. adv. vult.

The following judgments were delivered on the 4th of July, 1879:—

HUDDESTON, B.—The Legislature has provided by the 16 & 17 Vict. c. 34. s. 2, schedule D, that income tax shall be paid on the annual profits or gains arising or accruing from any profession, trade, employment or vocation, by persons residing in the United Kingdom, whether the profession, &c., be carried on in the United Kingdom or elsewhere; and by persons, whether subjects of her Majesty or not, although not resident in the

United Kingdom, where those profits or gains arise or accrue from any profession, &c., exercised within the United Kingdom.

The Imperial Ottoman Bank carried on business, as bankers, in Constantinople and in London; and their profits in the year 1875 were gained or accrued from business carried on in the United Kingdom and out of the United Kingdom.

It was held in *The Attorney-General v. Alexander* (3) that the Imperial Ottoman Bank was not liable to be assessed to income tax in respect of its whole profits as a "person residing within the United Kingdom," under the first clause of schedule D, but was liable in respect of the profits arising from its business carried on in the United Kingdom, under the 2nd. The profits arising from its business carried on in the United Kingdom for the year ending April 5th, 1875, were ascertained under the provisions of the 5 & 6 Vict. c. 35. s. 100, first case, rule 1, upon an average of three years, to be 81,477*l.* 4*s.* 8*d.*; and on this amount the Imperial Ottoman Bank admit they are liable to be assessed to the income tax, but they contend that they are not liable to be assessed to or to pay more.

The annual profits of the Imperial Ottoman Bank arising from their whole business, both in and out of the United Kingdom, are, after certain deductions, divided equally among the shareholders, and the dividend is paid on coupons attached to the shares, when presented for payment. In the year 1874–5 98,322*l.* 10*s.* was paid in London, by the London branch of the Imperial Ottoman Bank, as dividend on shares presented there. Each person receiving his dividend was liable to pay income tax thereon under the first clause of schedule D, and it was admitted, in argument, that in practice income tax was deducted on payment of the dividend by the London branch of the Imperial Ottoman Bank.

By the provisions of the 5 & 6 Vict. c. 80. s. 2, and 16 & 17 Vict. c. 34. s. 10, all persons entrusted with the payment of dividends in respect of shares of any foreign country to any persons in Great Britain shall deliver to the Commissioners for Special Purposes an account of the

Gilbertson v. Ferguson, Excs.

dividends and shares entrusted to them for payment, and the commissioners shall make an assessment thereon, giving notice of the amount of such assessment to the persons entrusted, who shall pay the duty, that is the income tax on those shares, on behalf of such persons in Great Britain, out of the moneys in their hands.

The Imperial Ottoman Bank in London were persons entrusted with the payment of the 98,322*l.* 10*s.*, the dividend on the shares presented in London, and, as such persons so entrusted, were entitled to deduct the income tax from the dividend holder, and, therefore, must pay and be assessed for the amount.

Each dividend paid represents a portion of profits arising in the United Kingdom and a portion of profits arising out of the United Kingdom. As they have already been assessed for that portion of the profits arising in the United Kingdom in the 81,477*l.* 4*s.* 8*d.*, they have a right to retain so much of that income tax as would be applicable to that portion, otherwise they would be charged twice over; but, with reference to so much of the income tax as is applicable to the portion representing profits out of the United Kingdom, they must pay that over to the commissioners, under the provisions of the two last statutes referred to, and must be assessed for the same.

It was urged that the Imperial Ottoman Bank were only liable to pay upon the amount of their profits in the United Kingdom and upon any sum remitted to them beyond those profits to enable them to pay dividends in the United Kingdom, but where the profits in the United Kingdom were greater than, or equal to, the dividend to be paid in the United Kingdom, they were to pay nothing more than the tax upon the former. I find no such word as "remitted" in any of the statutes. When they are entrusted with the amount to pay the dividend, they are to pay out of the money in their hands, that is, out of the money entrusted to them, the amount of each dividend, less the income tax, to the coupon holder in the United Kingdom, and the amount of the income tax to the commissioners.

The amount of income tax to be paid is not to be regulated by any system of book keeping or practice the Imperial Ottoman Bank may adopt.

It might be that the whole of the profits made in the United Kingdom were transmitted to Constantinople, and yet a sufficient amount arising on financial operations remained in the hands of the Imperial Ottoman Bank in London, out of which they were entrusted to pay the coupon holders in the United Kingdom, or that there was sufficient in the Imperial Ottoman Bank in London to enable them to hold to the credit of the bank in Constantinople the whole of the profits made in the United Kingdom, and, besides, to pay the dividends on the coupons in the United Kingdom; or it might be, at the particular period of a financial year when the dividend had to be paid, that there was no balance in the hands of the London house, and the whole had to be remitted from Constantinople. Could it be said that in the two first cases the Imperial Ottoman Bank were not to pay over to the commissioners the amount of income tax they had deducted on paying the dividend, and in the last case they were?

It was said that it would be difficult to ascertain what proportion of the 98,322*l.* 10*s.* would represent profits made out of the United Kingdom; but, if it cannot be ascertained absolutely, it may be arrived at proximately, by the process suggested in the 37th paragraph of the case, or by some other method.

It follows that the assessments of the commissioners in paragraphs 35 and 37 of the case cannot be supported. The case ought in my opinion to go back to them to make the assessment on the total amount of the profits made in the United Kingdom on an average of three years, that was 81,477*l.* 4*s.* 8*d.*, plus the amount of so much of the 98,322*l.* 10*s.* as can be ascertained to be profits made out of the United Kingdom in 1874-5, the principle of the first case, rule 1 of the 5 & 6 Vict. c. 35. s. 100, not being applicable.

As neither party have established the position for which they respectively contended, I think there should be no costs.

If the Imperial Ottoman Bank, on de-

Gilbertson v. Fergusson, Exch.

mand, refuse or neglect to furnish the necessary information to the commissioners to enable them to assess the amount of foreign-made profits in the English-paid dividends, it may be that the commissioners would be justified in assessing the Ottoman Bank to the full amount of the English-paid dividends, leaving them to prove on what amount they have already paid income tax as profits earned in the United Kingdom.

POLLOCK, B.—The question which arises in this case is—in respect of what funds coming to the hands of the London agency of the Imperial Ottoman Bank are they properly assessable to income tax?

The bank is a corporation established as a *Société Anonyme* under a government concession, at Constantinople, and having branches or agencies at Paris and London, business being carried on and profits at times being made in all three places.

The capital of the bank is divided into shares of 20*l.* each. The certificates of shares are made out to bearer, and the shares themselves are transferable by delivery of the certificate. The dividends thereon are payable at the option of the holders at Constantinople, Paris or London, by means of coupons attached to the certificates. At the end of each year the accounts are submitted to a general meeting, who fix the amount of the annual dividend. The net proceeds, after deducting all expenses, constitute the profits, and out of these there is deducted ten per cent. for reserve fund and five per cent. on the share capital for dividend on account. The surplus after paying one-tenth to the founders and members of the committee and council is distributed as dividend to the shareholders.

The London agency act as agents for the bank in the United Kingdom, and pay to any coupon holders who may produce them at the London office, the amounts to which from time to time they may be entitled by way of dividend.

The bank admit that they are liable to be assessed for income tax under 16 & 17 Vict. c. 34. s. 2, schedule D, in respect of all money coming to the hands of the London branch which arises from profits earned within the United Kingdom. They

also admit that whenever the amount earned by such profits is insufficient to pay the dividends payable in the United Kingdom, and money is transmitted from abroad to pay so much of the dividends as cannot be paid out of such profits, they are liable to be assessed in respect of such money by virtue of section 10 of the above Act; and as to both of these, income tax has in previous years been assessed and paid. The income tax commissioners, however, make a further claim, and assert that, although the amount paid by way of dividend in the United Kingdom should not in any one year exceed the amount of profit earned in the United Kingdom, the bank are liable to income tax in respect of so much of the amount paid in the United Kingdom by way of dividend as consists of profits earned abroad.

The mode in which the commissioners have sought to assess the London agency in respect of this sum is twofold.

By one assessment the commissioners treated all the shareholders as persons, some of whom reside in the United Kingdom, and some elsewhere, carrying on a concern jointly in the United Kingdom and elsewhere; and as to those who reside in the United Kingdom the commissioners claim to tax them in respect of their share of the entire profits, whether earned in the United Kingdom or elsewhere.

By an alternative assessment the commissioners treated the London branch or agents as persons in the United Kingdom entrusted with dividends payable out of the funds of a foreign company, and as such, liable to income tax in respect of all dividends paid in the United Kingdom, and also as persons liable to income tax in respect of all profits made in the United Kingdom; but, to the extent to which the amount paid by way of dividend consisted of profits earned in the United Kingdom, the commissioners admitted that this amount, having been taxed once as profits, was not further liable. In the result, therefore, the commissioners, by this assessment, claim to tax, first, all profits made in the United Kingdom; and, secondly, so much of the amount paid for dividends in the United

Gilbertson v. Fergusson, Excr.

Kingdom as consists of profits earned elsewhere.

The first of these two assessments appears to me to be wrong in principle for these reasons.

The bank is a foreign corporation whose chief place of business is at Constantinople, and, as has already been decided by *The Attorney-General v. Alexander* (3), the London branch or agency cannot be treated as a person residing in the United Kingdom. The bank itself is a corporation, and although a foreign corporation, its constitution as such should be respected and recognised by the legal tribunals of this country. It results from this, that the shareholders, although they receive in the shape of dividends that which is derived from the profits of the bank, are not partners, and cannot be treated as such. In other words, their right under the constitution of the corporation is to a dividend, but they have beyond this no interest in the general funds of the bank.

With respect to the alternative assessment, the English agents are, in my opinion, properly assessed, and for these reasons. According to the literal construction of the statute, the profits which have been earned in the United Kingdom, and are in the hands of the English agents to be distributed among the shareholders in the United Kingdom by the payment of dividends, come within the incidence of both branches of the statute. First, they are annual profits arising from a trade exercised within the United Kingdom within the second branch of schedule D, and are properly assessable as such under section 100. Secondly, with respect to all money in the hands of the London agents applicable to the payment of dividends to the shareholders within the United Kingdom, they are entrusted therewith for payment to persons in the United Kingdom, within the meaning of section 10, whether such money arises from profits earned in England or elsewhere, the language of the section being "entrusted to" not "transmitted to," and so the London agents are assessable under the provisions of section 10, and unless there be good reason to the contrary they must pay income tax upon the

whole amount. If, however, they can shew that they have already paid income tax upon the amount in whole or in part, they are entitled to do so, inasmuch as it would be clearly unjust that they should pay twice over. Then arises the question which appears to me to give rise to the entire difficulty in the case. In respect of what portion have they paid twice over, or have they so paid in respect of the whole? Now it is quite clear that the dividends which are payable alike to all the shareholders, whether resident within the United Kingdom or not, may, and probably do, accrue from profits earned within the United Kingdom, and also from profits earned without the United Kingdom; and this is not in any way disturbed or affected by the fact that the directors choose to pay such dividends out of any particular moneys as moneys earned in Constantinople, Paris or London. Hence the London agents by paying tax upon the profits made in the United Kingdom are entitled to have the tax payable upon the dividends reduced only in respect of so much of those dividends as arose from profits earned in the United Kingdom.

If all the money applicable to dividends paid within the United Kingdom was in any year earned within the United Kingdom only, then the profits earned within the United Kingdom would represent in all respects the same sum, and the agents having paid upon it as profits, ought not to pay upon it again as money entrusted to them to pay dividends. If, however, a portion only was earned within the United Kingdom, then they can claim to deduct in respect of that portion only; otherwise no income tax would be paid upon that portion of the money entrusted to the agents for payment of dividends which was earned abroad.

In the result the first assessment cannot be supported. The second is correct, but the bank, by a proper return, may escape its effect to the extent I have indicated.

Under these circumstances I think there should be no order as to costs.

KELLY, C.B.—I am of opinion that the appellants are entitled to the judgment of the Court, on the ground that the assessment made and sought to be enforced by

Gilbertson v. Fergusson, Exch.

the Crown upon the bank is a claim, at once, to income tax on the year's profits of a body of traders, and then to income tax again upon their year's income; in which the fact is lost sight of by the Crown, that the profits of a trader constitute his income, and are, in fact, his income, and that profits and income are one and the same thing; and that the assessment by the Crown upon the bank, in this case, is as if a banker, or merchant, or shopkeeper, who had earned 1,000*l.* as profits in a given year by his trade, and which in fact constituted his whole and sole income and means of subsistence, were to be made to pay the income tax, first, upon the 1,000*l.*, the profits earned within the year, and then, over again, upon the same 1,000*l.*, as his income, when he should proceed to appropriate and expend it in the maintenance of his family; which, simply stated, would be to make a trader who made 1,000*l.* a year, and had no other income, to pay the income tax upon it twice over, and so, in the year in question, to pay fourpence in the pound, instead of twopence for income tax.

This was attempted by the Crown, for the first time, in 1874-75; the true principle having been acted upon, alike by the Crown and the bank, from 1863 until the year 1874-75, of assessing to the income tax for the profits earned in England, but once, and once only; and when the amount so earned was insufficient to meet the payment of the coupons, which constituted the dividends for the year in question, it was necessary to require a further sum to be entrusted to the agency from abroad, and application for it was made, and it was remitted from Constantinople accordingly, and so entrusted to the agency, within the statute; and of this sum a return was made, and income tax paid upon it under section 10 of the Act. No claim was made, as now, to tax the bank in respect of the act of payment of the coupons, nor (except in *Alexander's Case* (3) hereafter noticed) to tax any other sum than the amount of the earnings in England, and the amount entrusted, if any, and remitted from Constantinople, under the statute.

The real facts of the case, when cor-

rectly stated, and attentively considered, together with the legislative provisions alone applicable to the questions which are raised, will be found to demonstrate these propositions; especially when the case can be presented, or illustrated, in a form divested of intricate arithmetical calculations and unmanageable figures.

But first, as to the facts, as they appear in the printed case. The Ottoman Bank is a large body of shareholders (whether corporate or not is immaterial) carrying on its business at Constantinople, in Paris, and in London. One portion of its shareholders reside in Turkey, another in France, and another in England. The shares, which are of 20*l.* each, may be stated to be 500,000 in number. The accounts of the bank are taken at the end of December in each year, and the amount of dividends to be paid in the shape of coupons is ascertained by the 5th of April in the following year; and the assessment to the income tax in relation to the year in question, 1874-75, is made when these figures are ascertained, after the 5th of April in the year 1875. The accounts of the bank having been taken at the end of December in each year, and the profits made in each of the three countries being ascertained, a dividend is declared, which, after certain deductions, is paid to the shareholders in the three countries upon the presentation of coupons, which coupons are annexed to the shares, and are therefore in the hands of the shareholders. No payment of money actually takes place, except upon the presentation of the coupons, but the amount of the dividend declared is published in the three countries, and this amount determines the value of each coupon. The coupons, which are payable half-yearly, that is, two coupons for each year, are annexed to each share, and they are made payable at the offices of the bank in the three cities of Constantinople, Paris and London.

In the year in question, 1874-75, the amount of profits actually earned in England was 145,539*l.* 0*s.* 2*d.* The sum, in respect of which, under the regulations and practice of the commissioners, the bank was assessed, and being the average of the profits earned during the next pre-

Gilbertson v. Fergusson, Exch.

ceding three years, was 81,477*l.* 14*s.* 4*d.* The amount paid upon the presentation of coupons, and treated as paid for dividends to which English shareholders were entitled, was 98,322*l.* 10*s.* And these sums were returned to the commissioners by the bank, or their representatives here, and were, in my opinion, all that they were called upon to return as material to the case, or that, in fact, it was possible for them to return. The bank have, however, at my instance, through their solicitors, furnished certain further information, which has also been laid before the commissioners, and is strictly correct; and we now know that the entire aggregate of profits made in the three countries during the year in question was 848,125*l.* 12*s.* 7*d.* It follows, therefore, that the sum already specified having been earned in England, 702,586*l.* 11*s.* 5*d.* was earned abroad, that is at Constantinople and in Paris together. The dividend declared and paid upon the year 1874-75 was, I believe, 1*l.* 14*s.* 6*d.*, or 17*s.* 3*d.* payable in each of the two half-years, in January and in July. I do not see the materiality of these figures, but they are now before the Court.

The provisions of the Acts of Parliament applicable to the case are, first, the second clause in schedule D of the 16 & 17 Vict. c. 34. s. 2, which imposes the income tax upon the annual profits or gains arising or accruing to any person (or corporate body) although not resident in the United Kingdom, on any trade exercised within the United Kingdom. And, under this provision, the bank have been assessed upon the sum of 81,477*l.* 14*s.* 4*d.*, which the commissioners themselves have substituted, as the average of the next preceding three years, for the sum actually earned of 145,539*l.* 0*s.* 2*d.*; and this assessment has been acquiesced in and paid by the bank to the Crown. And, as the sum of 98,322*l.* 10*s.* was the amount paid to the holders of coupons upon their presentation, that sum has been also returned And, inasmuch as the amount of profits earned in England, and in the hands of the bank here, was sufficient to meet and to pay this sum, no further sum has been

required to be supplied, or was supplied, from Constantinople, and so "entrusted" to the bank here under the 16 & 17 Vict. c. 34. s. 10, and I am of opinion that therefore the liability of the bank to income tax is at an end.

Some complexity is occasioned by its being made to appear that 98,322*l.* 10*s.* has been provided for by the smaller sum of 81,477*l.* 14*s.* 4*d.*; but this arises from the mode of assessment of the profits adopted by the commissioners themselves, and that sum of 98,322*l.* 10*s.* has in fact been paid out of the profits actually earned, and on which the tax has, according to that assessment, been duly paid, and I am not aware that any question was raised on this point during the argument.

Reference has been made to section 100 of 5 & 6 Vict. c. 35; but it must be remembered throughout this case, that this is not an assessment of the shareholders resident in England upon the amount of their respective incomes as shareholders in the bank, but is an assessment upon the bank itself, in respect of the specific sum of 81,477*l.* 14*s.* 4*d.*, assumed by the Crown to be the amount of the profits earned in England; and upon what ground, that amount of profits having been assessed to and paid the income tax, a new and additional assessment can be made upon the 98,322*l.* 10*s.*, to the payment of which the profits of the year have been applied, I am at a loss to understand; this, as already observed, being an assessment to the income tax, not upon profits, nor upon the income derived from the profits, but upon the mere act of payment of the income to those who are entitled to it.

Then, it is said that this money, 81,477*l.* 14*s.* 4*d.*, is money "entrusted" to the bank, under the 16 & 17 Vict. c. 34. s. 10. But, in the first place, it must be remembered, that the amount of profits earned in England is not, in fact, a large specific sum, which might consist of bank notes, or of gold lying upon a table, but is the result of almost innumerable operations, by which very small, as well as large sums, are realised as profits during an entire year, from 1*l.* to 1,000*l.* and upwards; realised day by day, and hour by hour, in the bank. And

Gilbertson v. Ferguson, Exch.

if it could be said that each and every of these sums is money "entrusted" to the bank, under the Act referred to, the same might be said of every sum of any and every amount which comes into the hands of the bank in the course of the year, and which sums, great and small, are applied to all imaginable purposes, such as the payment of clerks and servants, the payment of the rent of offices, the insurance of their property, and all other purposes incidental to the business of a bank. How can a sum of 50*l.* which has come into the hands of the bank in London, in the ordinary course of their dealings, and which is applied in the payment to one of their clerks of a half-year's salary (which is as much "entrusted" to the bank as the sums daily arising to them from profits upon their transactions), be seriously argued to be money "entrusted" to them under, and according to, the provisions of this section 10 of the Act of Parliament? I know of no other form in which the proposition contended for, on the part of the Crown, can be stated, than to insist that, upon a true construction of the Act of Parliament, the sum earned as profits within the year, and applied to the payment of dividends, is impressed with a double character, and may be assessed to the income tax, first, as profits earned in England, and next, as money "entrusted" to the bank under the statute. I can only repeat that, in my view of the case, if this be so, every shilling that they receive in England, and at whatever time, and for whatever purpose, or to whatever purposes it may be applied, is "entrusted" to the agency in London by the bank itself, and within the meaning of the statute. The Attorney-General, in his ingenious argument suggested, and indeed contended, that the profits received by a shareholder, and constituting the whole or a part of his income, are liable to assessment, whether such profits were earned in England or abroad. And it is certainly in one sense true; not that any Act of Parliament makes the profits earned by this bank abroad liable to assessment to the income tax, the contrary having been decided by this Court in the case of *The Attorney-General v. Alex-*

ander (3) so often referred to; but there can be no doubt that every dividend upon every share in the bank, to which the shareholder is entitled, consists of profits earned abroad, as well as profits earned in England; and if this were an assessment upon a shareholder, upon his income derived from his shares in the bank, he would, no doubt, be liable to the assessment, and in that sense would be liable to the tax, as well upon the profits earned abroad as upon the profits earned in England, of which his dividend should be composed. But the Government of this country has thought fit, by means of legislation convenient and advantageous to itself, to abstain from taxation, in respect of the income tax, of shareholders in a foreign bank resident in this country, by a direct assessment made upon the shareholders themselves, and has substituted a liability to the income tax upon any agents or representatives of a foreign bank here who are "entrusted" under the provision of section 10, so often referred to, with the money of the bank, for the purpose of paying the dividend, in respect of which shareholders resident in England would themselves have been liable to assessment. We have, therefore, to consider whether, where the amount of profits earned by a foreign bank in England, within a year, has been assessed to, and has paid the income tax, and that same sum of money has been found sufficient to pay the dividends (or the coupons supposed to represent the dividends) to which English shareholders are entitled, that same sum of money is liable to be assessed, and to pay the income tax over again, upon its application to the payment of the dividends (or the coupons assumed to represent the dividends) of the English shareholders, on the ground that it is entrusted to the agency here, under the statute of the 16 & 17 Vict. c. 34. For this there is no warrant in any of the statutes. As profits earned in England, the amount has already been assessed, and the income tax paid to the Crown, and no money whatever has been entrusted to the agency under the statute 16 & 17 Vict. c. 34.

The two provisions applicable to this

Gilbertson v. Fergusson, Excu.

case, and under which alone the bank can be assessed to the income tax, are, first, the clauses in schedule D to which reference has already been made, and then, where it is brought into operation, the 16th & 17th Vict. c. 34. s. 10. The effect of that statute, which is most useful and beneficial to the Government here, is simply this; that where, in order to satisfy the claims to an income consisting of dividends upon the shares or stock of a foreign corporation, it is necessary, there, instead of remittances by the corporation abroad to the shareholders in this country, and an assessment to the income tax upon such shareholders, the foreign corporation may remit the aggregate amount of the dividends to which such shareholders would be entitled, to an agency or a branch bank in this country, and assess them to the amount so remitted, leaving it to them to pay the English shareholders, deducting the amount of the income tax which shall have been paid by the branch bank or agents to the Crown, and this is called an "entrusting" by the bank to the agency here of the amount so remitted. And in every year, from the year 1863 when the bank was established, to 1874-5, the amount of profits earned in England has been found insufficient to pay the amount of dividends which had already before the 5th of April been paid by the agency to the English shareholders, upon the presentation of their coupons, the amount deficient has been required from the bank abroad, and has been remitted from Constantinople and so entrusted to the agency within the statute, and the income tax has been paid upon it by the branch bank or agency here in strict accordance with the provisions of this Act. Both statutes have, therefore, been complied with from 1863 to the year in question, 1874-5, the provisions of the Act in schedule D, and the provisions of the 16th & 17th Vict. c. 34. s. 10 to the amount required and remitted from abroad. In the year in question, 1874-5, the sum earned as profits by the bank in England being 145,539*l.* 0*s.* 2*d.* (for which the commissioners have substituted 81,477*l.* 14*s.* 4*d.*) and actually in hand and more than sufficient to pay the 98,322*l.* 10*s.*, the

dividends due to and claimed by the English shareholders upon their coupons, no money whatsoever has been required to be remitted or has been remitted from abroad; and so there is no other sum in existence, upon the facts of the case, upon which the bank could have been or can be assessed to the income tax. And I in vain called upon the learned counsel for the commissioners to point out what enactment, in any Act of Parliament, authorised or empowered the commissioners to assess the Ottoman Bank upon any other than these specified sums in respect of which they have been assessed and have paid the tax.

In like manner, I called upon the learned counsel for the commissioners to point out and specify what returns the bank could be called upon to make which they have not made, and which it was possible for them to make. They have returned the amount of profits earned in England, and the amount which they have been called upon to pay, and have paid upon the presentation of the coupons representing or assumed to represent the dividends of the English shareholders. They have, indeed, added the amount earned by the bank at Constantinople, and in Paris, though, as already observed, I do not see what bearing that amount has upon any question in this appeal. It is clear upon these facts that the Ottoman Bank has been assessed to and has paid the income tax upon the whole of that portion of its profits which has been earned in England; and, as decided in this Court, in the case of *The Attorney-General v. Alexander* (3), the bank is not liable to assessment upon any portion of the profits earned abroad. It has, therefore, satisfied the provisions of the Act in schedule D, and in the year in question, unlike what was found to be necessary in former years, they have not needed to require the aid of the establishment at Constantinople or in Paris to meet the dividends which they have been called upon to pay, and have paid, to the English shareholders, and so have not brought the 16th & 17th Vict. into operation at all.

In order to avoid the intricate calculations which have been resorted to by the

Gilbertson v. Fergusson, Exch.

learned counsel for the commissioners, and the large figures so inconvenient to deal with, which appear in the real statement of the case, I would suggest a more convenient form in which every question in the case may be dealt with. Suppose the bank to consist of 500,000 shareholders, each possessing a single share, and to have made in the year in question, in the three countries, a profit of 500,000*l.*; 100,000*l.* in England and 400,000*l.* abroad, of which 200,000*l.* have been made in Constantinople, and 200,000*l.* in Paris. Suppose the English shareholders to be entitled altogether to dividends, to be paid to them upon the presentation of coupons, to amount to 100,000*l.*, the Paris shareholders, in like manner, to 200,000*l.* and the Constantinople shareholders to the remaining 200,000*l.* The bank has, therefore, 500,000*l.* of profits in its hands, of which 100,000*l.*, which has been earned in England, is in the hands of the agency in England and the remaining 200,000*l.* and 200,000*l.* at Constantinople and in Paris respectively. In respect of what sum or sums of money is the bank liable, under the two statutes referred to, to be assessed to the income tax? 100,000*l.* having been earned in England, they are to be assessed to the income tax upon that sum. Upon the 400,000*l.* earned abroad they are liable to no assessment whatsoever. If with the 100,000*l.* in their hands in England they pay the dividends or coupons to the English shareholders, the amount of the 100,000*l.* to which the shareholders are entitled, deducting the income tax, and they pay to the shareholders at Paris the 200,000*l.*, and to the shareholders at Constantinople the remaining 200,000*l.*, without deduction, they have thus disposed of the whole of the 500,000*l.*, the entire aggregate of their year's profit, and by virtue of what provision in any Act of Parliament can the bank be assessed in respect of any other sum whatever? The case may be put in every variety of forms, and upon every variety of possible facts that can be supposed, and the result will be found, that unless a trader or a body of traders, like the Ottoman Bank, can be made to pay income tax, first upon the profits of their trade, and afterwards

upon the incomes of their shareholders, which incomes are derived from their profits, and are, in fact, their profits, upon the division of such profits among those who are entitled to them, and which shares of the aggregate profits to which they are entitled constitute, and are in fact their incomes, no assessment can be made under any imaginable state of things that can be suggested beyond a single assessment upon the profits which the trader has earned.

Suppose from some political disturbances in Turkey or France, or from any other cause, the whole profits of 500,000*l.* to have been earned in England, and the whole of the shareholders in the bank to have quitted the Continent or to be resident in England, the bank is assessed upon the amount of profits and pays the income tax of 2*d.* in the pound upon 500,000*l.* The sum is then divided among the shareholders, and in fact constitutes their incomes. If, as I hold to be the law, profits, and, as is the fact, income consisting of these profits, are one and the same thing, the trader can be taxed but once upon the sum thus earned and being his year's income.

But, before proceeding further, to put the question in the clearest and simplest form—suppose a firm of bankers consisting of two partners had earned profits in their business to the amount of 10,000*l.* within the year, and which profits in their business were their only incomes or sources of subsistence, and they return as the amount of their year's profits or incomes this sum of 10,000*l.*, and are assessed to the income tax upon that amount and pay the tax accordingly, and they then proceed to divide the money, each party taking 5,000*l.* of it and expending it in the course of the year upon the maintenance of himself and his family, could these two individuals be assessed over again, each to the sum of 5,000*l.*, upon their having divided it between them, and proceeding to appropriate and expend it? For if so, if the income tax were, as in 1875, 2*d.* in the pound, they would have to pay to the Crown, not 2*d.* but 4*d.* in the pound upon their income, and this additional tax would in reality be imposed, not upon

Gilbertson v. Fergusson, Excn.

the year's income derived from the profits of a trade, but upon the mere act of receiving and appropriating such profits, *quod absurdum est*.

Suppose, next, as the case first put, and which, except as to the amount of the figures, is identical with the case now before the Court, the case of the bank possessing 500,000*l.* which has been earned for profits, of which 100,000*l.* having been earned in England is in England, and, the shareholders in England being entitled to 100,000*l.* in respect of dividends or coupons, the 100,000*l.* in their hands and on the spot is paid to the English shareholders, and the 200,000*l.* in Paris to the shareholders in Paris, and the remaining 200,000*l.* to the Turkish shareholders in Constantinople; can it be contended that the bank is liable to pay the income tax upon either of these two latter sums of 200,000*l.*?

In such a case the Ottoman Bank would have in its hands 500,000*l.*, the aggregate amount of its profits in three countries within the year. Of this, 100,000*l.* having been earned in England, would be here, in London, and 200,000*l.* having been earned in Paris, would be in Paris, and the remaining 200,000*l.* having been earned in Turkey, would be at Constantinople. The bank would accordingly pay the 100,000*l.* which they have here to the English shareholders who are here, the 200,000*l.* which they have at Paris they would pay to the shareholders in Paris, and the 200,000*l.* which they have at Constantinople would be paid to the Turkish shareholders at Constantinople. Is it possible seriously to contend that any law or statute in England would compel the bank to divide 100,000*l.* which they have here into five parts, and remit two fifth parts to Paris, and two fifth parts to Constantinople, and also to divide the 200,000*l.* which they have in Paris into five parts, and remit one fifth part to England, and two fifth parts to Constantinople; and again to divide the 200,000*l.* at Constantinople into five parts, and remit one fifth part to London, and two fifths to Paris, and retain the remaining two fifth parts at Constantinople, instead of paying the 100,000*l.* which they have in England to the shareholders there, and

the 200,000*l.* which they have in Paris and the 200,000*l.* at Constantinople, to their shareholders in those two cities respectively. Yet this is the course which they would be bound to adopt if the calculation and application of those different sums suggested in the arguments for the Crown were to be practically adopted.

As to the claim to have certain other returns made, as we have already before us the several sums before referred to, which are all that are known or can be known to the Ottoman Bank or its agents in England or elsewhere, there remains but the number of shareholders and the precise amount of the dividends to which they are entitled, that can be suggested on the part of the Crown. As to the shareholders, I have already pointed out that the number is unknown and uncertain. No register is kept, and their number, the shares being transferable by delivery from hand to hand, may, as already observed, vary from day to day and hour to hour. And as to the amount of dividends to which the English shareholders or any others may be entitled, inasmuch as the coupons are also transferable by delivery and may pass from hand to hand at any moment, and in either of the three countries, it is only upon their being presented and paid that the bank or their agents can know or ascertain their amount as presented in each of the three cities, and even then they know not to whom they belong. The practice adopted by the bank, and, indeed, forced upon them by the commissioners, is to take the amount of the coupons paid by the agency in England to be the amount of the dividends to which the English shareholders are entitled; but it is obvious that as many of these coupons may have been brought or remitted to England by foreign shareholders to whom they belonged, a considerable sum may have been paid, within any given year, to persons not English shareholders, and who, therefore, are not liable to income tax.

The ingenious suggestion and calculation of the Attorney-General, to the effect that the English shareholders are liable to pay the tax upon profits made abroad, as constituting a portion of their divi-

Gilbertson v. Fergusson, Exch.

dends, really comes to this: — Every single dividend upon every share (I believe in the year in question amounting to 1*l.* 14*s.* 6*d.*), and payable at the two periods of January and July in each year, is really composed of profits earned in the three countries; and if the English shareholders were assessed on their respective incomes here, no doubt they would be liable to the income tax, wherever the different portions of the amounts had been earned. But the assessment here is on the bank, and the bank is liable only to the income tax upon the profits earned in England, and upon the money remitted to them from abroad for the payment of their dividends to the English shareholders, under 16 & 17 Vict. c. 34. s. 10, and to no other assessment whatsoever.

By adopting the convenient figures which I have suggested, of 500,000*l.* of profit and 500,000 shareholders, every possible case which can occur may be tested upon the true principle of assessment, whether by supposing the whole of the profits earned in England and the whole of the shareholders to be resident in England, or the whole of the profits made abroad and the whole of the shareholders resident abroad; or a portion of the profits earned in England and the remaining portions abroad. And, in each and every case, by the application of the English statutes, the extent and amount of the assessments to income tax upon a bank may be ascertained. But finally, to take the real sums appearing upon the case, however inconvenient may be the figures to be dealt with, the sum earned in England in the year in question is 145,539*l.* 0*s.* 2*d.* But for this must be substituted, as required by the commissioners upon the three years' average principle, 81,477*l.* 14*s.* 4*d.* Upon this the income tax of twopence in the pound is 678*l.* 19*s.* 7*d.*, and this sum has been assessed upon the appellants and paid by them to the Crown. The sum paid to the English shareholders, or such as are assumed to be English shareholders, upon the coupons presented to the bank in the year in question, is 98,322*l.* 10*s.* But this sum has been paid out of the profits actually earned in England, and upon

which the income tax has been assessed and paid, though claimed by the commissioners upon the minor amount only of 81,477*l.* 14*s.* 4*d.* Unless, therefore, contrary to the practice adopted and acted upon from the year 1863 until the year in question, 1874–5, the Crown is now entitled to claim income tax at once upon profits earned, and upon the income consisting of such profits; in other words, unless traders in England are liable to the income tax upon the profits which they earned within the year, and again, upon the income which, in fact, is or are the profits thus earned, the trader possessing no other income, it is impossible, for the reason assigned, for the Crown to maintain its claim to income tax upon the 145,539*l.* 0*s.* 2*d.*, or, as substituted for it by the commissioners, upon 81,477*l.* 14*s.* 4*d.*, and also upon the sum of 98,322*l.* 10*s.*, which constitutes the incomes of the whole body of English shareholders, and which are paid to them as representing their shares of the whole profits of the bank, or the proportion to which they are entitled of the sum of 848,125*l.* 12*s.* 7*d.* Of this sum, which constituted the aggregate profits made by the bank in the three countries within the year in question, the bank, by its representatives in this country, having here, upon the spot, a sum sufficient to pay this amount to the shareholders, have paid it accordingly; and unless the fanciful, and I venture to think, the absurd course were adopted of remitting to Paris and Constantinople the proportion of this sum of 145,539*l.* 0*s.* 2*d.*, to which the foreign shareholders were entitled, and then requiring the bank abroad to remit back again to them the proportion of the foreign profits made abroad, which in that case would belong to the English shareholders, the case in fact is simply this: that out of the aggregate profits earned by the bank, they have paid to the English shareholders, as represented by the appellants, that portion of the aggregate profits which the bank had in its possession here in England, in satisfaction of the dividends claimed by the English shareholders, and to the foreign shareholders the proportion of the entire profits to which they were entitled,

Gilbertson v. Fergusson, Exch.

I quite agree that it is not competent to the Ottoman Bank, by any mode in which they may think fit to carry on their business, to defeat or to evade the claim to any income tax to which the Crown is entitled. But the British Government having thought fit to relieve itself from the inconvenient task of assessing an indefinite number of English shareholders, whose numbers are unknown, and whose residences may be likewise unknown, to the income tax to which they are liable upon their respective incomes, is itself bound, as well as the Ottoman Bank, to resort to the Act of Parliament which the Government itself has framed and passed, for assessing the bank in lieu of the shareholders, under the provisions of that Act, to whatever amount of money may have been entrusted to them, within and according to those provisions, for the purpose of paying those incomes to the shareholders. And, as already observed, there are now no other provisions of any Act or Acts of Parliament in existence under which the Ottoman Bank can be lawfully assessed to the income tax than the 2nd clause in schedule D, and the 10th section of 16 & 17 Vict. c. 34. And although it is true that there is no such word in the latter statute as "remitted," it is perfectly clear that the agency of the bank in England can obtain the sum of money in respect of which they are to be assessed instead of the shareholders in no other way than according to the precise terms to be found in that statute, and which is a remittance from abroad of the sum required when the amount of profits earned in England, and already in their hands, is insufficient for that purpose. Were it otherwise, and if the bank could be assessed in respect of any other sum than that which is entrusted to them from abroad by virtue of that statute, it could only be for the 98,322*l.* 10*s.* which will have been paid to those assumed to be the English shareholders; and as that sum is income, and income only, and the profits with which it has been paid are profits earned in England, and the only profits in the hands of the Ottoman Bank liable to income tax, unless profits and income, which consist of profits, can be

taxed twice over, which, for the reasons assigned, I hold that they cannot, the Ottoman Bank is not liable to this double taxation. As to the demand of 115,835*l.* and then of 197,412*l.* 14*s.* 8*d.*, I must leave it to the advisers of the Crown, with the assistance of the judgments of my learned brethren, as they best can, to specify the amounts of these sums, and how they are made up, and the grounds upon which by any law or statute of England they are made liable to the income tax.

Finally, I am of opinion that the judgment in this case should be entered, *mutatis mutandis*, for the appellants, in the terms of the judgment entered in the case of *The Attorney-General v. Alexander* (3), as follows:—"That the London agency of the Imperial Ottoman Bank (such agency being represented by the said appellants) is only bound to make a return under 5 & 6 Vict. c. 35, in respect of the profits made in the United Kingdom; and, inasmuch as no profits made abroad have been actually remitted to this country for distribution in London, under 16 & 17 Vict. c. 34. s. 10, no further returns are required to be made; and the appellants are liable to no further or other assessment to the income tax; and that judgment be thereupon entered for the said appellants, with costs of suit."

Case remitted with the opinion of the Court (5).

Solicitors—G. M. Clements, for appellant; Solicitor for Inland Revenue, for respondent.

(5) The judgment of the Court, as entered on the 4th of March, 1880, was as follows:—

"Whereas the said case came on for hearing on the 7th and 8th days of December, 1877, when the same stood over for judgment, but was subsequently directed by the Court to be again argued before three Judges; and whereas, on the 28th of February and the 1st and 3rd days of March, 1879, the said case came on to be re-argued accordingly, when the matter was adjourned for the judgment of the Court until this day; now the Court are of opinion that the decision of the Commissioners for Special Purposes of the Income Tax, in confirming the assess-

[IN THE COMMON PLEAS DIVISION.]

1880. } *In re* THE TRUSTS OF THE WILL
 April 24. } OF THOMAS CLARE.

Husband and Wife — Conveyance by Married Woman under 3 & 4 Will. 4. c. 74. s. 91.

The Court refused to make an order under 3 & 4 Will. 4. c. 74. s. 91, dispensing with the concurrence of the husband to the execution of a deed by his wife on an affidavit by the son that the husband and wife had for three years been living apart, in consequence of the intemperate and violent habits of the former, which rendered necessary his confinement in a lunatic asylum for some time, and that although he had since been discharged, he was not in a fit mental condition to execute a deed, or understand its nature. The Court directed that application should be made to the husband to execute, and that the result should be stated to the Court, and that he should have notice of an application for the order, and further, that there should be an affidavit by a medical man of the husband's mental condition.

Hon. Alfred E. Gathorne Hardy moved for an order to enable *Mary Ellen Kershaw*, a married woman, to join in the transfer of a mortgage without the concurrence of *William Kershaw*, her husband. The application was made under 3 & 4 Will. 4. c. 74. s. 91, and was founded on an affidavit made by *Thomas Clare Kershaw*, the eldest son of the said *William Kershaw* and *Mary Ellen*, his wife. This affidavit stated that the said *William Kershaw* and *Mary Ellen*, his wife, had been for the last three years and still were living apart and separate; that they so lived apart in

ment to income tax called in the case, paragraph 35, "the assessment on dividends, made upon the committee of the Imperial Ottoman Bank for the year 1874, ending 6th of April, 1875," is based upon the right principle of assessing, in so far as it assesses so much of the profits of the bank entrusted to the committee for payment of dividends in the United Kingdom as is not shewn by a proper return on the part of the bank to arise from profits made in the United Kingdom; and do order the case to be remitted to the commissioners to be dealt with by them on the above-stated principle; and do further order that no costs be paid on either side."

consequence of the intemperate and violent habits of the said *William Kershaw*, which rendered necessary his confinement in a lunatic asylum for some time, and that although he had since been discharged from the said asylum, he was not in a fit mental condition to execute any matters of business of importance, or to execute a deed or understand the nature thereof.

There was also an affidavit of the trustee of the will of *Thomas Clare*, deposing to the advance out of the trust estate, in which the wife was interested, of 1,700*l.* on mortgage, and that an arrangement had been made for a transfer of such mortgage, which was required to be executed by the said *William Kershaw*, the husband, who, however, had no interest therein, or in the money which was invested.

No doubt, in *Ex parte Murphy* (1), the Court declined to make an order until application had been made to the husband, where the affidavit stated only that he was in a nervous and excitable state; but here the affidavit goes much further, and states that he is not in a fit mental condition to execute a deed or to understand its nature.

[*Grove, J.*—The affidavit by the son is not sufficient. There ought to be an affidavit by some medical man.]

The husband and wife are living apart, not by mutual consent, but in consequence of the intemperate habits of the husband.

THE COURT (2) refused to make an order, and adjourned the application for further affidavits, namely, an affidavit of a medical man as to the mental condition of the husband, and an affidavit shewing the result of an application to the husband to execute; and the husband also was to have notice of the renewal of the motion, so that he might appear thereon if he pleased.

Application adjourned.

Solicitors—*Gregory & Co.*, agents for *H. Christian*, *Liverpool*.

(1) 5 Scott N.S. 166; 12 Law J. Rep. C.P. 92.

(2) *Grove, J.*, and *Lopes, J.*

[IN THE QUEEN'S BENCH DIVISION.]
 1880. } M'COLLIN v. GILPIN AND
 May 7, 25. } OTHERS.

Directors of Company—Personal Liability—Assignment of Property of the Company by Directors without Authority—Representation of Authority—Measure of Damages.

By an agreement, headed as between a limited company of the one part and the plaintiff of the other, in consideration of the advance by the latter of 500*l.* to the company, the undersigned three directors of the company agreed to repay the loan in six months, and they thereby assigned as security for the advance the machines and tools as invoiced to him, to be removed by him only in case default should be made in repayment of the 500*l.* The agreement was not sealed with the company's seal nor countersigned by the secretary, nor was there any statement by the directors that they signed on behalf of the company. Default having been made, the plaintiff took possession, but was restrained from dealing with the machines by a perpetual injunction obtained by the company, on the ground that the directors had no power to make the assignment.

On action brought subsequently by the plaintiff against the three directors personally, to recover the advance with interest, and also his costs of defending his possession of the machines against the company:—

Held, by LUSH, J. (on further consideration), that the agreement was to be read as a guarantee given by the defendants personally for repayment of the advance, and that the heading expressing it to be made on the part of the company must be rejected, as inconsistent with the form of signature; but there being no representation that the directors had special authority from the company to assign the machines, and it being incumbent on all persons dealing with directors to know how far under the articles of association their general powers extend, the plaintiff was not entitled to recover the costs of resisting the injunction.

This was a case which was tried before Lush, J., without a jury, at the

Winter Assizes for the West Riding of Yorkshire, held at Leeds, in February, 1880, and reserved for further consideration.

On May 7, at Westminster, *Cave* and *Cyril Dodd* argued for the plaintiff.

A. Wills and *Lockwood*, for the defendants.

The facts and arguments appear sufficiently from the judgment.

Our. adv. vult.

The following judgment was delivered (on May 25) by

LUSH, J.—This is an action against the directors of a trading company, called the Turnbridge Iron and Boiler Works Company, Limited, to recover a sum of 500*l.* advanced to the company, with interest, and also to recover the costs which the plaintiff had incurred under the circumstances after mentioned in defending his possession of certain machinery and tools alleged to have been assigned to him by way of security for the advance.

Upon the trial before me at Leeds, without a jury, it appeared that in May, 1878, the company was in difficulties, and that at a meeting of directors, the plaintiff, who had been introduced to them as a person likely to assist them, was applied to to lend the company 500*l.* for six months. This he declined to do, alleging that he had not so much to lend, and was not used to lending money that way; but after some hesitation, he said that if he procured the money, it would be on condition that he lent it to the defendants themselves. They then asked if he would take a second mortgage on the premises. He refused, and was then offered security on the machinery and tools. In the result he agreed to make the advance, on having an agreement signed by the defendants, to pay the 500*l.* and interest at the end of six months, and in default to deliver over the machinery and tools at invoice price. An invoice was then made out, and the parties adjourned to have the agreement prepared. On the 5th of June they met again to conclude the transaction. An

M'Collin v. Gilpin, Q.B.

agreement had in the meantime been prepared, which was intended to bear the company's seal. This the plaintiff refused to accept, and thereupon the agreement in question was written out and signed by the defendants and by the plaintiff. The question is, what is the construction which ought to be put upon this document? It is in these terms:—

"Agreement between the Turnbridge Iron and Boiler Works Company, Limited, of the one part, and William M'Collin, Esq., of Hull, on the other part. In consideration of the advance of the sum of 500*l.*, paid by the said William M'Collin, Esq., to the said company, we the undersigned, three of the directors of the said company, hereby agree to repay the said sum of 500*l.*, with interest at the rate of five per cent. per annum, in six calendar months from the date hereof. And we do hereby assign to the said William M'Collin, as security for the said advance of 500*l.*, the machines and tools as invoiced to him 3rd June, 1878, the machines to be delivered in the same condition for working as they are now. And the said William M'Collin hereby agrees not to remove the said machines and tools from their present position, except in default of the repayment of the said sum of 500*l.*, with interest at the rate of five per cent. per annum, at the expiration of six months from the present date. As witness our hands, this 5th day of June, 1878." This document is signed by the defendants and by the plaintiff, but it is not sealed with the seal of the company, nor countersigned by the secretary, pursuant to the 52nd article of association, nor do the defendants ever express that they sign it on behalf of the company. The only part which creates a difficulty is the heading, which declares the document to be an agreement between the company on the one part and the plaintiff on the other. This, I presume, was the heading of the agreement which was first written out, and intended to be sealed with the company's seal, and which the plaintiff refused to accept. But however that may be, as it stands it professes to describe a contract with the company; but when we turn to the signatures, we find that this description is

inaccurate, and that whatever might have been originally intended, the document is not signed so as to bind the company, or as it is would have been signed if the directors had intended to make it the contract of the company. To proceed with the narrative. The 500*l.* was then and there advanced, and a receipt for it given by the secretary, who signed per pro. for the company. No part of the principal or interest having been repaid, the plaintiff, at the expiration of six months, took possession of the machinery and tools. The company thereupon commenced an action in the Chancery Division, and obtained a perpetual injunction restraining the plaintiff from removing, selling or in any way dealing with the machinery and tools, on the ground that the directors were not authorised to make the alleged assignment.

The plaintiff claims, in addition to the 500*l.* and interest, the costs he has been put to in taking possession and defending his rights to the security.

The first question is, does the agreement bind the defendants personally to pay the 500*l.*? It seems to me that to make it of any avail at all, the heading must be rejected, since it is not signed in a form to be binding on the company. If it is read without the heading, it is in terms an engagement in the nature of a guarantee by the defendants to repay the money, with interest, in six months.

And I think the heading must be rejected without violence to any rule of law. The document will then be what the plaintiff stipulated for, namely, the security of the directors in their individual character. The claim for damages occasioned by the action for an injunction was attempted to be sustained upon the authority of *Richardson v. Williamson* (1), as being a representation by the defendants that they had the authority of the company to assign the machinery and tools as security for a loan. The 46th article of association empowers the directors, with the sanction of the company in general meeting, to borrow on mortgage of the company's lands, or

(1) 40 Law J. Rep. Q.B. 145; Law Rep. 6 Q.B. 276.

M'Collin v. Gilpin, Q.B.

upon debentures, bonds, promissory notes, bills of exchange and other transferable securities, or otherwise, as they shall deem requisite for carrying on the works, &c. If the defendants had so executed this agreement as to make it in form the company's contract, the plaintiff would have been justified in assuming that they had received the requisite authority of the company in general meeting, and the defendants would have been then in the same position as the defendants in *Richardson v. Williamson* (1). But the agreement does not contain or imply any such representation, inasmuch as it does not profess to be an assignment by the company, but only by the directors as such.

Now directors of these companies have no authority other than that which is given them by the articles of association, and these are open and supposed to be known to all persons who have dealings with the company.

The representation is that they, in their capacity as directors, in virtue of their general authority, had power to assign, not that they have received the special authority which the articles empower a general meeting to give, and which fact persons dealing with them cannot be presumed to know. See *Beattie v. Lord Ebury* (2).

I am therefore of opinion that the plaintiff is not entitled to the costs of resisting the injunction, but that he is entitled to judgment for 500*l.*, and interest at five per cent.

Judgment for plaintiff.

Solicitors—E. Jukes, agent for E. Laverack, Hull, for plaintiff; Torr & Co., agents for Wells & Hind, Nottingham, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. }
March 5. } WALKER v. CLAY.

Bill of Sale—Grantor carrying on Business and selling Goods—Covenant not to remove—*Bona fide* Purchase of Goods comprised in Bill of Sale.

The grantor of a bill of sale, described in the instrument as an innkeeper and horse-dealer, in consideration of a loan of 100*l.*, assigned to the plaintiff by the said bill all his personal property, including "an entire horse called Fireaway, a cob called Charley, a pony called Nelly." The bill of sale contained a covenant that so long as the money should remain owing the grantor would not remove any of the said premises from the said message without the consent of the plaintiff, and provided that until default in payment the grantor should hold, make use of and possess the premises thereby assigned.

Subsequently, and without the consent of the plaintiff, the grantor sold the three horses, Fireaway, Charley and Nelly, at a public auction, where one of them, the cob, was purchased by the defendant. In an action of *detinue* brought by the plaintiff to recover the cob or its value from the defendant, it was

Held, that the object of the bill of sale being to enable the grantor to carry on his business, the sale of the horses, which must be taken to have been sold in the ordinary course of his business, was not a breach of the covenant, and that the action was, therefore, not maintainable.

The National Mercantile Bank v. Hampson (49 Law J. Rep. Q.B. 480; Law Rep. 5 Q.B. D. 177) followed.

Appeal by motion under 38 & 39 Vict. c. 80. s. 6, from the County Court of Yorkshire.

An action in *detinue* was brought in the County Court of Yorkshire, holden at Halifax, to recover possession of a cob or pony called Charley or its value in money. Prior to the 14th of March, 1879, the cob in question, an entire horse called Fireaway, a horse called Jenny and a pony called Nelly, were the property of one Joseph Wilkinson, who kept the New Inn, Harrogate. On the 14th of March,

(2) 44 Law J. Rep. Chanc. 20; Law Rep. 7 E. & I. App. 102.

Walker v. Clay, C.P.

1879, Wilkinson executed a bill of sale in favour of the plaintiff, which, so far as is material, was as follows: Wilkinson, described in the instrument as innkeeper and horse-dealer, in consideration of the sum of 100*l.*, advanced to him by Walker, assigned to the said Walker all and every the household goods and furniture, stock-in-trade, plate and plated articles, household linen, books, china and other household effects whatsoever, horse saddles, harness and other accoutrements, and also one entire horse called Fireaway, horse called Jenny, cob called Charley and pony called Nelly, light gig, dog-cart, cart, trade fixtures and all other goods, chattels and effects now on the said messuage; and all and every the book and other debts and sums of money due and owing to the said Wilkinson, and all other his personal estate.

Then followed a covenant by the mortgagor that so long as any money should remain owing on the security of these presents, the said mortgagor would not remove any of the said premises from the said dwelling-house without the previous consent in writing of the said mortgagee, except for necessary repairs, and would replace any articles damaged or worn out with others of equal value, to be included in this security. The deed contained the usual covenant for repayment, and a power of sale, and provided that until default should be made in payment of the said sum of 100*l.* and interest, it should be lawful for the said mortgagor to hold, make use of and possess the said premises thereby assigned.

On the 24th of March, 1879, Wilkinson, the grantor, sent for sale to the Yorkshire repository, Leeds, to be sold by auction, three horses, namely, the horse Fireaway, the cob in question and the pony Nelly. The auctioneer advanced to Wilkinson 40*l.*, and sold them on the 1st of April following. The cob was purchased by the defendant for fifteen guineas, and was afterwards claimed by the plaintiff as his property.

The County Court Judge was of opinion that the intention of the bill of sale was that the grantor should be at liberty to carry on his trade of an innkeeper and horse dealer by the sale of his stock-in-

trade, both of drinkable liquors and horses, upon the understanding that the property so dealt with should be replaced by similar property of equal value, and that the action was, therefore, not maintainable; or even if that were not so, that the rule of law by which where one of two innocent parties must suffer by the fraud of a third party, he, who by his indiscretion has enabled the fraud to be committed, must bear the loss, and that on that ground the plaintiff could not recover, and gave judgment for the defendant.

The plaintiff subsequently obtained a rule calling on the defendant to shew cause why the judgment should not be set aside, and instead thereof judgment be entered for the plaintiff for damages, to be assessed as the Court might direct; or why a new trial should not be had between the parties on the ground that upon the evidence the purchase of the cob was an act of conversion by the defendant, for which he was liable to the plaintiff.

A. L. Smith shewed cause, and referred to *The National Mercantile Bank v. Hampson* (1).

E. O. B. Lane, in support, contended that the ground of that decision was that the intention of the bill of sale was to enable the grantor to continue his business, but that in the present case no such intention appeared.

GROVE, J.—In my opinion this case cannot be distinguished from *The National Mercantile Bank v. Hampson* (1). The facts of the two cases are nearly identical, the sole difference being that in this case the cob was sent to an auctioneer, and by him sold to the defendant; whilst in the other case the wheat was wrongfully sold on the farm of the grantor of the bill of sale to the purchaser. The statement of defence there set up was that even if the goods sold were the plaintiff's property, the plaintiff by suffering the grantor to have possession thereof, enabled him to hold himself forth

(1) 49 Law J. Rep. Q.B. 480; Law Rep. 5 Q.B. D. 177.

Walker v. Clay, C.P.

as the owner, and that the grantor sold the same to the defendant, who bought them in the ordinary course of his business, and without notice that they did not belong to the grantor; that the said grantor was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale; and that it was the ordinary course of the grantor in such business to make such sales.

Every word of this applies to the present case, for the plaintiff has permitted the grantor of the bill of sale to make use of the horses to carry on his ordinary business. The grantor of the bill of sale was an innkeeper and horse dealer, and we must take it to be found that this horse was sold in the ordinary course of his business. The object of the bill of sale was to permit the grantor to carry on his business as innkeeper and horse dealer, and it must therefore be taken to have contemplated this sale. In his character as publican the grantor would, of course, be entitled, and the bill of sale must be taken to have intended him to be entitled, to sell beer and wine to his customers. To send casks away and sell them by auction would probably not be in the ordinary course of business, and an action might be brought by the grantee to recover them. It is difficult to say where the exact line ought to be drawn. But the object of the bill of sale being to enable the grantor to carry on his business of innkeeper and horse dealer, he ought to have some liberty in order to carry it on, and he would be greatly hindered if he were not allowed to part with some of the property by selling articles which were of a saleable nature.

So far as the facts are concerned the case closely resembles that in the Queen's Bench, but as regards the equities of it, it is very much stronger, for whereas in that case the purchaser bought direct from the grantor of the bill of sale, and might have discovered the existence of a bill of sale by searching the registry, in this case the horse is put up and sold at a public auction, and the purchaser had no chance of discovering the owner; but however that may be, we do not dissent from the case in the Queen's Bench, and

being a decision of a Court of equal jurisdiction, it is one we should follow. Our judgment is, therefore, for the defendant.

LINDLEY, J.—I am of the same opinion. The first thing we have to consider is the true construction of the bill of sale and the real meaning and object of it. It appears that the grantor is described as an innkeeper and horse dealer, and the bill contains an assignment of all the effects of the grantor as a security for a loan of money. The object of the bill of sale is obviously not to paralyse the trade of the grantor, but to enable him to carry on his trade, and the bill would be worthless if we were to construe it otherwise. The covenant not to remove any of the things comprised in the bill of sale without the consent of the grantee is not a covenant not to sell, and it would be, to my mind, contrary to the intention of the parties to construe that covenant as a covenant not to sell in the ordinary course of business, for it would paralyse the business and destroy the value of the security. I think, therefore, that the covenant not to remove is a covenant that the grantor will not remove or dispose of the goods otherwise than in the ordinary course of his trade.

Then follows a proviso that until default in payment the grantor may hold and make use of the premises assigned. Taking all the provisions of this bill together, the object of it is plainly to let the grantor carry on his business in the ordinary way, not that he is to consult the grantee as to everything he requires to sell, but only in case he desires to remove them in any other sense, such as removing them off the premises to another house.

The judgment of the County Court Judge proceeded on the assumption that this sale was not a breach of covenant, but a sale in the ordinary course of trade; the purchaser has bought *bona fide*, and the question is, has he a good title against the mortgagee? It appears to me that he has, and I am also unable to distinguish this case from *The National Mercantile Bank v. Hampson* (1) in the Queen's Bench. The *ratio decidendi* of that case

Walker v. Clay, C.P.

appears to be that if the holder of a bill of sale allows the grantor to continue his business he allows him to dispose of the goods comprised in the bill of sale, in the ordinary course of business. It is to my mind an extension of the doctrine that a *bona fide* purchase for value without notice is to be protected, but it is a wholesome, though perhaps a bold, decision, and I avail myself of it. Possibly this is an omission in the Bills of Sale Act. The rule must be discharged with costs.

Rule discharged.

Solicitors—Layton & Jaques, agents for Lancaster & Wright, Bradford, Yorkshire, for plaintiff; Torr & Co., agents for Chambers & Chambers, Brighouse, Yorkshire, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. }
May 5. } THE QUEEN v. HUTCHINS.

Public Health—Paving Private Street—Highway repairable by the Inhabitants at large—Decision of Justices as to Character of Street conclusive—Res Judicata—38 & 39 Vict. c. 55 (Public Health Act, 1875), s. 150—Dismissal of Complaint, Evidence of—11 & 12 Vict. c. 43. s. 14.

[For the report of the above case, see 49 Law J. Rep. M.C. 64.]

[IN THE COMMON PLEAS DIVISION.]

1880. } WHITE (*appellant*) v. FOX AND
Feb. 27. } ANOTHER (*respondents*).

Justices—Summary Jurisdiction—Ouster of Jurisdiction—Mens rea—Assault and Battery—24 & 25 Vict. c. 100. ss. 42 and 46.

[For the report of the above case, see 49 Law J. Rep. M.C. 60.]

[IN THE COMMON PLEAS DIVISION.]

1880. } TAYLOR v. M'KEAND AND
May 3. } ANOTHER.

Bill of Sale—Stock-in-Trade—Implied License to Grantor to sell in course of Trade—Title of Purchaser.

Where by a bill of sale in which a trader assigns his stock-in-trade as security for the money borrowed, the grantor is to hold and use the goods without hindrance by the grantee until he makes default in repayment of the money, there is an implied license to the grantor until default to sell the goods which form such stock-in-trade, but he must do so in the ordinary course of his trade; and where, therefore, he sells fraudulently, and not in the ordinary course of his trade, the purchaser acquires no title to them as against the grantee of the bill of sale, though he purchases *bona fide* and without notice of the fraud.

Trover for goods. At the trial before Lopes, J., at the last Hilary Sittings in Middlesex, it appeared that one Isaac Henry Bass, a draper, in Peckham Park Road, Surrey, executed a bill of sale on the 1st of October, 1878, by which he assigned *inter alia* his stock-in-trade to the plaintiff as security for money lent to him by the plaintiff, and which was to be repaid at any time on demand. The bill of sale was not registered, and by its terms it was to be lawful for Bass, until he had made default in repayment of the money, to hold and make use of the goods without hindrance or disturbance on the part of the plaintiff. On the 24th of October, 1878, and before such default (no demand having been made until November, 1878) the defendants, who were drapers, purchased by private arrangement of Bass his book debts, and also the goods, the subject of this action, which formed part of his stock-in-trade, and were comprised in the said bill of sale. They had been invoiced at 18l. 1s. 10d., and were bought by defendants for 13l. 3s. 1d. Bass very shortly afterwards absconded.

The learned Judge left it to the jury to say whether Bass sold these goods *bona fide* and in the ordinary course of business, or whether, on the contrary, he

Taylor v. M'Keand, C.P.

did so to enable him to decamp with the proceeds. The jury found that Bass sold the goods to the defendants with a fraudulent intention and not in the ordinary course of business, but that the defendants did not know of this, and bought them *bona fide*. The learned Judge thereupon directed the verdict to be entered for the plaintiff for 13l. 3s. 1d. A rule *nisi* was afterwards obtained by *Oppenheim*, for the defendants, to set aside such verdict, and for a new trial, on the ground of misdirection in not directing the jury that if the defendants purchased the goods *bona fide* it was immaterial whether the intention of Bass was fraudulent.

Douglas Kingsford shewed cause.—The direction of the learned Judge was right. The sale was not in market overt, and was not good as against the plaintiff, the grantee under the bill of sale. It is not disputed that Bass, until default, had power to deal with the goods in the ordinary way of his business, but the defendants did not buy in the ordinary way of Bass's business, and Bass, therefore, who sold fraudulently as regards the plaintiff, could not give a title to the goods. If there were *lashes* on the part of the plaintiff in leaving the goods in the possession of Bass, there were *lashes* on the part of the defendants in buying them in the way they did. The case of *The National Mercantile Bank v. Hampson* (1) shews, as it appears reported in the Weekly Reporter, that if the sale by a grantor of a bill of sale, in a form similar to the present one, be not in the ordinary course of his trade, but for the purpose of his running away, it will confer no title on the purchaser.

Oppenheim, in support of the rule.—The plaintiff had allowed Bass to be held out to the public as having not only the possession but the property in these goods, and therefore if one of two innocent persons is to suffer for the conduct of Bass it ought to be the plaintiff and not the defendants, who bought the goods *bona fide*, and without any reason to suspect that Bass had no right to sell

them, especially as the bill of sale was not registered. In *The National Mercantile Bank v. Hampson* (1), as reported in the Law Reports, the defence to the action of trover was that the grantee of the bill of sale had suffered the grantor to have possession of the goods, and had enabled him to hold himself forth as having not only the possession but the property in the same, and that he sold the same to the defendant, who bought them in the ordinary course of his business, and without any notice that they did not belong to the grantee. The Court held that that defence was good, and Lush, J., said in his judgment that, "having regard to the terms of the bill of sale, there was an implied license for the grantor to carry on his business and to sell the wheat, and any *bona fide* purchaser from him would have a good title." In that case the bill of sale was registered, whereas here it was not, and therefore the defendant had no means of knowing that the goods were not Bass's.

[DENMAN, J.—In *The National Mercantile Bank v. Hampson* (1) the sale was by the grantor in the ordinary course of his business, but in the present case it is expressly found that it was not.]

The learned Judge should have told the jury that, if the defendants purchased *bona fide* and without any knowledge of the fraudulent intention of Bass, it would give them a good title to the goods. In *Walker v. Olay* (2), where the defendant *bona fide*, and without knowledge of a bill of sale, had bought a horse of the grantor of such bill, who was a horse dealer, Grove, J., and Lindley, J., approving and following the case of *The National Mercantile Bank v. Hampson* (1), held that the defendant had acquired a good title to the horse.

LORD COLERIDGE, C.J.—I am of opinion that this rule should be discharged. The action is by the holder of a bill of sale which had been granted to him by one Bass of his stock-in-trade, and it has been found by the jury that the sale by Bass to the defendants was fraudulent, and not in the ordinary course of his trade, but

(1) Law Rep. 5 Q.B. D. 177; 28 W. R. 424; and since reported 49 Law J. Rep. Q.B. 480.

(2) *Ante*, p. 560.

Taylor v. McKeand, C.P.

that the defendants purchased the goods *bona fide* and without notice that Bass was acting fraudulently. The question is, whether under the circumstances the defendants can hold the goods? I think that they cannot. The goods are the plaintiff's by a valid instrument, although not being registered it was by an Act of Parliament, namely, the Bills of Sale Act, made invalid against certain persons therein mentioned, but which did not include such persons as the defendants. The goods are, therefore, the plaintiff's; but it is said that being stock-in-trade, there is in the bill of sale, if not an express at least an implied condition, that the trade may be carried on by the grantor, and that he may sell such goods in the ordinary way of his business, or otherwise there would be a stoppage of his business which would, as my brother Lush observes in *The National Mercantile Bank v. Hampson* (1), defeat the object of the bill of sale. But the business must be carried on *bona fide*, and the disposition and sale of the goods must be *bona fide*, and in the ordinary course of such business. I am aware that those last words do not occur in the report of *The National Mercantile Bank v. Hampson* (1) in the Law Reports, but the report of that case in the Weekly Reporter is more accurate, because in the pleadings which are not set out in the Weekly Reporter but are in the Law Reports, there is a statement that Seaman, the grantor, sold the goods to the defendants, who bought them in the ordinary course of his business, and that it was the ordinary course of Seaman in such business to make such sales, and therefore when my brother Lush is reported in the Weekly Reporter to have said, "There must be an implied license to sell where the person who gives the bill of sale sells in the ordinary course of his trade," I have no doubt the report is correct, for it follows the statement in the pleadings. But in the present case the defendants bought the property of one who had no right to sell, for he did not sell to the defendants in the only way in which he could by law give a title. It has been suggested that this was a case in which there are two innocent parties, and that the one, namely, the grantee of the bill

of sale who enabled the fraud to be committed, must therefore bear the loss. But that doctrine does not apply to this case, in which the property was taken out of the person who professed to sell, and was vested in another by a bill of sale, an instrument known to the law and recognised by Parliament. I, therefore, am of opinion that my brother Lopes was quite right, and that this rule must be discharged.

DENMAN, J.—I am of the same opinion. I think that the learned Judge put the point correctly to the jury, and that he rightly entered the verdict for the plaintiff.

Rule discharged.

Solicitors—John Laidman, for plaintiff; Hicklin & Washington, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. March 18, 20, 22.	{ THE MAYOR AND FREE BURGESSES OF THE BOROUGH OF SALTASH v. GOODMAN AND ANOTHER.
-------------------------------	--

Trespass—Several Oyster Fishery—Navigable River—Claim to take without Stint—Free Inhabitants of Ancient Tenements.

The plaintiffs, an incorporated body, claimed to be possessed of a several fishery in a tidal navigable river, and in support of their title produced charters of confirmation and grant, and proved acts of immemorial user, from which the Court, drawing inferences of fact, held a *prima facie* title to the soil and several fishery to be established, raising the presumption of a legal origin, i.e., a grant before Magna Charta.

The defendants claimed, as free inhabitants of ancient tenements in the borough of Saltash, to have from time immemorial, without interruption, and as of right, the privilege of dredging for oysters in the locus in quo, from the 2nd day of February to Easter Eve in each year, and carrying away the same without stint, for sale and otherwise. They also claimed to have exercised the above privilege as free inhabitants of the borough, and as subjects of the realm; and they also claimed a general

Mayor &c. of Saltash v. Goodman, C.P.

right to dredge for oysters as subjects of the realm,—

Held, that no right in the defendants, as subjects of the realm, could be established, as it would be inconsistent with a several fishery in the plaintiffs, who would take nothing by their grant, and would be destructive of the fishery.

Held further, that the other claims of the defendants founded on immemorial user could not be established, for that they were made in respect of a fluctuating body, and would have to be supported by the presumption of a lost royal grant, which alone would have the effect of incorporating such body, and that such a presumption could not be made when antagonistic to the existing rights of the plaintiffs.

Lord Rivers v. Adams (48 Law J. Rep. Exch. 47; Law Rep. 3 Ex. D. 361) followed.

SPECIAL CASE stated in an action brought to determine a question as to the alleged right of the defendants, as inhabitants of the borough of Saltash, in Cornwall, to dredge for oysters in the river Thamer, within the liberties of the borough of Saltash.

CASE.

1. This is an action of trespass brought against two inhabitants of the borough of Saltash, in the county of Cornwall, for a trespass alleged to have been committed by them in a certain part of the river Thamer, and on the soil thereof, wherein the plaintiffs claim to be possessed of a certain several oyster fishery, and for disturbing, catching, carrying away, and converting to their own use, divers quantities of the oysters therein, for the purposes of sale and otherwise.

2. The alleged trespass was committed by the defendants on the 2nd day of February, 1876.

3. The defendants admit the commission, in fact, of the acts complained of, but claim the right to do those and similar acts at all reasonable times, from the 2nd day of February to Easter Eve in each year, both inclusive.

4. The plaintiffs are a corporation incorporated by divers royal charters, granted respectively in the reigns of

Queen Elizabeth, King Charles 2, and King George 3. By virtue of such royal charters, and by prescription, the plaintiffs claim to be possessed of the soil and of a certain several oyster fishery in those parts of the river Thamer, and its tributaries, described in the plaintiffs' particulars (1).

5, 6, and 7 stated that the charters and acts of ownership hereinafter set out form part of the case.

8. The defendants are free inhabitants of ancient tenements in the borough of Saltash.

9. The free inhabitants of ancient tenements in the borough of Saltash have, from time immemorial, without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo* mentioned, from the 2nd of February in each year to Easter Eve in each year, both inclusive, and of catching and carrying away the same without stint, for sale and otherwise. The acts complained of were done in the exercise of the privilege.

10. The river Thamer was at the time mentioned, and at the *locus in quo* mentioned, a navigable river or arm or creek of the sea, where the tide flows and reflows.

11. The defendants contend that the soil of the Thamer of the *locus in quo*, and the several oyster fishery, if any, are vested in the Crown or Duchy of Cornwall. The plaintiffs contend that the soil and several fishery are vested in them.

12. The defendants claim to have exercised the privilege described in paragraph 9 as subjects of the realm.

13. The defendants contend that the user described in paragraph 9 raises the presumption and inference of a royal grant or charter from the Crown or

(1) The particulars were as follows:—Plaintiffs' liberty of the water Thamer extends from Okle Tor Rock in the Thamer, Old Man's Beard in the river Tavy, Cutter Beake Rock in the river Lynher, to Prince Rock in the river Lana, and seawards to an imaginary line drawn between inner Penlee Point, on the west of Plymouth Sound, and a rock called Shagglestone or Shillestone, on the eastern side of the Plymouth Sound. The plaintiffs' oyster fishery extends throughout these limits, excepting in that part called Cattewater,

Mayor &c. of Saltash v. Goodman, C.P.

Duchy of Cornwall, made either to the free inhabitants of ancient tenements in the borough of Saltash, or to some person or body corporate in trust for them, which said grant or charter has been lost, and the defendants rely, as a justification for their acts, on such last-mentioned grant or charter.

14. The defendants allege that this user is sufficient to establish their right in law to do the acts complained of, upon the ground of custom, or any other legal origin, which may be reasonably presumed or inferred from such user.

14A. If the plaintiffs are entitled to any right of fishery at all, the defendants contend that it is a right of fishery subject to the rights of the defendants, and that the plaintiffs have only a several or exclusive fishery *sub modo*, and against persons other than the free inhabitants of the borough of Saltash.

15. The defendants contend that such user from time immemorial is sufficient to establish the rights of free inhabitants of ancient tenements, under 2 & 3 Will. 4. c. 71.

16. The plaintiffs contend, that an usage to dredge oysters without stint, for the purposes of sale or otherwise, in a several fishery is unreasonable, and destructive of the fishery, and does not raise any presumption of royal grant or charter, and cannot be the subject of any prescription or right under the statute mentioned in the previous paragraph. The said usage does, in fact, tend to the destruction of the said oyster fishery, and if continued will destroy the same.

17. The questions for the opinion of the Court (who are to be at liberty to draw inferences of fact) are:—

1. Whether the defendants, as subjects of the realm, are entitled to dredge for oysters, and to carry away the same without stint, for sale or otherwise, between the 2nd of February and Easter Eve in each year, both inclusive.

2. Whether the defendants are entitled to the same rights as free inhabitants of ancient tenements in the said borough.

3. Whether the defendants are entitled to the same rights as free inhabitants of the said borough.

If the Court be of opinion that the defendants are not so entitled, judgment is to be entered for the plaintiffs for 40s., and for an injunction restraining the defendants from any repetition of the acts complained of, with costs of suit.

If the Court should be of the contrary opinion, judgment is to be entered for the defendants with costs.

The charters referred to in the Special Case are, so far as is material, as follows:—

I. A charter of 27th Elizabeth, which, after referring to ancient letters patent of confirmation and charters to the free burgesses of Essa, otherwise Saltash, and ratifying and confirming the same, and reciting that the said burgesses “have from time immemorial held divers customs, liberties, &c., as well by prescription as by the aforesaid charters,” proceeded to constitute the town or borough of Saltash a free borough, and the burgesses a body corporate, and granted to the mayor and free burgesses of Saltash “the town and borough aforesaid, with all and singular its suburbs, members and appurtenances, and all the aforesaid customs, liberties, privileges, franchises, immunities,” &c., “and the like lands, tenements, waters, water-courses,” &c., “and also all the rents of assize, tolls of oysters, with the minute customs, to wit, anchorage of, and the customs to be taken for every seine of the sea, &c. To have and to hold the same in fee farm for ever, rendering therefore yearly to us, our heirs and successors, so long as the Duchy of Cornwall shall be in the hands of us, our heirs or successors, the sum of eighteen pounds.”

II. A charter of 30th Charles 2, which confirmed the charter of Elizabeth.

III. A charter of 35th Charles 2, which, after reciting the previous charters and letters patent, and reciting that sundry doubts and allegations had lately been moved concerning the election of mayor and other officers of the borough, by reason of omissions and doubtful expressions in the aforesaid charters, and reciting that the mayor and free burgesses of the borough of Saltash had surrendered their charters and privileges, which said sur-

Mayor &c. of Saltash v. Goodman, C.P.

render was accepted, and that the mayor, &c., besought a re-grant of the same, proceeded to re-constitute the town of Saltash to be a free borough, and the mayor and free burgesses thereof to be a body corporate, to hold the town and borough of Saltash, with its appurtenances, and to re-grant all the like customs, liberties, privileges, franchises, &c., in the same manner and with the same words as in the charter of 27 Elizabeth.

IV. A charter of George 3, which, after reciting all previous charters and letters patent, together with the charter of surrender and re-grant of Charles II., and after reciting that, by reason of several disputes, the corporation was becoming dissolved, proceeded to re-constitute the corporation, and to grant to the mayor and free burgesses of the borough of Saltash all such like customs, liberties, privileges, franchises, immunities and jurisdictions thereunto of old belonging, in the same manner, and with the same words as in the charter of 27 Elizabeth.

The following, so far as are material, were the acts of ownership relied on by the plaintiffs.

Record in the action of *Rudiard v. Porter*, decided shortly after the charter 27 Elizabeth, in which the plaintiffs, as farmers under the Duchy of Cornwall, complain that the defendants have entered and intruded on this fishery. The defendants justified as free burgesses of Saltash, and set out an inquisition of 20 Henry 6, finding that "the Mayor and free burgesses of the town of Asyshe have from antient time been seized of the water Thamer, with its profits, &c." Judgment for the defendants.

Record in the action of *The Mayor and Free Burgesses of Saltash v. Uden* dated 1843, in which the plaintiffs sued for money due from the defendants to the plaintiffs for certain tolls, anchorage and other duties. Judgment for the plaintiffs.

Record in the action of *The Mayor and Free Burgesses of the Borough of Saltash v. Finemore* in 1845, in which judgment was given for the plaintiffs.

Several inquisitions on bodies found in

the river Thamer, in which the Mayor presided as coroner.

25th of August, 1860. Lease by the mayor and free burgesses of the borough of Saltash of the sole liberty of dredging for oysters in the river Thamer for seven years.

Accounts, consisting of money received for dredging oysters from the year 1749 up to 1810.

Also other leases of oystering.

Arthur Charles (J. V. Austin with him).

—By the charters, and the inquisition of Henry 6, as well as by the acts of ownership, which are admissible to shew the construction of ancient charters, *The Duke of Beaufort v. The Mayor of Swansea* (2), the plaintiffs have made out a *prima facie* title to the soil and several fishery in the *locus in quo*. "A subject may by prescription have the interest of fishing in an arm of the sea which may be either as a liberty without the soil or interest in the propriety of it." *Hargrave's Tracts on Hale de portibus maris*, 18 —Anchorage imports propriety of the soil, *ib.* 74.

The defendants' claim cannot be established by custom, for a *profit à prendre* cannot be claimed in *alieno solo*—*The Attorney General v. Mathias* (3). Nor can they claim by prescription, because a prescription to be good must be reasonable and certain, and to take without stint is unreasonable and uncertain, *ib.* and bad in law, for as found in the special case it would be destructive of the subject-matter, see *Olayton v. Corby* (4); *Bland v. Lipscombe* (5); nor can the defendants claim by grant because prescription assumes a lost grant, and therefore *a fortiori* the claim cannot be supported on that ground—*Attorney-General v. Mathias* (3). A grant from a private person would be useless to a fluctuating body; there could be no such grant to the inhabitants of ancient tenements, therefore the defendants claim on a lost royal grant, which alone would have the effect of incorpora-

(2) 3 Exch. Rep. 413; 19 Law J. Rep. Exch. 97.

(3) 4 Kay & J. 579; 27 Law J. Rep. Chanc. 761.

(4) 5 Q.B. Rep. 415; 14 Law J. Rep. Q.B. 364.

(5) 4 E. & B. 713; 24 Law J. Rep. Q.B. 155.

Mayor &c. of Saltash v. Goodman, C.P.

ting them. A similar attempt was made in *Lord Rivers v. Adams* (6), but it was there held that a crown grant could not be presumed, because it would be presuming a corporation to have been created which never in fact existed, and which was inconsistent with another body actually and legally existing. The same reasons apply to the present case.

Muir-Mackenzie (*Bullen* with him), for the defendants.—This being a tidal navigable river, *prima facie* the soil is vested in the crown, and *prima facie* the right of fishing therein belongs to the public—*Williams on Rights of Common*, 267. The onus is therefore on the plaintiffs to establish a several fishery. The charters relied on shew a *prima facie* right in the plaintiffs to the soil of the river, but do not grant a several fishery therein. The words “several fishery” do not occur, and they must be used to pass the fishery—*Banne’s Case* (7), cited by *Bailey, J.*, in *The Duke of Somerset v. Fogwell* (8). The grant of a several fishery in the arm of the sea could not be made after *Magna Charta*, c. 16 (9). The corporation surrendered their rights to *Charles 2*, and there was no right then to regrant them—see *The Mayor, &c., of Colchester v. Brooke* (10). The defendants, therefore, have rights of fishing as subjects of the realm.

The acts of ownership on the part of the plaintiffs are opposed by immemorial user on the part of the defendants. A several fishery may exist apart from any ownership of the soil, and the right may be confined to certain fish, as oysters in a tidal navigable river—*Williams on Rights of Common*, 264; *Rogers v. Allen* (11);

(6) 48 Law J. Rep. Exch. 47; Law Rep. 3 Ex. D. 361.

(7) *Davis* 55.

(8) 5 B. & C. 875.

(9) 9 Henry 3. c. 16. “No banks shall be defended from henceforth, but such as were in defence in the time of King Henry our grandfather, by the same places, and the same bounds, as they were wont to be in his time.”

That is, that no owner of the banks of rivers shall so appropriate or keep the rivers several to him to defend or bar others either to have passage or fish there, otherwise than they were used in the reign of King Henry II.—2 Coke Inst. 30.

(10) 7 Q.B. Rep. 339; 15 Law J. Rep. Q.B. 59, 173.

(11) 1 Campb. 309, 312.

VOL. 49.—Q.B., C.P. & EXCH.

Hall on Seashore, 192; *Duke of Somerset v. Fogwell* (8). There may be a prescriptive right in a subject to a several fishery in an arm of the sea—*The Mayor of Orford v. Richardson* (12). Even assuming the plaintiffs to have a several fishery, yet the rights claimed by the defendants can co-exist. “A free fishery is a right either co-existent with a several fishery, or with other free fisheries. A man who has a several fishery may grant a free fishery to another who will have free fishing with the grantor.” *Viner, Abr. Pisc. A.*; 2 Sid. 8. *The Mayor of York v. Pilkington* (13); *Seymour v. Lord Courtenay* (14). Where there is immemorial user, the tendency of the Courts is to find a legal origin—see per *Blackburn, J.*, in *Bryant v. Foote* (15), and per *Lord Coleridge, C.J.*, in *The Duke of Norfolk v. Arbutnot* (16).

[*DENMAN, J.*, referred to *Johnson v. Barnes* (17).]

The words “without stint” must be construed reasonably, and subject to the various Acts regulating oyster fisheries, and passed for their preservation. A custom to pasture in *alieno solo* may exist. Co. Litt. 1,229; *Viner, Abr. Prescr.* 269.

[*GROVE, J.*—That would only take the usufruct, it would not destroy the subject-matter. A custom to take minerals from a mine, as exists in the High Peak of Derbyshire, may well be good, because the minerals must some day come to an end, but it would be different where the subject-matter is of a reproductive nature as oysters.]

The common law did not recognise any difference between oysters and other fish, and a right to take oysters is a right of fishery. See *The Mayor, &c., of Maldon v. Woolvet* (18). In *Bagott v. Orr* (19) a distinction was raised between oysters

(12) 4 Term Rep. 437; 2 H. Black. 182.

(13) 1 Atk. 282.

(14) 6 Burr. 2816.

(15) 36 Law J. Rep. Q.B. 65; Law Rep. 2 Q.B. 161.

(16) 48 Law J. Rep. C.P. 737; Law Rep. 4 C.P. D. 290.

(17) 41 Law J. Rep. C.P. 250; Law Rep. 7 C.P. 592.

(18) 12 Ad. & E. 13 9 Law J. Rep. Q.B. 370.

(19) 2 Bos. & P. 472.

Mayor &c. of Saltash v. Goodman, C.P.

and floating fish, but the point was not decided.

The free inhabitants of ancient tenements can prescribe for a free fishery, they are analogous to the freehold tenants of a manor. *Warwick v. Queen's College, Oxford* (20), and *Elton on Commons*, 215, were cited on this point.

Arthur Charles, in reply. The charters are all confirmative, and the word "waters" is amply sufficient to pass a fishery—Co. Litt. 4. b. The right of dredging for oysters was held evidence of a several fishery in *Mannall v. Fisher* (21). The claim of the defendants as subjects of the realm is inconsistent with the plaintiffs' several fishery, and if valid the plaintiffs would take nothing by their grant. The analogy of inhabitants to freehold tenants of a manor is not sound, for the former would be a fluctuating body for whom a prescriptive right cannot be claimed—*Ohlthern v. The Corporation of London* (22).

GROVE, J. (on March 22), after referring to the charters and acts of ownership as set out above, proceeded as follows:—These documents disclose rights of immemorial user and acts of ownership of so strong a character that we are clearly of opinion that the plaintiffs have made out a *prima facie* title to this several fishery and to the ownership of the soil. It has been urged on behalf of the defendants that there is no mention of a several fishery in the various grants, but there is authority to shew that the word "waters" is sufficient to pass the fishery—Co. Litt. 4 b.

The defendants claim their privileges as subjects of the realm by virtue of Magna Charta, and unless the grants can be remitted to a time anterior to Magna Charta, the plaintiffs cannot support their title to a several fishery in a navigable river. But a general right in all subjects of the realm to fish for oysters, which would be to fish at all times, would be inconsistent with the plaintiffs' rights, and the plaintiffs would take nothing by their grant.

(20) 39 Law J. Rep. Chanc. 636; Law Rep. 10 Eq. 105.

(21) 6 Com. B. Rep. N.S. 856.

(22) 47 Law J. Rep. Chanc. 433; Law Rep. 7 Ch. D. 735.

The defendants say that the plaintiffs' rights were surrendered by the Charter of 35 Charles 2, and could not then be regranted because after Magna Charta. No doubt the word "surrendered" was there used, but in this grant, as in all the others, the words "confirm, ratify and approve" are used. I am therefore disposed to think that independently of the re-grant it was intended to confirm all the privileges and prescriptive rights which had been enjoyed by the plaintiffs. There is also authority to shew that a several fishery does not merge upon its being resumed by the Crown, either by reason of forfeiture or otherwise—*The Duke of Northumberland v. Houghton* (23). It seems to me that if in the present case the surrender could be held to apply to prescriptive rights, it is a nominal surrender for the purposes of re-grant. I, therefore, am of opinion this charter could re-grant and does re-grant all privileges and prescriptive rights, and that the corporation still hold them.

The defendants' main reliance in support of their claim is placed on immemorial user without interruption, to have dredged for oysters for a limited time and carried the same away "without stint." They claim this limited privilege as subjects of the realm, but an immemorial user in the subjects of the realm to fish for a limited time is not only inconsistent with a general right in the subjects of the realm to fish at all times, but also with the finding in the case that the free inhabitants of ancient tenements have from time immemorial exercised the privilege; because if the privilege is confined to the free inhabitants of ancient tenements, it is exclusive of the right of other subjects of the realm, and if all the subjects of the realm have the privilege, then the occupation of tenements is unnecessary. The special case does not find that the subjects of the realm have exercised the privilege, and there appears to me to be nothing in support of this claim.

The claim is mainly founded on inhabitation of ancient tenements. It has been argued that this is analogous to the free tenants of a manor, which would be a prescription in *qua* estate, but there is no

(23) 39 Law J. Rep. Exch. 66; Law Rep. 5 Exch. 127.

Mayor &c. of Saltash v. Goodman, C.P.

real resemblance; the claim is not set up in respect of holding nor *qua* estate, but in respect of inhabitancy. The only way in which such a right could be established would be by virtue of a lost crown grant, the only grant which could confer such a right on a fluctuating body as inhabitants. This presumption is disposed of by *Lord Rivers v. Adams* (6), where it was attempted for the first time to set up the presumption of a lost royal grant before *Magna Charta*, which would have the effect of incorporating the inhabitants of the parish. The reasons for that decision would be far stronger in the present case by reason of the continuing crown grants to the corporation, which would be antagonistic to such a presumption; and on the authority of that case I am of opinion there is no evidence by which an immemorial user on the part of the free inhabitants of ancient ténements in the borough can be supported by the fiction of a lost royal grant.

It is contended by the plaintiffs that the prescriptive user is unreasonable, because it is utterly destructive of the subject matter. It is true it is limited, but nevertheless it is claimed "without stint." There may be oyster fisheries in which the oysters may be taken "without stint," without danger of destruction to the subject matter. But there is no need to speculate on this because it is found in the case that the usage if continued would destroy the oyster fishery. The *Attorney General v. Mathias* (3) and *Bland v. Lipscombe* (5) are authorities to shew such a right could not be claimed by custom or prescription. In the latter case the facts are not fully set out, and it is assumed by Lord Campbell that the custom claimed would be destructive of the subject matter and therefore bad.

One argument addressed to us by the counsel for the defendants was, that the Court will make any presumption in favour of a lawful origin, but the Court will not make such a presumption when the claim is destructive of the subject matter or antagonistic to opposing rights. It was said those opposing rights were legally inconsistent with the immemorial user on the part of the defendants. That argument was also brought forward in *Lord Rivers v. Adams* (6), and the Court

then said that the user might have been allowed to go on because it was felt it would not grow into a right, and I am inclined to think such may have been the case here. While oysters were not of much value and plentiful, the inhabitants of cottages in the neighbourhood may have been allowed to dredge, but when oysters became scarce and there was a high probability of the whole fishery being destroyed, then the corporation thought fit to interfere.

On the whole of the case I am of opinion that the plaintiffs have made out a *prima facie* title, and that the defendants have made out no title to support the right they claim, and I answer the three questions submitted to us in the negative.

DENMAN, J., delivered the following written judgment.—The plaintiffs claim a several oyster fishery in parts of the Thamer. The defendants, first, deny any such right, and claim as subjects of the realm to take oysters for sale without stint; this they might, of course, do if the plaintiffs have no several fishery—subject to any statutes which might be applicable to this case. The river Thamer being a tidal navigable river or arm of the sea, it is clear that the plaintiffs cannot have a several fishery except one granted before *Magna Charta*. But where the evidence shews immemorial enjoyment of all the incidents of a several fishery, a grant before *Magna Charta* (i. e. the proper legal origin) ought to be presumed.

In this case I think the evidence from the charters, being all confirmation charters, coupled with the usage, is irresistible evidence of a several oyster fishery. It was hardly contested that, in the absence of the finding in paragraph 9 of the case, there is ample evidence of a several fishery at one time; but it was argued that, admitting there was such a grant, the fishery is gone, because it was surrendered in the 35 Car. 2, and could not be regranted. I think that this is not the effect of what has happened in this case. Looking at the manner in which this charter originated, and at its object and scope as shewn on the face of it, it appears to me that it is impossible to say that at any given moment of time the general right of fishery ceased to exist. The ac-

Mayor &c. of Saltash v. Goodman, C.P.

ceptance of the surrender to the Crown, and the re-grant to the corporation, are contemporaneous acts. In such a case I can find no authority for saying that the right is gone. In the case of forfeiture and resumption by the Crown of a several fishery, it was held in the case of *The Duke of Northumberland v. Houghton* (23), by Martin, B., and Pigott, B., assenting, and Kelly, C.B., not disputing, that notwithstanding the doubts which had arisen as to the due election of the officers, there would be no merger. The evidence is very strong in the present case to shew that the right continued to be acted upon down to and subsequent to the last charter of 14 Geo. 3. The lease set out in the case of the sole privilege of dredging oysters is wholly irreconcilable with a cessation of the right at any time. It appears to me quite clear that the charter of 35 Charles 2 was not intended to resume, and had not the effect of resuming possession for a single moment of the right of fishery vested in the corporation, but merely to continue and confirm to the corporation the same franchises, including the several fishery which the corporation then possessed.

I have therefore no hesitation in coming to the conclusion that the plaintiffs have made out their case to a several fishery continuously enjoyed without interruption in such a way as to call upon the Court to presume a legal origin, i. e. a grant before the time of Magna Charta, in the absence of anything to displace such presumption. I do not recapitulate all the evidence in support of the grants, but I must say I think a stronger *prima facie* case could hardly have been made out.

Then, if there was a several oyster fishery in the plaintiffs, the right of the public as such, and therefore of the defendants as subjects of the realm to fish and take oysters without stint, which is relied upon by the defendants, cannot exist. It would be wholly inconsistent with a several (i. e. sole and exclusive) oyster fishery in the plaintiffs, and it would be destructive of the several oyster fishery. Mr. Mackenzie, in his able argument, was obliged to admit that he could not rely upon the right of the public, without relying upon it to that ex-

tent. In fact, he used it as an argument only against the existence of such a several fishery at all. But the defendants mainly relied upon the right described in paragraph 9 of the case. The case finds such a usage to have existed from time immemorial. I assent to the proposition so forcibly enlarged on by Willes, J., in the case of *Johnson v. Barnes* (17), that we are bound to presume a legal origin if possible for the usage so found; but the real question is, whether such a user as that here stated can possibly have had any legal origin. I must, however, here say, that I quite assent to the qualification that when the word possible is used, it must be considered to mean reasonable. The defendants' claim is, first, as free inhabitants of the borough, and secondly, as free inhabitants of ancient tenements in the borough, "to dredge for oysters from the 2nd of February to Easter Eve inclusive, and to carry away the oysters without stint for sale and otherwise." Such a claim appears to me to be one which, with every desire to support it, on the ground that it is found to have been exercised immemorially and without interruption, cannot be supported in law.

It cannot be claimed by prescription, because those in whose right it is said to exist are a fluctuating body. The free inhabitants, as free inhabitants of ancient tenements, must be a transitory and uncertain body, as the inhabitants of ancient tenements in *Gateward's Case* (24), or as the several persons who set up the right in any of the cases on the subject. It cannot be set up by custom, because it is a profit *in alieno solo*—*Constable v. Nicholson* (25), *Chiltern v. The Corporation of London* (22), and other cases. It is suggested that the Court may, in order to support the immemorial usage in this case, presume a lost royal grant, incorporating the body in whom this custom is said to exist, for the purpose of doing the very acts mentioned in paragraph 9, as having been immemorially done. This is undoubtedly a very ingenious suggestion, but the presumption would certainly be a most violent one. A similar attempt

(24) 6 Rep. 596.

(25) 14 Com. B. Rep. N.S. 230; 32 Law J. Rep. C.P. 240.

Mayor &c. of Saltash v. Goodman, C.P.

was made in *Lord Rivers v. Adams* (6), but the Court held that such a presumption ought not to be made, if inconsistent with the past and existing state of things. In the present case, in order to suppose such an origin as this usage, we should have to make a presumption to the last degree in conflict with the whole history of the fishery, so far as we can gather it. There is no indication of any corporate act ever having been done by the persons of whom the supposed corporation must, if it existed, be composed. The very right claimed is one violently in antagonism with the several fishery of which we think there is a strong *prima facie* case. It is a far more improbable supposition than that which was rejected in *Lord Rivers v. Adams* (6), because in that case the faggots to be got were not sold or used out of the parish, whereas in the present case the right claimed is to get oysters for sale anywhere without stint, even though it tends to the destruction of a several oyster fishery granted before Magna Charta to an existing corporation. The very statement of the purposes for which such an incorporation would have to be presumed, according to the test given in *Constable v. Nicholson* (25), appears to me to be fatal to one drawing such a conclusion. It would be a purpose wholly unreasonable and in derogation of rights clearly established as existing in others. Considering that the right claimed is one which cannot be claimed either by custom or prescription, I think that we should be by no means justified in presuming so improbable a thing as an incorporation of the persons in whom this right is set up. I can draw no such inference from the facts. On the contrary, I think it wholly inconsistent with the facts proved. I therefore think that our judgment ought to be for the plaintiffs.

Judgment for the plaintiffs for forty shillings, and for an injunction as prayed.

Solicitors—N. Bennett, agent for Cleverton & Son, Plymouth, for plaintiffs; Wedlake & Letts, agents for Edmonds & Son, Plymouth, for defendants.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1880.

June 9. }

BARTON v. TITMARSH.*

Practice—Appeal—Prohibition to the County Court—19 & 20 Vict. c. 108. s. 42—39 & 40 Vict. c. 59. s. 20—Judicature Act, 1873, s. 19.

An appeal lies from the decision of the Divisional Court on an application for a prohibition to a County Court; for section 42 of 19 & 20 Vict. c. 108, relates to procedure only, and does not enact that the judgment of the Divisional Court shall be final.

Appeal from the Exchequer Division.

The plaintiff sued the defendant in the County Court of Hertfordshire for a breach of a warranty, and recovered a verdict with 20*l.* damages. An application was made to the Judge of the County Court for a new trial, which he at first refused, but which he, after a few minutes consideration, granted. The defendant moved in the Exchequer Division for a prohibition, on the ground that the Judge having refused a new trial was *functus officio*, and could not reconsider his determination. On the rule coming on for argument before the Divisional Court it was made absolute, because the plaintiff had not filed any affidavits in answer to those filed by the defendant, and the counsel for the plaintiff, who was present, and who applied for a postponement, which was refused, did not argue. The rule was then made absolute, and was drawn up containing the words, “no cause being shewn.”

The plaintiff appealed.

Cooper and Birch, for the defendant, took a preliminary objection. It is not competent to the plaintiff to appeal, as he did not shew cause in the Divisional Court—*Walker v. Budden* (1).

[BAGGALLAY, L.J.—The circumstances are not the same—there the party did not

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

(1) 49 Law J. Rep. Q.B. 169; Law Rep. 5 Q.B. D. 267.

Barton v. Titmarsh (App.), Exce.

appear in the Divisional Court, here the party appeared, but not having the necessary materials declined to occupy the time of the Court uselessly. BRETT, L.J.—Is it not rather as Mellish, L.J., said, that the Court has a discretion as to hearing the appeal, not that it cannot hear it. BRAMWELL, L.J.—There is nothing in the objection. I think the words, “no cause being shewn,” should not be in the rule, they do not represent what occurred.]

H. Browne, for the plaintiff, argued on the facts. He was stopped by the Court.

Cooper, for the defendant.—Apart from the facts of the case, it is submitted that no appeal lies from the decision of the Divisional Court. It is provided by 19 & 20 Vict. c. 108. sect. 42, “When an application shall be made to a Superior Court, or a Judge thereof, for a writ of prohibition to be addressed to a Judge of a County Court, the matter shall be finally disposed of by rule or Order, and no declaration or further proceedings in prohibition shall be allowed,” and section 20 of 39 & 40 Vict. c. 59, provides that, “Where, by Act of Parliament, it is provided that the decision of any Court or Judge, the jurisdiction of which Court or Judge is transferred to the High Court of Justice is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any Judge thereof, to Her Majesty’s Court of Appeal.” The effect of the two sections, when read together, is to make the decision of the Divisional Court final.

Cockerell, for the Judge of the County Court.—The section of the County Court Act referred to only relates to procedure, it provides there shall not be any declaration or other pleadings in prohibition, it does not enact that the decision of the Divisional Court shall be final.

BRAMWELL, L.J.—I am of opinion that on the facts this appeal should be allowed. It is objected, however, that we have no jurisdiction to hear this appeal, and that objection is founded on two sections of two Acts. The later Act, and the more general Act, is the Appellate Jurisdiction Act of 1876, which provides, by section 20, that where, by Act of Parliament, it is

provided that the decision of any Court or Judge is to be final, an appeal shall not lie in any such case from the decision of the High Court. Now, if we find that there is any provision in any statute which enacts that the jurisdiction of the Divisional Court is to be final in such a case as this, we ought to hold that this appeal will not lie; there is, however, no such provision, for the section of the County Court Act does not say so, it only says, that instead of there being a declaration in prohibition, the Court shall finally dispose of the question, on the rule or Order. Section 42 of 19 & 20 Vict. c. 108, really only provides for a question of pleading, it does not enact in terms that the decision of the Divisional Court shall be final. As a matter of fact, that decision was, before the Judicature Act, final, for error could not be brought, the reason being that decisions of the Courts on prohibitions to County Courts were final. But the Judicature Acts alter that, and so there is now an appeal; however, it is to be observed, that there never was a statutory enactment forbidding an appeal. There was no appeal, because there was no means by which it could be brought. If we had any misgiving as to whether special legislation is repealed by general legislation, such as the legislation of the Judicature Act, that doubt would be set at rest by the case of *Garnett v. Bradley* (2), and therefore the general right of appeal given by the Judicature Acts extends to this case, and to all cases, unless there is some special provision in some statute which gives the jurisdiction, and which enacts that there shall, in fact, be no appeal.

BAGGALLAY, L.J.—I agree. I had doubts as to the effects of the statutes, but I am satisfied that the decision of the Divisional Court as to this prohibition is not final. That decision is an order within section 19 of the Judicature Act, 1873, and it is therefore the subject of an appeal.

BRETT, L.J.—I am of the same opinion. It is said that there is no jurisdiction in

(2) 48 Law J. Rep. Q.B. 186; Law Rep. 3 App. Cas. 944.

Barton v. Tivmarsh (App.), Exch.

this Court to hear this appeal, but I am satisfied that the section of the County Court Amendment Act only deals with procedure, and only enacts that a certain procedure shall prevail in the Court where the prohibition is moved for. There is no express enactment that there shall be no appeal. The Divisional Court has made an order, and by the Judicature Acts there is, subject to certain exceptions, of which this is not one, an appeal from every order of the High Court. There is, therefore, an appeal from the order of the Divisional Court in this case, and this appeal must be allowed.

Appeal allowed.

Solicitors—Dubois & Reid, agents for Ellison & Co., Cambridge, for appellant; Cooke & Jonas, agents for H. D. Nash, Royston, for respondent.

[IN THE EXCHEQUER DIVISION.]

1880. { COLLEY AND ANOTHER v. THE
May 11. { LONDON AND NORTH WEST-
ERN RAILWAY COMPANY
AND OTHERS.

Railways — Accommodation Works — Remedy for Insufficiency—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 68–73.

An action was brought by owners of land adjoining a railway against the railway company for damage from alleged insufficiency of accommodation works made by the company. No proceedings had been taken by the landowners before justices of the peace under the Railways Clauses Consolidation Act, 1845, s. 69, in respect of the alleged insufficiency in the works, and the time limited by section 73 of that Act for compelling the company to make further accommodation works had expired:—Held, on demurrer, that the action was not maintainable.

Demurrer to a reply.

The pleadings, so far as material, were as follows:—

Statement of claim.—1. The plaintiffs

are the tenants of a farm called Marlbrook, and the defendants are railway companies, having vested in them the Shrewsbury and Hereford Railway. 2. Before the construction of the culvert hereinafter mentioned the farm was drained by a natural watercourse emptying itself into the river Lugg, and the owners and occupiers of the farm were entitled so to drain the farm. In the year 1853 the Shrewsbury and Hereford Railway Company, pretending to act in the execution of certain powers conferred upon them by authority of Parliament, constructed a culvert upon the farm for the purpose of carrying the water from the farm in and through another channel. 3. The culvert was constructed in an insufficient manner, so as not to carry the water from the farm, and the defendants have allowed the culvert to remain insufficient. 4. In consequence of the insufficiency of the culvert the farm was flooded in June, 1879, and the plaintiffs have sustained damage. The plaintiffs claim 50*l.*

Statement of defence.—2. The defendants do not admit that the culvert was constructed in an insufficient manner. 4. No application to justices or to the defendants or to their predecessors in title for any further or other culvert was made within five years after the completion of the works and the opening of the railway, or at any subsequent time. 5. The making of a culvert for the purposes mentioned in the statement of claim was an accommodation work within the meaning of sections 68 to 73 of the Railways Clauses Consolidation Act, 1845 (1),

(1) The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), enacts: "And with respect to works for the accommodation of lands adjoining the railway be it enacted as follows:—

Section 68. The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say" (*inter alia*) "all necessary arches, tunnels, culverts, drains, or other passages, either over or under, or by the sides of the railway, of such dimensions as will be sufficient at all times to com-

Colley v. London and North Western Rail. Co., Exch.

and the questions in this action related not to the maintaining or repairing, but to the making of a proper culvert, and if no sufficient culvert was made by the Shrewsbury and Hereford Railway Company during the construction of the railway, the plaintiffs and their lessors, or the predecessors of the plaintiffs or of their lessors, ought to have proceeded in accordance with the provisions of the said sections, and not otherwise, and this action is not maintainable.

Reply.—2. As to the last paragraph of the defence the plaintiffs say that this action is brought to recover damages and not to compel the defendants to make any further accommodation works.

The defendants demurred to the 2nd paragraph of the reply, alleging for ground of demurrer that the fact that the

vey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be.

Section 69. If any difference arise respecting the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by two justices; and such justices shall also appoint the time within which such works shall be commenced and executed by the company.

Section 71. If any of the owners or occupiers of lands affected by such railway shall consider the accommodation works made by the company or directed by such justices to be made by the company insufficient for the commodious use of their respective lands, it shall be lawful for any such owner or occupier at any time at his own expense to make such further works for that purpose as he shall think necessary, and as shall be agreed to by the company, or, in case of difference, as shall be authorised by two justices.

Section 73. The company shall not be compelled to make any further or additional accommodation works for the use of owners and occupiers of land adjoining the railway after the expiration of the prescribed period, or, if no period be prescribed, after five years from the completion of the works and the opening of the railway for public use."

action was brought only to recover damages, and not to compel the defendants to make further accommodation works, was no answer to the matters alleged in the last paragraph of the defence.

E. S. Wright, for the defendants.—The question is whether an owner of land adjoining a railway who has not within the time limited by the Railways Clauses Consolidation Act, 1845, s. 73, for requiring a railway company to make further accommodation works, taken proceedings in respect of insufficiency of accommodation works before the justices, to whom by section 69 an exclusive jurisdiction is given over differences respecting the sufficiency of accommodation works, can afterwards bring an action for damages founded upon alleged insufficiency of accommodation works. Such an action cannot be brought.

[He was stopped.]

J. O. Griffiths (*W. T. Barnard* with him), for the plaintiffs.—There was no grievance till the damage happened; the case, therefore, resembles *Bonomi v. Backhouse* (2) and *Whitehouse v. Fellowes* (3).

Wright was not heard in reply.

KELLY, C.B.—I am clearly of opinion that the defendants are entitled to the judgment of the Court. The cases cited for the plaintiffs turn upon the respective statutes of limitation in question in those cases, and have no application to the case now before the Court. If the railway company who made this culvert made an insufficient culvert the plaintiffs' remedy was clear under the Railways Clauses Consolidation Act, 1845.

Judgment for the defendants.

Solicitors—*Twisden, Parker & Kelly*, for plaintiffs; *R. R. Nelson*, for defendants.

(2) 9 H.L. Cas. 503; 34 Law J. Rep. Q.B. 181.

(3) 10 Com. B. Rep. N.S. 765; 30 Law J. Rep. C.P. 305.

[IN THE HOUSE OF LORDS.]

1880.
March 4, 8, 9, } JULIUS V. THE BISHOP OF
11, 15, 16, 23. } OXFORD.

Church Discipline Act (3 & 4 Vict. c. 86), ss. 3 and 13—Meaning of Words "It shall be lawful"—Complaint against Clerk for Ecclesiastical Offences—Discretion of Bishop as to allowing Proceedings—Mandamus.

By 3 & 4 Vict. c. 86, s. 3, it is provided that "in every case of any clerk in holy orders who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report, as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission for the purpose of making enquiry as to the grounds of such charge or report." By section 13 it is provided that "it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment, then for the bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit either in the first instance or after the commissioners shall have reported . . . to send the case by letters of request to the Court of Appeal of the province . . .":—

Held, that these sections do not prescribe two alternative courses, one of which must be taken, but that the bishop has a discretion, so that he can refuse to allow any proceedings to be instituted against a clerk accused of ecclesiastical offences.

The words "it shall be lawful," when used in a statute, are in themselves always permissive, not compulsory. Where it has been held that there is an obligation to exercise an authority conferred by such words, the obligation must be found in the context of the statute, or in the nature of the act authorised.

This was an appeal from a decision of the Court of Appeal, by which a rule absolute for a *mandamus* granted by the Queen's Bench Division against the

Bishop of Oxford was reversed. (See 48 Law J. Rep. Q.B. 609; Law Rep. 4 Q.B. D. 245, 525.)

Dr. Frederick Guilder Julius, a resident in the parish of Clewer, within the diocese of Oxford, made a complaint to the Bishop of Oxford against Thomas Thellusson Carter, clerk, rector of the said parish, for offences against the law ecclesiastical in the mode of conducting the Church services, and asked the bishop to issue a commission under the Church Discipline Act (3 & 4 Vict. c. 86), s. 3, to enquire into the grounds of the complaint. The bishop, in reply, without positively refusing to issue a commission, alleged as reasons for "unusual care in deciding on the course" he "ought to adopt," the repeated occurrence of failures in proceedings of this kind, tending to bring ridicule on all concerned, and contempt on the Church; also that the complaint was made in opposition to the strongly expressed wish of the majority of the parishioners against a clergyman in advanced years, generally respected and beloved.

Dr. Julius again applied to the bishop, who answered that while certain appeals were pending in the Queen's Bench Division he was "unwilling to add to the large amount of costly and abortive litigation from which the Church has already suffered so much discredit."

In reply to a further application, the bishop referred the complainant to his last letter.

The complainant then moved the Queen's Bench Division for a *mandamus* to the bishop, requiring him to issue a commission under section 3 of the Church Discipline Act, or to send the case by letters of request to the Court of Appeal of the province, as provided by section 13.

A rule absolute for a *mandamus* granted by the Queen's Bench Division was reversed by the Court of Appeal.

Dr. Julius appealed.

Herschell and Jeune (Chalmers with them), for the appellant.

Charles (M. M'Kenzie with him), for the bishop.

Phillimore, for Mr. Carter.

Julius v. Bishop of Oxford, H.L.

Chalmers (1), in reply.

In the course of the arguments, which were the same as those fully reported in the Courts below, strong disapprobation was expressed by the Lord Chancellor and Lord Selborne of the course taken by the Court of Appeal in allowing to be cited, as an authority, the speech made by the Lord Chancellor on the third reading of the Public Worship Regulation Act, 1874.

THE LORD CHANCELLOR (EARL CAIRNS).

—In this case Dr. Frederick Guilder Julius, of Clewer, in the county of Berks, preferred a complaint to the Bishop of Oxford against the Rev. Thomas Thellusson Carter, rector of the parish, in respect of unauthorised deviations from the ritual of the Church in the Communion Service, and the use of unauthorised vestments, and required the bishop to issue a commission under the Church Discipline Act (3 & 4 Vict. c. 86), to enquire into this charge. This commission the bishop, in the exercise of his discretion, declined to issue. The Court of Queen's Bench, on the application of Dr. Julius, directed a writ of *mandamus* to issue, commanding the bishop either to issue the commission which Dr. Julius had applied for, or to send the case by letters of request to the Court of Appeal of the province under the statute.

The question is, was the Court of Queen's Bench right in awarding this *mandamus*? The Court of Appeal has reversed the decision of the Court of Queen's Bench. The Court of Queen's Bench in awarding the *mandamus*, and the Court of Appeal in reversing this decision, were both unanimous, and it is for your Lordships now to decide between them.

The case appears to me to turn upon the use of the words "it shall be lawful," in the 3rd section of the Church Discipline Act. I cannot think that the practice of the Ecclesiastical Courts, before the Act, need be the subject of much examination. The Act states in the preamble that "the manner of proceed-

ing in cases for the correction of clerks requires amendment." Whether, therefore, the office of the Judge could, before the Act, be promoted by any person as of right, or whether a discretion could be exercised by the Judge as to allowing himself to be put in motion, or as to the terms on which he could be put in motion, is not, as it seems to me, of much importance, inasmuch as the practice in this respect may have been just one of the matters which the Act was intended to amend.

The 3rd section of the Act enacts,—omitting words which for the present purpose are immaterial,—that in every case of any clerk who may be charged with any offence against the laws ecclesiastical, it shall be lawful for the bishop of the diocese within which the offence is alleged to have been committed, on the application of any party complaining thereof, to issue a commission for the purpose of making enquiry as to the grounds of such charge. And the question is, under the words, "it shall be lawful," is the bishop bound, on the application of any party, to issue a commission, or has he a discretion as to whether he will issue it or not?

The question has been argued and has been spoken of by some of the learned Judges in the Courts below as if the words, "it shall be lawful," might have a different meaning, and might be differently interpreted in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words, "it shall be lawful," are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible, which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom

(1) By special leave of the House. Both his leaders were absent on business connected with the general election, which took place soon after.

Julius v. Bishop of Oxford, H.L.

the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a *mandamus*. And the words, "it shall be lawful," being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation.

I think that if these principles are kept in mind it will be found that all the cases on this subject are easily understood and reconciled, and I will refer shortly to the most important of those which were mentioned to your Lordships before examining farther the circumstances connected with the present case.

The earliest case which is generally referred to is that of *Alderman Backwell* (2) before Lord Keeper North. The creditors of Alderman Backwell petitioned for a commission of bankruptcy against him, and they would have been obviously exposed to prejudice and hazard, if it had not been granted. The words of the statute were that the Chancellor "may grant a commission," and the Lord Keeper held that he was bound to exercise the power which was in effect reposed in him for the benefit of those who asked for its exercise.

The next case is *The King v. Barlow* (3). That was not a *mandamus* but an indictment on the 14 Car. 2. c. 12, against the churchwardens for not making a rate to reimburse the constables. The statute appears to have used the words "may make a rate," but it was naturally held that the constables were entitled to be reimbursed, and that the churchwardens, being made the depositaries of a power for that purpose, could not refuse to exercise it.

The King v. The Steward of Havering-

atte-Bower (4) was the case of a *mandamus* in reference to a power granted by royal charter to the steward and suitors of a manor, giving them authority to hear and determine civil suits. It was held that this was in effect the establishment of a Court for the public benefit, and that the stewards and suitors of the manor were bound to hold the Court.

In *Macdougall v. Paterson* (5), the question was whether the plaintiff in a County Court action who had recovered his debt, should not have his costs taxed and allowed in a particular way. The statute had provided there, that under the circumstances in which the plaintiff stood, the Court might by rule or Order direct that he might recover his costs; and Chief Justice Jervis, delivering the opinion of the Court, stated that the conclusion to be drawn from the cases was that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right (that is, having by statute the right) to make the application.

This case of *Morisse v. The Royal British Bank* (6) was a case of the same kind, and decided that under the words, "it shall be lawful for the Court," a creditor who had obtained judgment against a joint-stock banking company, and had failed to recover his debt against the company, was entitled as of right to execution against a shareholder on complying with the conditions imposed by the statute.

The only other case that I will refer to is one which was decided in the Court of Queen's Bench in 1849—*The Queen v. The Tithe Commissioners* (7). A power was there given to the tithe commissioners in dealing with certain landowners to confirm agreements for commutation of tithe under certain special circumstances and conditions which I need not refer to

(4) 5 B. & Ald. 691.

(5) 11 Com. B. Rep. 755; 21 Law J. Rep. C.P. 27.

(6) 1 Com. B. Rep. N.S. 67; 26 Law J. Rep. C.P. 62.

(7) 14 Q.B. Rep. 450; 10 Law J. Rep. Q.B. 177.

(2) 1 Vern. 152.

(3) 1 Salk. 609.

Julius v. Bishop of Oxford, H.L.

at length. The Court held, upon the construction of the whole statute, that if a case occurred, coming within the terms of the statute, the commissioners were bound to confirm the agreements there mentioned. In delivering the opinion of the Court, Mr. Justice Coleridge uses these words:—"The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that in public statutes words only directory, promissory or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." To the rule thus guardedly expressed there is not, perhaps, much to object, and I only refer to the words for the purpose of pointing out that I am unable to see that they justify the expressions of the Lord Chief Justice of the Queen's Bench in the present case, who speaks of them thus:—"Now finding nothing in the enactments or language of the third section or other parts of the Church Discipline Act, which should have the effect of controlling or qualifying the words, 'it shall be lawful,' but, on the contrary, finding the language of the section pointing, as it seems to us, the contrary way, we can see no ground which would justify us in giving to those words any other than the meaning which the established canon of construction has assigned to them, a canon of construction so thoroughly settled, that Mr. Justice Coleridge speaks of it as an axiom, and by which, in construing this statute, we deem ourselves absolutely bound." The only axiom Mr. Justice Coleridge spoke of was that, under certain circumstances, enabling words might have a compulsory force.

The cases to which I have referred appear to decide nothing more than this—that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

I now turn to the Church Discipline

Act, for the purpose of considering whether it is possible to suppose that an absolute and unconditional right was given by it to put in motion the bishop of the diocese, independently of any judgment or discretion of his own. [His Lordship read the 3rd section.] The first observation which occurs upon this section is, that the words "any party" are words of the most general kind, and must, as was admitted in the argument of the appellant, extend to any natural-born subject of the Queen. The appellant who, in the case before your Lordships, invokes the action of the bishop, is a parishioner of the parish of Clewer, and a member of the Church of England; but if he is right in his construction of the statute, the aid of the bishop might be invoked equally by one who never had entered the parish, who never had been in England, who was ignorant, perhaps, of the language, who was not a member of the Church of England, who was not, possibly, a believer in Christianity. If, under the statute, any person has an absolute right to put the bishop in motion, a person may do so who is a pauper, or wholly unable to answer the costs of the suit. No authority is given to the bishop to require security for costs, and the clerk may be ruined by a litigation from which he emerges as the victor.

Again, the offence charged may be an offence against the laws ecclesiastical, but it may be of so trifling and insignificant a nature that no one, having any discretion in the matter, ought to allow it to be the subject of litigation. Or the charge or the report may be one which, within the knowledge of the bishop, is unfounded. Or again, the clerk may have been chargeable with a departure from authorised ritual, and on the remonstrance of the bishop may have admitted his fault and have promised to discontinue the wrong practice, and may have faithfully kept such promise, and yet an offence having once been actually committed, the bishop, if the argument of the appellant be right, may be called upon to proceed against the clerk, with whose conduct in the matter he has every reason to be satisfied.

The illustrations of the effect of the

Julius v. Bishop of Oxford, H.L.

appellant's argument which I have suggested (and many more might be added) appear to have been felt by the Queen's Bench to press against the argument. In some of the cases which I have suggested the difficulty is met by the Court of Queen's Bench, by saying that if the bishop refused to act, the Court might, in its discretion, refuse to grant a *mandamus* to make him act. But this is only saying that the Court will take upon itself to exercise a discretion which it refused to allow to the bishop.

It is further to be observed, on this part of the case, that the bishop of the diocese cannot, in my opinion, be looked upon merely as a ministerial officer, through whose hands process is to pass, as a matter of form. He is charged with the oversight of his diocese, and with a vigilant attention to its discipline; and if discretion as to proceedings in respect of the discipline of clerks is to be reposed anywhere, it is in the bishop that you would expect to find it. But, in truth, a most conspicuous instance of the reposing of this discretion in the bishop is found in another part of this statute. The 3rd section allows the bishop of a diocese, in which an act of immorality has been committed by a clerk having preferment in another diocese, to issue a commission to enquire into the grounds for a formal charge. I will suppose that the bishop of diocese A. issues such a commission of his own authority against X., a beneficed clergyman of diocese B. The commissioners report that there are *prima facie* grounds for proceeding against the party accused. The bishop of diocese A. is thereupon, under section 5, to transmit a copy of this report, and of the depositions, to the bishop of diocese B.; thereupon, under section 7, the bishop of diocese B. may proceed in due form of ecclesiastical law against X., up to punishment; but it is quite clear, under the 7th section, that it is discretionary with the bishop of diocese B. whether he will do this, or whether he will allow the whole proceedings, even after the commissioners have found that there is a *prima facie* case, to drop.

If the statute had singled out particular individuals who might naturally be sup-

posed to have a personal interest—the churchwardens, for example, or even certain communicants or parishioners—and had laid down conditions as to costs, or otherwise, which they were to comply with before calling on the bishop to take proceedings, there might have been a ground for contending, on the authorities I have referred to, that the power of the bishop was one which, under those circumstances, he could not refuse to exercise. This, however, is not the frame or character of the enactment; and, indeed, having regard to the various matters to which the Act applies, and the various dioceses in which it might have to be put in force, it is difficult to see how the enactments could have taken that shape.

I ought to mention an argument which was much dwelt upon before your Lordships, and in the Courts below, namely, the argument that the words, “if he shall think fit,” in the 3rd section, in the alternative power to the bishop to proceed of his own mere motion, rather imply that, on the application of a third party, he is to proceed, whether he thinks fit or not. I do not think that the words, “if he shall think fit,” have any such effect. They appear to me to be, where they occur, mere surplusage, as indeed is proved by the circumstance that if they were altogether omitted that clause of the section would mean just exactly what it means with those words inserted. But the words, in fact, appear to me to be introduced merely to mark more clearly that an alternative power is conferred upon the bishop, and that he is left free to proceed without anyone to put him in motion, if he chooses to do so.

I am satisfied upon these short grounds, and without going into many of the topics which were so elaborately considered in the Courts below, that the judgment under appeal is correct, and ought to be affirmed. I will only add that if I am right in holding that the bishop has, under the statute, a discretion as to proceeding or not proceeding, in the way in which the appellant calls upon him to do, your Lordships have not, as it seems to me, any occasion, or indeed any right, to examine into the manner in which, or the principles upon which, that discretion

Julius v. Bishop of Oxford, H.L.

has been exercised. For the exercise of that discretion the bishop, and the bishop alone, is responsible; and it would, in my opinion, be inconsistent to hold that his discretion is an answer to the application for a *mandamus*, and, at the same time, on that application, to criticise the grounds upon which that discretion has been exercised.

I have only to move that the appeal should be dismissed in the usual way.

LORD PENZANCE.—The considerations upon which the decision of this case should be based are, in my judgment, much more limited than those which have been advanced in argument.

The state of the law before the Church Discipline Act passed, though not perhaps wholly immaterial, can go for very little in the interpretation of that Act, when it is borne in mind that the preamble declares that "the manner of proceeding in causes for the correction of clerks requires amendment." In the face of such a preamble, it would be difficult to contend that any particular change in the "manner of proceeding" could not have been intended, and the change actually made, whereby the bishop is substituted for the Judge, renders the practice which existed at the time when the whole proceeding was in the hands of the Judge, a matter of very slender and remote consideration.

If it were otherwise, I should not hesitate to say that, in my opinion, the Judge always had a right and power to refuse to permit his office to be promoted, if he thought fit; and that the statements of the law on this subject by Lord Stowell and Sir J. Nicholl, far outweigh the language attributed to Dr. Lushington in the single case of *Ditcher v. Denison* (8). Nor do I think the question raised in the present proceeding has been, in any binding sense, concluded by previous authority. There are numerous *dicta* on the interpretation of the clause in the Church Discipline Act, which is now in controversy, but there has been one decision, and one only, which proceeded upon the proper effect to be given to that clause.

I allude to the *Bishop of Chichester's Case* (9), in which Mr. Justice Wightman, with, I think, probably the approval of Lord Campbell, decided the case, and acted upon the principle which the Court of Appeal in the present case has affirmed.

The contention of the appellants, therefore, is one which I think may and ought to be considered by your Lordships on its merits, and I proceed to consider what those merits are.

In the outset, I entirely agree with what has fallen from the Lord Chancellor, as to the proper and legitimate way of stating the question here involved. The words, "it shall be lawful," are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is, not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred to exercise it.

This, in my judgment, is the true question; and I confess that I hardly think that it receives a satisfactory solution from the somewhat loose definition attributed to Mr. Justice Coleridge in the case of *The Queen v. The Tithe Commissioners* (7), which has been referred to as a binding statement of the law upon this subject. It is surely not enough that the thing empowered to be done should be for the public benefit, in order to make it imperative to exercise that power on all occasions falling within the statute. It may be assumed that all powers conferred by statute on individuals in general public Acts are for the public benefit, or they would not have been conferred. But had the words been more precise, they would hardly justify the use that has been made of them; for what Mr. Justice Coleridge said was, not that permissive or enabling words are to be held to "have a compul-

(8) Special Report, 1857.

(9) 2 E. & E. 209; 20 Law J. Rep. Q.B. 23.

Julius v. Bishop of Oxford, H.L.

sory force where the thing to be done is for the public benefit," &c., but only that such words "may," in some cases, have that effect. If the matter were to be decided by previous definitions, I should prefer that of the Lord Chief Justice Jervis, who said, in the case of *The Queen v. The York and North Midland Railway Company* (10) that such words as "it shall be lawful" were to be understood as permissive only, unless some "absurdity or injustice" would follow from giving them that, their natural meaning. Neither, however, of these definitions goes so far as that which is to be found in the judgment of the Lord Chief Justice in the present case. He said, "It is an established canon of construction that in statutes of a certain class such words as 'it shall be lawful' have acquired a settled meaning, unless controlled by the context of the particular enactment, or by the sense in which they are used in other parts of the statute, or by what, on the purview of the statute, is its apparent purpose." That is to say, these words, in a certain class of statutes, import, *prima facie*, not permission but obligation; and must be so construed, unless the conclusion that they were so intended can be displaced. No specific authority is cited for this proposition, nor have I been able to find any.

Passing, therefore, from definitions which are apt not to be uniform, and which are with difficulty so framed as to be applicable to all cases, I think it far more satisfactory that your Lordships should look at what the Courts in previous cases have done rather than what the learned Judges may have said, and I invite your Lordships' attention to the cases cited in argument, where the Courts have actually held that the power conferred, though by permissive words only, was one which the individual was bound to exercise, and to compare those cases with the case now under consideration.

In *Backwell's Case* (2) the power conferred was that of issuing a commission of bankrupt, and it was conferred on the Lord Chancellor. In *The King v. Barlow* (3), power was conferred on certain per-

sons to raise a rate to reimburse a constable for expenses lawfully incurred. In *The King v. The Steward of Havering-atte-Bower* (4), power was conferred to hold a Court for recovery of debts in a manor; the power had been exercised, but had for fifty years been disused, the exercise of it by holding the Court was enforced by *mandamus*, on the application of one entitled to sue in it. In *Macdougall v. Paterson* (5) and *Crake v. Powell* (11), the Superior Courts were empowered to direct that a person entitled to costs should recover them. In the case of *The Queen v. The Tithe Commissioners* (7), in which the expressions above quoted of Mr. Justice Coleridge are to be found, power was conferred on the Tithe Commissioners to confirm agreements with respect to tithes not legally binding, when it appeared to them that such agreements gave a fair equivalent for the tithe. In *Morisse v. The Royal British Bank* (6), power was conferred upon the Courts to grant execution against a shareholder to a creditor who had obtained judgment against the company and issued execution against it without effect.

In all these instances the Courts decided that the power conferred was one which was intended by the legislature to be exercised; and that although the statute in terms had only conferred a power, the circumstances were such as to create a duty. In other words, the conclusion arrived at by the Courts in these cases was this—that regard being had to the subject-matter—to the position and character of the person empowered—to the general objects of the statute—and, above all, to the position and rights of the person, or class of persons, for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended. Thus the right of a creditor to have his debtor made a bankrupt, though the person empowered to issue the commission was the Lord Chancellor, and, therefore, a person in whom a discretion (if the subject had admitted of one) might well have been reposed, was held to be one that justice required should be

(10) 1 E. & B. 868; 22 Law J. Rep. Q.B. 41.

(11) 2 E. & B. 210; 21 Law J. Rep. Q.B. 183.

Julius v. Bishop of Oxford, H.L.

exercised without discretion. The right of the constable to be re-imbursed his expenses stood on the same footing. The same may be said of the right of the suitor to have his case heard in the Manor Court. When once it was plain that a plaintiff had a right to his costs, it could not be intended that the legislature had conferred a discretion on the Courts whether they would enable him to get them or not; and the same reason applies to a creditor's remedy against the member of a company which was indebted to him. If the idea of a discretion had not been excluded in these cases by the requirements of justice, and other general considerations, the Courts could not have held that to be compulsory which the legislature had described in terms enabling and permissive only.

The question then arises whether in the present case there are any considerations sufficiently cogent to exclude the idea that the legislature intended a discretion. If we look at the subject-matter to which the enactment in question relates, we find that it involves nothing less than the entire discipline of the clergy, and the enforcement of all ecclesiastical punishments and penalties. Did the Legislature intend, then, that ecclesiastical offences should be a matter for wholesale and indiscriminate prosecution, without regard to their nature, the circumstances under which they may have been committed, the conduct by which they may have been atoned, or the guarantees that may exist that they will not be repeated? It must be borne in mind that the offences that we are considering are not necessarily offences against the criminal laws, or even the laws of morality understood in their widest sense. They may, some at least of them, be committed innocently from inattention, or carelessness, or a wrongful conception of obligation, such, for instance, as one trifling and perhaps inadvertent departure from the authorised ritual of the Church.

I cannot see my way to a conclusion that the Legislature plainly intended that all these offences should be made the subject of prosecution without discretion or limit. Still less can I perceive with any certainty, that the public benefit—

the rights or benefit of individuals, or the requirements of justice—to say nothing of the due and efficient discipline of the clergy, and the best interests of the Church, require the indiscriminate prosecution of everything in the conduct of every clergyman which may legally constitute an ecclesiastical offence. So far, then, from the nature of the subject excluding the intention of conferring a discretion, it is one in my opinion in which a discretion is loudly called for, and would naturally be expected. The language of the clause itself, both in the provisions it contains, and still more in what it omits, points in the same direction. I cannot do better here than quote Lord Justice Bramwell: "There is no provision," he says, "regulating who is to be the complainant; it may be any one, man, woman or child, churchman or other, for aught I can see. There is no provision how the complaint is to be made, by writing, or verbally; no provision how, if at all, it is to be verified; no provision that the complainant shall undertake to prosecute, or shall be liable to costs, no provision as to the character or nature of the offence; how far its prosecution may be desirable in the interests of religion or morality; not a word as to its being possibly an isolated offence, and unintentional, and atoned for; nothing as to the motives or object of the complaint." I agree with the Lord Justice that the absence of all provision and limitation on these heads points strongly to the probable intention that a discretion should be vested in some one as to the cases in which a commission should issue; and that such a discretion should be reposed in the bishop, whose office it is to guide, correct and control the clergy, is exactly what might have been expected in an Act for the regulation of church discipline. He is the person who, above all others, has the means and opportunity of knowing the character and conduct of an offending clergyman, the condition and circumstances of his parish, and the probable motives of those who charge the offence—and, above all, whose position may enable him to interpose admonition and advice, which may render recourse to the law unnecessary.

Julius v. Bishop of Oxford, H.L.

But (still comparing the present case with the authorities above cited), the strongest point of contrast remains to be stated. For, in place of a duty being inferred and enforced, as in those cases, in order to do justice to the legal rights of an individual, if a duty be inferred at all from the provisions of this statute, its exercise may be called for at the instance of a complainant who has not only no legal right, but perhaps no interest, immediate or remote, in the exercise of the bishop's power; inasmuch as the statute makes it possible for any man to be a complainant, no matter where resident, and no matter whether Churchman, Non-conformist, or Roman Catholic, Christian, Jew or Mohammedan. I cannot think that the intention of this statute was to maintain the discipline of the clergy by vesting the power of legal prosecution, without limit, in the community at large.

The conclusion, then, at which I arrive is, that the appellant has not established his case. The words, "it shall be lawful," are permissive and enabling only. It devolved upon him to shew that the Legislature intended the exercise of the power thus conferred, to be a duty, in the performance of which the bishop was not intended to have any discretion, and he has, in my opinion, failed to shew it.

With regard to the particular circumstances of the present case, I forbear to make any remark. Being of opinion that the permissive words of the statute ought not to be held to have created a duty in the bishop to issue a commission without any discretion in the matter, I forbear to inquire whether that discretion has been well exercised. It may be that it has not; and I am not insensible to the weight of the argument that, if bishops have a discretion in such matters, it is a discretion without appeal and free from legal control. It may, therefore, be abused; but so may a discretion in whomsoever vested; and in the possibility of abuse I see no reason to believe it unlikely that the Legislature intended to confide the discipline of the clergy to the good sense and good faith of the bishops, upon whom, in the earlier history of the

church, the task of correction exclusively devolved.

LORD SELBORNE.—The use of inexact language in the statement of reasons for judicial decisions (though nothing may turn upon it in particular cases determined upon sound principles), is sometimes liable to become a starting point in other cases towards erroneous conclusions. This appears to me to have happened in the Court of first instance in the present case. The language (certainly found in authorities entitled to very high respect) which speaks of the words, "it shall be lawful," and the like, when used in public statutes, as ambiguous, and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion inaccurate. I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *alunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.

The present question is, whether it can be shewn, from any particular words or provisions of the Church Discipline Act, or from the general scope and objects of that statute, that it is the duty of a bishop, whenever a complaint is made to him under the 3rd section, to issue a commission of inquiry, with a view to penal proceedings if a *prima facie* case should be made out? The words, "it shall be lawful," &c., give him the power to do so; but this is a power, not in aid of any private right, nor for the due course and administration of justice after the commencement of any prosecution or suit; it is altogether initiatory and preliminary. The argument from the collocation of the words "if he shall think fit" in the immediate context is, in my opinion, much too slender and uncertain to justify the

Julius v. Bishop of Oxford, H.L.

inference that in the earlier branch of the sentence, where those words do not occur, obligation, and not mere power, must have been intended. Apart from those words, the only proof offered of the alleged duty, consists in the assumption that the public must always have an interest in the punishment of every clergyman offending against any part of the ecclesiastical law. I cannot make that assumption.

The Legislature did, no doubt, give the power in question to the bishop, in trust and confidence that every person chosen to fill, and who had accepted, so high an office would be properly sensible of the duty of maintaining the authority of the law, and would, in proper cases falling within his jurisdiction, use the powers intrusted to him for the correction of offences against that law for the purposes for which they were given. But it is perfectly consistent with that proposition, that it may have been intentionally left to the discretion of the bishop to judge what were proper cases for the exercise of those powers. I cannot accede to the suggestion made at the bar, that a bishop, if he had such a discretion, might be supposed liable to use it in opposition to the authority of the law, or as a means of dispensing with obedience on the part of his clergy, to any requirements of the law which might not be in accordance with his private views. The Legislature, in my opinion, neither contemplated nor provided against any such case, the occurrence of which was not, when the Act passed, and is not now, within the bounds of reasonable probability.

The very great preponderance both of practical reason and of public convenience, and of the inferences to be drawn from what is, and what is not, contained in the statute itself, seems to me to be against the supposition that the Legislature did intend, by this Act, to make it the duty of a bishop to inquire by commission into every imputation of an ecclesiastical offence, or of a scandal or evil report of such an offence against a clergyman, which might be brought before him in the way of complaint by any person whomsoever. It is at least not obvious that it would be for the interest either of the Church or of the State to open, or

leave open, so very wide a door to private intolerance, contentiousness, uncharitableness or folly. Every passage in a book or sermon to which any individual of different doctrinal views might in proper form impute heresy, or inconsistency with the Thirty-nine Articles; every trivial omission or irregularity in the conduct of Divine Service, even on points where the law might be in practical desuetude; every venial act of misconduct, atoned for by the offender, and condoned by every one having any real interest in his ministrations; every impertinent and groundless scandal, believed in by nobody whose judgment was of any value;—might thus be made the subject of an enforced inquiry, which from the beginning might be seen to be vexatious and useless, and perhaps very costly and mischievous; and that, at the instance of a person without either private interest or public responsibility. The bishop would be called in by the statute, for the first time (instead of a Court or Judge), not to exercise his episcopal judgment with any view to the good of the Church, the peace or good order of the diocese, or the general spiritual interests of his clergy or laity, but as a passive ministerial officer, to do what he might have the strongest reasons in the world to disapprove. He might have read the book or sermon, and have found it perfectly unobjectionable; he might have received the most unreserved submission to his own judgment in the supposed case of ritual irregularity, and such irregularity might have been wholly discontinued; he might be convinced on the best possible grounds that ample reparation had been made for any other kind of error; or that any alleged scandal was merely malicious and contemptible; and yet he would be compelled to proceed. The complainant might be, not (like the appellant in this case) a parishioner, but a stranger, neither answerable in costs, nor even offering to substantiate his own accusation; the statute making no regulation itself, nor enabling any to be made, either as to the form or manner of the complaint, or as to its verification, or as to any costs of the enquiry demanded.

I cannot collect, nor can I presume, that this was the purpose of the Legislature.

Julius v. Bishop of Oxford, H.L.

I do not think it reasonable, and I agree that the present appeal should be dismissed with costs.

LORD BLACKBURN.—In this case the appellant charged the incumbent of a parish within the diocese of Oxford with having committed within that diocese offences against the laws ecclesiastical. The charges are all of such a nature that proceedings might have been taken in respect of them under the Public Worship Act. And one point made on behalf of the respondents was that the proceedings ought to have been taken under that Act. All the Judges below agreed that proceedings could still be instituted under the Church Discipline Act, which applies to any offence against the laws ecclesiastical by a clerk in holy orders, though the offence charged was of such a nature that proceedings might have been taken under the later Act. This point was given up at your Lordships' bar, and is clearly not tenable. [After stating the facts, his Lordship continued.]

The question before this House depends upon the construction of the Church Discipline Act, for if the Legislature cast on the bishop of a diocese the absolute duty of forwarding inquiry in one or other of these two ways, there can be no question that the bishop has not fulfilled that duty, and there can equally be no question that there is power by *mandamus* to require him to fulfil a duty cast upon him by a statute. But if the Legislature gave the bishop power to grant farther inquiry in one of those two ways, trusting that he would always do so where it was proper, but leaving it open to him, when convinced that it was not proper, to decline to act; if, in short, the intention of the Legislature was to make it lawful for him to act, if convinced that it is expedient, but to leave it to his discretion to say whether it is expedient, the *mandamus* will not lie.

The Court of law does not sit as a Court of Appeal from the bishop to say whether he has exercised his discretion, if he has one, wisely or not; though if he has no discretion it may compel him to fulfil his duty and act.

The question as to the construction of

this particular Act was directly raised in *The Queen v. The Bishop of Chichester* (9), and there Mr. Justice Wightman thought that the bishop had discretion, and made that the ground of his decision. But the Court of Queen's Bench did not so decide; Mr. Justice Hill, who was the only other member of the Court at the time the decision was made, based his judgment entirely on the discretionary power of the Court of Queen's Bench to refuse a writ of *mandamus*. Lord Campbell and Sir William Erle, who had been members of the Court when the rule was argued, but had ceased to be so before it was decided, authorised Mr. Justice Wightman to state that they were of opinion that the rule should be discharged, but he did not state on which ground. It seems probable that Lord Campbell would have decided on the ground that he agreed with Mr. Justice Wightman on the construction of the Act, and Sir William Erle on the narrower ground taken by Mr. Justice Hill. There have, since that time, been several expressions of judicial opinion on the construction of this statute; none of them decisions, but, being *dicta* not irrelevant to the subject under consideration, of weight as authorities, though none, I think, of so much weight as the opinion of Mr. Justice Wightman, because in none of them was it the *ratio decidendi*, as it was with him. Lord Justice Bramwell says, "I cannot but think we are concluded. The decisions and opinions are such and so many that we ought to follow them. This is my conviction. I think at least none but the ultimate Court of Appeal should overrule opinions so expressed, even if that should, as to which I content myself with observing that where the law has been laid down, and generally supposed and taken to be correctly laid down and acted on, great Judges have doubted much whether, if wrong, the only remedy was not in the Legislature."

I quite agree that where, from the nature of the decision, there is reason to believe that rights have been regulated and arrangements as to property made, on the faith that the law was as laid down, it may be right to follow the decision even if wrong. On this I had occasion to express my views in the

Julius v. Bishop of Oxford, H.L.

recent case of *Davidson v. Sinclair* (12). But I do not think that this is such a case. Whilst I agree with what I understand to be Lord Justice Thesiger's opinion, that the preponderance of authority in favour of the view that under this statute the bishop has a discretion, is great, I cannot think with Lord Justice Bramwell and Lord Justice Baggally, that the question was, even in the Queen's Bench Division, concluded by authority, and still less that it is so in this, the highest Court of Appeal. I agree that, before deciding that such a preponderance of authority was based on a mistake, the case should be considered carefully; and I have no doubt that the Judges of the Queen's Bench Division did so consider it.

I have myself come to the conclusion, independently of those opinions, that, applying the general principles of law as to the construction of statutes, to this statute, there is no duty cast on the bishop enforceable by *mandamus*, unless, perhaps, a duty to hear and consider the application of the party complaining, which, in this case, the bishop has done. The case has now been so carefully and elaborately discussed, that I think I may properly at once proceed to the point where what is, in my opinion, the fundamental error, that which I consider the fallacy, in the judgment of the Queen's Bench Division, lies. That judgment treats the words, "it shall be lawful," as ambiguous words, capable of bearing several meanings; and then says, "We start with an established canon of construction, namely, that in statutes of a certain class, of which the statute under consideration is one, these words have acquired a settled meaning;" and after referring to *In re The Newport Bridge* (13), where it had been laid down that the words, "it shall be lawful," *prima facie* import a discretion, the judgment proceeds, "But though the rule thus laid down may hold good in the general run of statutes, in those of the class to which the Church Discipline Act belongs a different rule has prevailed for a very

great length of time, and is now fully established." Cases are cited in support of this position—*The King v. Barlow* (3), *Macdougall v. Paterson* (5), *Morisse v. The Royal British Bank* (6), *Crake v. Powell* (11), *The Queen v. The Trike Commissioners* (7), and an American case of *The Supervisors v. The United States* (14). It then comes to the conclusion that they establish that the words which the judgment considers ambiguous, and in an ordinary statute *prima facie* discretionary only, are in a statute relating to public justice and of general interest and concern, to be deemed *prima facie* obligatory.

If this were the established canon of construction, it would not conclusively shew that the words were in this statute obligatory; but it would be a very important step in that direction. But I think that there is no such established canon of construction. I am not aware that it has ever in any previous judgment been laid down, and I think that all of the cases which in the judgment are cited in support of the position so laid down, and all the other cases of which I am aware, in which words in terms empowering have been held to be imperative, are to be supported on a different principle.

I do not think the words, "it shall be lawful," are in themselves ambiguous at all. They are apt words to express that a power is given, and as, *prima facie*, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, *prima facie*, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. It by no means follows that because there is a duty cast on the donee of a power to exercise it, that a *mandamus* lies to enforce it; that

(12) Law Rep. 3 App. Cas. 426, 765.

(13) 2 E. & R. 377; 29 Law J. Rep. M.C. 52,

(14) 4 Wallace, 436.

Julius v. Bishop of Oxford, H.L.

depends on the nature of the duty and the position of the donee. The earliest case in point of date in which I find this doctrine touched on is *Alderman Backwell's Case* (2). The statute 13 Eliz. c. 7. s. 2, enacted that the Lord Chancellor or Lord Keeper, upon every complaint made to him in writing against such person, being bankrupt, "shall have full power and authority by commission under the great seal of England" to issue a commission, and this power was by 1 Jac. 1. c. 15. s. 3, extended to bankrupts under that Act. When the Exchequer was closed in 1676, many bankers who had deposited their money there were unable, in consequence of the bad faith of the Government, to meet the demands of their own creditors. Alderman Backwell, who was one, fled to Holland, leaving his son to make what terms he could with the creditors, and apparently the Government helped him. Lord Keeper North seems to have done all he could, and a great deal more than he ought, and kept the creditors at bay for seven years. But at last, in 1683, even he could not delay longer, and according to the report, "the Lord Keeper declared that though the words in the Act of Parliament were that the Chancellor may grant a commission of bankrupt, yet that 'may' was in effect 'must,' and it had been so resolved by all the Judges, and the granting of a commission was not a matter discretionary in him, but that he was bound to do it." I have already pointed out that the word "may" does not occur in the statute, but, as I have already said, it is not inaccurate to say that the words conferring a power are equivalent to "may."

In one of the County Courts Acts, 13 & 14 Vict. c. 61. s. 13, the words used were that, on its being proved by affidavit by the plaintiff that the cause was one in which there was concurrent jurisdiction, the Court in which the action is brought or a Judge at chambers "may thereupon, by rule or order, direct that the plaintiff shall recover costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this Act had not passed." The Court of Exchequer had, in *Jones v. Har-*

rison (15) construed this as giving the Court a discretionary power to refuse the rule. That being a decision on which no appeal lay, was not binding on a Court of co-ordinate jurisdiction, and the Court of Common Pleas in *Macdougall v. Paterson* (5), and the Court of Queen's Bench afterwards in *Crake v. Powell* (11) held a contrary opinion.

In the judgment of the Common Pleas, Chief Justice Jervis says that "may" was, "as we think, aptly and properly used to confer on the Court an authority," and later states the rule to be "that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application." And in *Crake v. Powell* (11) Lord Campbell says, "If the plaintiff be entitled to costs, and the Court or Judge is empowered to make a rule or order for that purpose *ex debito justitiæ*, he may call upon the Court or Judge to do so." *Morisse v. The Royal British Bank* (6) was decided on the same principle.

But there are cases in which the authority or power given is not to do a judicial act, and yet there is a duty on the donee to exercise the power if it appears to be given to the donee for the purpose of making good a right, and he is called upon by those who have that right to exercise the power for their benefit.

The 14 Car. 2. c. 12. s. 18, reciting that constables, &c., may be at charges in enforcing the poor-law, and as yet have no power to make rates to reimburse themselves, enacts "that all constables, &c., so out of purse as aforesaid, together with the churchwardens and overseers of the poor and other inhabitants of the parish, shall hereby have power and authority to make an indifferent rate, and to tax all the inhabitants," &c. The inhabitants of several parishes of Derby seem to have combined to refuse to make any rates for this purpose; an

(15) 6 Exch. Rep. 328; 20 Law J. Rep. Exch. 166.

Julius v. Bishop of Oxford, H.L.

indictment was preferred against them, which was removed into the King's Bench, and on motion to quash it, the Court refused to do so. The case is reported under different names in different books. The report in Salkeld, under the name of *The King v. Barlow* (3), is in the following words: "Exception was taken that the statute only puts it in their power to do so by the word 'may,' &c., but does not require the doing of it as a duty for the omission of which they are punishable—*sed non allocatur*. For where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall;' thus, 23 Hen. 6 says the sheriff may take bail. This is construed he 'shall,' for he is compellable so to do."

The word "may" does not occur in the 14 Car. 2. c. 12, nor in the 23 Hen. 6, where in the Norman-French version the words are, "*lessent hors de prison*," and in the English version, "shall let out of prison;" but both are apt illustrations of the rule that, though giving a power is *prima facie*, merely enabling the donee to act, and so may not inaccurately be said to be equivalent to saying he may act, yet if the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the power to exercise the power when those who have the right call upon him so to do. And this is equally the case where the power is given by the word "may," if the object be clear. Thus, in the Public Health Act, 1848 (11 & 12 Vict. c. 63. s. 89), the words are, "The Local Board of Health may make rates prospectively, in order to raise money for the payment of future charges and expenses, or retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate;" yet on the application of a judgment creditor, a *mandamus* will go to compel the making of a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained—*The Queen v. The Rotherham Local Board* (16), *Wor-*

thington v. The Local Board of Moss Side (17).

In *The Queen v. The Tithe Commissioners* (7) Justice Coleridge, in delivering the considered judgment of the Court, says: "The words undoubtedly are only empowering; but it has been so often decided as to have become an axiom that in public statutes words only directory, permissive or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." The only part of this to which exception can be taken is the use of the word "public." If by that it is to be understood either that enabling words are always compulsory where the public are concerned, or are never compulsory except where the public are concerned, I do not think either was meant. The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to shew that there is a right where private interests are concerned than where the alleged right is in the public only, and in fact, in every case cited, and in every case that I know of (where the words conferring a power are enabling only, and yet it has been held that the power must be exercised), it has been on the application of those whose private rights required the exercise of the power. The personal liberty of the person arrested by the sheriff, the rights of the creditors of the bankrupt to their debts, the rights of the plaintiff who had recovered judgment to his costs, the right of the constable out of pocket to be paid by the parish, the right of the creditor of the bank or of the local board to be paid, were all private rights. I do not, however, question that there may be a right in the public such as to make it the duty of those to whom a power is given to exercise that power. I should say, for instance, that if, by enabling words, a Court is empowered to pass sentence on one convicted of a crime, it would be the duty of the Court to pass that sentence. But I cannot agree with the Court of Queen's Bench that whenever the statute

(16) 8 E. & B. 906; 27 Law J. Rep. Q.B. 166.

(17) 36 Law J. Rep. Q.B. 61; Law Rep. 1 Q.B. 63.

Julius v. Bishop of Oxford, H.L.

is for the public good, and of general interest and concern, powers conferred by enabling words are, *prima facie*, to be considered powers that must be exercised. And I cannot agree that in the statute now in question there is either a private or a public right requiring that this power given to the bishop must be exercised.

No doubt it is very desirable that the ecclesiastical law should be observed; and, both with the view that it should be observed, and with the view to punish those who have transgressed, it is very desirable that there should be the means of bringing to trial, and, on conviction, of punishing, transgressors against that law. But does it follow that it is desirable that it should be in the power of any individual to insist on a prosecution in every case? The author of the *Apology* (said to be the Dean of the Arches in the reign of Elizabeth) did not think so. He says that the proceedings must be by the office of the Judge, and "the Judge needs not lend his assistance but where he sees good and probable inducements to ground it upon."

Lord Stowell uses language in *Maidman v. Malpas* (18), often quoted, so like that used in the *Apology* as to make me think he had that passage on his mind.

It is true that where due security for costs was given the Judge did not, in practice, refuse his assent, so that there was not a practical check on the improper institution of criminal proceedings in the Ecclesiastical Courts. And it is also true that, in prosecutions for temporal crimes in the temporal Courts, any private person may institute a prosecution, and that the only check provided by the Common Law is that the Attorney-General may take the prosecution out of his hands, or enter a *nolle prosequi*. And it is also true that in England that power is rarely exercised. But every one who has had experience in Criminal Courts must know that cases do occur in which every one thinks it would be much better that there should be no prosecution; and some (I allude more particularly to prosecutions for bigamy) in which, though there was a conviction,

the Judge has said that the prosecution was so improper that he would not allow costs. I do not say that in all these cases the Judge was right, and the private prosecution wrong—far from it; but in every such case the Judge must have thought that it was not for the public benefit that the prosecution should be instituted, though there was a breach of the law.

At Common Law the Master of the Crown Office, being the Queen's Coroner and Attorney in the Queen's Bench, could file *ex officio* informations in that Court for any misdemeanours; and a practice had arisen before the Revolution, by which he allowed any one to file an information in his name. This was very analogous to promoting the office of the Judge in an Ecclesiastical Court. By 4 & 5 Will. & M. c. 18. s. 2, he was forbidden to do so "without express order to be given by the Court, in open Court." At first it seems to have been thought that the Court ought to grant that leave if it was shewn that there was a breach of the law; but it has been long held discretionary. In *The King v. Stacy* (19), Lord Mansfield says (speaking of *quo warranto* informations), "But now since these matters have come more under consideration, it is no longer a motion of course, and the Court is bound to consider all the circumstances of the case before they disturb the peace and quiet of any corporation." And this has been acted on repeatedly: see *The King v. Parry* (20); *The Queen v. The Rector of Lambeth* (21); and *The Queen v. Ward* (22). It is difficult, in the face of these authorities, to say that it is impossible to suppose that the Legislature could have intended to leave the bishop power to consider all the circumstances of the case before he takes a step which may disturb the peace and quiet of the Church and of his diocese. And at Common Law the prerogative writs of *mandamus*, prohibition, and *certiorari* were not writs of course. The Court, when called on to issue them, always exercised a discretion. See the

(19) 1 Term Rep. 1.

(20) 6 Ad. & E. 810.

(21) 8 Ad. & E. 356.

(22) 42 Law J. Rep. Q.B. 126; Law Rep. 8 Q.B. 210.

(18) 1 Hag. Cons. 205.

Julius v. Bishop of Oxford, H.L.

authorities collected in *The Queen v. The Justices of Surrey* (23).

It is true that the Courts always thought it their duty to grant the writ where the party applying had a special interest in asking it. And those who framed the Church Discipline Act seemed to have had this in view, as they have, by section 19, said that nothing should affect or hinder any person from exercising the right to institute as voluntary promoter, or from prosecuting in such form and manner, and in such Court, as he might have done before the passing of this Act, any suit which, though in form criminal, shall have the effect of asserting, ascertaining or establishing any civil right. This goes far to shew that it was thought that, but for this section, the prosecution even in such a case would have been subject to the control of the bishop.

It is also true that, in exercising their discretion, the Courts have thought it very material to inquire whether the applicant was a mere busybody and makebate, or was a person who had an interest, though it fell short of what would fall within the terms of section 19. And I am far from saying that the bishop should not, in this case, have considered, as one of the elements to guide his discretion, that the appellant was a parishioner. But it was only one element. The Act is general. It allows prosecutions for immorality in which a parishioner is hardly more grieved than any neighbour. And it applies to clerks who have no preferment, and consequently can have no parishioners; and, if the bishop has no discretion, he must in every case act on the application of any party. I certainly cannot see any sufficient ground for saying that the object of the statute is such as to lead to the conclusion that the Legislature must have intended to oblige the bishop to exercise the power which, *prima facie*, he is entitled to refuse to exercise. And certainly, if discretion is to be entrusted to anyone, the bishop is the fittest person to whom to trust it. It is very true that bishops are but men, and, being human, may misuse any dis-

cretion entrusted to them; but so are Judges, and so are the parties who make a complaint. And it seems strange to say that the Legislature, which has not provided that there shall always be a prosecution, but has left that to the discretion of any one who likes to interfere, could not trust any discretion to a bishop, who, to say the least, is not more likely to err than any voluntary prosecutor.

I do not think it necessary to examine the words and clauses and the history of the Act. I have considered them, and find nothing to lead me to think that it was intended to make the exercise of the power conferred on the bishop imperative in all cases, though conferred by words *prima facie* discretionary.

I see no reason for departing from the rule by which costs are given to the successful party.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—James Girdlestone, for appellant; Cuffe, Beaumont & Co., for the Bishop; Brooks, Jenkins & Co., for Canon Carter.

[IN THE QUEEN'S BENCH DIVISION.]

1880. { THE QUEEN, on the prosecution
Feb. 21. of SIR JAMES TAYLOR INGHAM,
KNT. (respondent), v. TRUELOVE
(appellant).

Obscene Books—Order for Destruction—Death of Complainant before Order—Lapse of Proceedings—20 & 21 Vict. c. 83.

[For the report of the above case, see 49 Law J. Rep. M.C. 57.]

(23) 39 Law J. Rep. M.C. 145; Law Rep. 5 Q.B. 466.

[IN THE COURT OF APPEAL.]

1880. { FORWOOD v. THE NORTH WALES
June 7. { MUTUAL MARINE INSURANCE
 { COMPANY.
 { THE SAME v. THE PROVINCIAL
 { A 1 MUTUAL MARINE INSU-
 { RANCE COMPANY (LIMITED).*

Ship—Marine Insurance—Insurance limited to Actual Damage—Claim for Constructive Total Loss—Effect of Bye-law when indorsed on Policy.

A valued policy of insurance, made with a mutual marine insurance company, incorporated certain bye-laws of the company, which were indorsed thereon. The policy declared that the acts of the assurer or assured, in recovering, saving or preserving the property insured, should not be considered a waiver or acceptance of abandonment. By one of the bye-laws it was provided, that in the event of any ship being stranded or damaged, and not taken to a place of safety, the company might use all possible means to procure her safety; but that no acts of the company, in pursuance of such power, should be deemed to be an acceptance of any abandonment of which the assured might have given notice; and that the company, under any circumstances, should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured. In an action, brought to recover for a constructive total loss,—

Held, that the bye-law did not exclude a constructive total loss, and that the plaintiff was entitled to recover.

Appeal by the defendants in the first case from the judgment of Lush, J., after a trial without a jury.

The case is reported *ante*, p. 243.

Appeal by the defendants in the second case from the judgment of Lord Coleridge, C.J., after trial without a jury.

The two appeals involved the same question, and were heard together.

The plaintiff insured a ship with the two defendant societies, both of which were mutual societies. The ship was damaged while the policies were in force, by the perils insured against; the cost of

repairing would have amounted to more than the value of the ship when repaired, so that a prudent owner would have sold her unrepaired. The plaintiff gave notice of abandonment within a reasonable time, and there was in effect a total constructive loss. The question raised on the appeal was whether, on the construction of the policy, and the bye-laws indorsed thereon, the plaintiff could claim and recover as for a constructive total loss.

The policy was in each case a valued policy, and was to the effect that, in consideration of the person effecting it agreeing to become a member of the company, and to do all the other acts provided by it, the company insured the ship, and after enumerating the perils, it was thereby declared and agreed, that the acts of the assurer or assured in recovering, saving or preserving the property insured, should not be considered a waiver or acceptance of abandonment.

There were a number of bye-laws indorsed on the policy, of which one, the 24th, was as follows:—

“Every loss, by stranding or otherwise, shall without delay be made known to the manager, and all protests, vouchers, surveys and other statements relating thereto, shall be sent to the manager, and laid before the directors, and be subject to the stipulations contained in these bye-laws. In the event of any ship being stranded or damaged, and not taken into a place of safety, it shall be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and any owner, or his representatives, refusing the co-operation of the agents of this company for the safety of such ship, shall suffer a deduction of not less than twenty-five nor over fifty per cent., as the directors shall determine in the settlement of the claim. And it is hereby provided, that no acts of the company or its agents, under or in pursuance of the power hereby reserved to the company, shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company; and the company, under any circumstances,

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

Forwood v. North Wales Mutual Marine Ins. Co. (App.), Q.B.

shall only pay for the absolute damage caused by the perils insured against, which is in no case to exceed the sum insured."

Lush, J., and Lord Coleridge, C.J., gave judgment for the plaintiff in each action.

The following was the judgment of

LORD COLERIDGE, C.J. (1).—In this case an action has been brought by Mr. Forwood against the defendants, the Provincial A 1 Mutual Marine Insurance Company, of which he is a member. It is brought on a policy for 1,025*l.* on a ship valued at 3,600*l.*, and from the statement of claim and the statement of defence and from certain admissions made in the action, it appeared that the ship which was insured is the *Balnaquith*, which when passing on a voyage from Coosaw to Newcastle-on-Tyne, was so much damaged, that although she was repairable as a ship, she was only repairable as a ship at a greater cost than the amount she would have been worth when the repairs were done to her, and therefore there was, according to the well understood principles with regard to such things, a constructive total loss of the ship. There was due notice of the abandonment of the ship given by the assured to the defendants, and that also is admitted by the pleadings.

Now the action is brought on a policy of insurance, to the words of which and of the bye-law I will refer in a moment, but the assured claimed as for a total loss, and the company have paid into Court a sum of money which I must take for the present purpose to be sufficient if the principle on which they have paid it in is right, and which I must take to be insufficient if the principle on which they have paid it in is wrong, and I understand that the point I have to decide, being really the one point which has been in dispute in the argument before me, is the principle on which that payment should be made. On the part of the plaintiff it is said that this is the ordinary case of a constructive total loss, that there has been the ordinary notice of abandonment given,

which he had the right to give under the circumstances, and that therefore as between him and the defendants 1,025*l.* is what he is entitled to receive, or, at any rate, he is entitled to be paid as for a total loss whatever that sum may be. In an ordinary case it would be 1,025*l.* On the part of the company it is contended that that is not so, as I understand it, that at least, under the circumstances of this case, and upon the admissions in this case, there is no such thing as what is commonly called a constructive total loss; and that the words of the policy, or if not the words of the policy, the words of the bye-law, which, according to the view taken by the defendants, either contradict the policy and supersede it, or which are consistent with the policy and explain it, provide that the defendants are only to pay such a proportion as they would be compelled to pay assuming the loss to be partial; and that supposing there had been a partial loss, and no notice of abandonment, and no constructive total loss, they are liable to pay that sum which they, under those circumstances, would have been bound to pay.

Now, those are the contentions on one side and the other, and the decision of the case depends mainly on two or three lines in the policy, and on the 24th bye-law which is incorporated with the policy, and indeed made part of the same document. The policy, I should observe, is made, as was pointed out to me, expressly according and subject to the bye-law, and the policy, almost at the conclusion of it, after the ordinary suing and labouring clause, and the undertaking on the part of the company to bear their proportion of the charges incurred in that way, goes on to say—"It is expressly declared and agreed that the acts of the assurer or assured in recovering, saving or preserving the property insured shall not be considered a waiver or acceptance of abandonment;" that is, a waiver or acceptance, *reddendo singula singulis*—a waiver on the part of the assured, and an acceptance of the notice on the part of the company. The 24th bye-law is set out at length, and is pleaded as part of the statement of defence, it is as follows:—"Every loss by stranding or

(1) The judgment was not written.

Forwood v. North Wales Mutual Marine Ins. Co. (App.), Q.B.

otherwise shall, without delay, be made known to the manager, and all protests, vouchers, surveys and other statements relating thereto shall be sent to the manager and laid before the directors, and be subject to the stipulations contained in these bye-laws." As far as I can see, I do not think that much turns on that particular portion of the bye-law. Thus far it says that every loss, whether by stranding or otherwise, that is, whether total or partial, shall, without delay, be made known to the manager, and then it goes on thus:—"In the event of any ship being stranded or damaged and not taken into a place of safety, it shall be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred, and any owner or his representative refusing the co-operation of the agents of this company for the safety of such ship shall suffer a deduction of not less than 25 per cent. nor over 50 per cent. as the directors shall determine in the settlement of the claim." Then it goes on—"And it is hereby provided that no acts of the company or its agents under or in pursuance of the power hereby reserved to the company shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company, and the company under any circumstances shall only pay for the absolute damage caused by the perils insured against, which is in no case to exceed the sum insured."

It has been said and perhaps with truth, that this is a bye-law somewhat inartificially drawn, but the object appears to me, looking at it by the light of the arguments which I have had addressed to me to be reasonably clear. I have said that the first sentence in it appears to be important only as dealing with every kind of loss, contemplating as I think, or at any rate comprehending as I think, both total and partial loss under the words "every loss." And then it goes on in the next sentence to deal with the case of partial loss:—"In the event of any ship being stranded or damaged, and not taken into a place of safety;"

and this being a Mutual Insurance Company, and all the assured in it being bound one to the other by the ties of the company itself, and by the general interests of the company itself, if any one of those mutually insured persons refuse the co-operation of the agents of the company to save the property, he shall be mulcted, because of his refusal, not less than 25 or more than 50 per cent. at the discretion of the directors, because it is a mutual company, and he has so refused, and he shall be mulcted as the words go "in the settlement of the claim." Now, I do not by any means say that in the settlement of the claim is included the payment of the whole insurance in the case of a total loss; but I do say that according to the *prima facie* meaning of those words, and the meaning that I think in the collocation in which they stand, and, in the connection in which they must be taken, they refer to the settlement of the claim in the case of a partial loss, and that portion of the bye-law applies to the case of a partial loss. It then goes on to say—"It is hereby provided that no acts of the company or its agents, under or in pursuance of the power hereby reserved to the company, shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company." Now, the only case, as it appears to me, in which the assured, according to well known insurance law, could give a notice of abandonment to the company, which was to have any legal bearing at all, would be a case of constructive total loss, so that here is a correlative expression, a notice of abandonment implying that the person who gives the notice of abandonment elects to treat the loss as a total loss, while the insuring company has the right either to dispute the legality of the notice or to accept the notice of abandonment and act upon it as in the case of a constructive total loss. It appears to me, I must own, that those words (I do not forget the words that follow and to which I will come in a moment), are a clear indication that as between the assured and the company the case of a constructive total loss is contem-

Forwood v. North Wales Mutual Marine Ins. Co. (App.), Q.B.

plated, and that certain acts, which if the insurance company were not mutual, or at all events, if it had not been so stipulated, might give rise to questions and litigation as to the fact of constructive total loss shall not, on this policy and between the parties to this policy, have the effect which it might be contended that otherwise they would have; that therefore they should do whatever they may think fit, the assurers on the one hand and the assured on the other, to save the ship for the benefit of, and so as to lessen the loss of the whole company, without prejudice to the legal effect of the notice of abandonment which the assured has a right to give, and the assuring company has a right to accept if they please. I think, therefore, that it is plain upon those words, to which I am really unable to give any other possible construction, that the case of a constructive total loss was and must be taken to have been in the contemplation of the parties to this contract.

Then it is said, that the words which follow must be construed, so as to limit to some extent the liability of the company. If I understand the argument for the defendants, they must limit the liability of the company in one particular fashion known to the law, namely, by imposing upon the assured that limit which alone he would be entitled to enforce against them if the loss had been partial. The company, under any circumstances, shall only pay for the actual damage caused by the perils insured against, which in no cases is to exceed the sum insured.

Now I own that the last words unless they mean—which is not raised before me here—unless they mean that the insuring companies are not, under any circumstances, to pay more to the assured than the dry sum assured, even although under other circumstances the assured would be entitled to recover under the suing and labouring clause; unless that is the meaning of them, I confess I am rather puzzled to give a reasonable construction to those last words, and it may be that the word “insured,” as it has been suggested in the course of the argument, is a misprint for “valued,” and it means that the liability

which they took on themselves by the suing and labouring clause is never to exceed in any event the valuation of the ship. How that may be I do not know, but it does not seem to me to be at all conclusive, or to have very much bearing upon the question before me here, because no such sum is attempted to be recovered, and no such question arises. The words are—“that the company under any circumstances shall only pay for the absolute damage caused by the perils insured against, which is in no case to exceed the sum insured.” Now some meaning, no doubt, is to be given to those words. It is urged by the defendants that they mean they shall only pay for the damage calculated—that is what it comes to really—they shall only pay for the damage calculated as in cases of partial loss. Now I do not think that that is the true construction. First of all, the mode of payment in cases of partial loss is a thing perfectly well known; and although these bye-laws are inartificially drawn, they are drawn by persons who know the ordinary and general words of insurance law, and if that had been the object, it would have been perfectly easy to express it clearly, and one would have expected it to be clearly expressed. The words are—“shall only pay for the absolute damage caused by the perils insured against.” Now it seems to me that those words may receive a perfectly adequate construction, some meaning must be given to them, and it seems to me a perfectly fair meaning may be given to them by construing them in the way which was suggested in the course of the argument. There may be a total loss, and there may be a constructive total loss; there is or may be, therefore, a right of action at the suit of the assured against the assuring company, and the assured may have a right to recover on the footing of a total loss, but if it turns out on investigation that the whole damage that has been sustained is really less than the sum ascertained between the parties as the total loss, then there shall be no right to the absolute recovery of the sum between the company and the assured; there shall be no such right, the company shall pay as for a total

Forwood v. North Wales Mutual Marine Ins. Co. (App.), Q.B.

loss, but they shall pay not the 1,025*l.* or whatever it may be, for which the policy is—it would be in other cases underwritten, but in this case entered into, I suppose—but they shall pay as for a total loss, but their liability shall be limited by the actual amount of the damage which the constructive total loss has occasioned to the assured. It seems to me that is the true construction of the document, and it is consistent with the bye-law, it is consistent, I think, perfectly with the words of the policy itself; and I therefore am of opinion that the proper principle on which the payment into Court ought to be made, or on which this case ought to be determined, is the principle that I have endeavoured to enunciate, that the assured is entitled to be paid as upon the footing of a total loss, but that if the real amount of his total loss is less than the sum insured, the company shall not be bound to pay the excess between the actual loss incurred and the sum insured, although there has been notice of abandonment, and although they may have taken to the ship. That seems to me to be the principle on which this case ought to be determined. What exact sum that is, I suppose it is not for me to say, unless the parties are agreed that 900*l.* are the sum. If it may be taken without trouble at that, I should be disposed to give judgment, but that I could only do by agreement between the parties. I am to determine the principle, and if the parties wish it, if it would facilitate matters, I would give judgment for the difference between 180*l.*, the amount paid into Court, and 900*l.*, the amount of actual damage, and that follows from my judgment of course. If there is any dispute about the items, that must be determined by some other tribunal, for I have heard no evidence on the matter.

The defendants appealed.

C. Russell and Trevelyan, for the defendants in the first action.—The claim of the plaintiff would be well-founded if this were an ordinary Lloyd's policy, but the question is whether the ordinary rules as to abandonment apply under this policy? It is contended, on behalf of the

defendants, that there can be, under this policy, no claim for a constructive total loss; the provisions of bye-law 24 prevent the defendants from being liable, even though they may have done acts which would otherwise render them liable. Under this policy and these bye-laws no notice of abandonment could have any effect; the only effect of the clauses in the policy is to remit the parties to their rights under the contract, whatever they may be, and in this case they must be ascertained from the 24th bye-law. Absolute damage must mean actual damage; the word is used in contradistinction to constructive damage, and the insurers are therefore only liable for actual damage. The bye-law might be held to refer to cases in which a ship might be temporarily out of the possession of the assured, but under this policy, and on the facts of this case, there could not be any useful effective abandonment; any attempt at an abandonment must be futile.

Cohen and J. G. Witt, for the defendants in the second action.—Of course, in any case, the assured can give notice of abandonment, and the underwriters may accept it, and if that is done the parties will be bound. If the clause in the policy and the bye-law are inconsistent, then the bye-law must override the policy. It is, however, submitted, that there is no inconsistency in the present case; if the last sentence of the bye-law were construed literally there might be, but it cannot be so construed, for "any circumstances" cannot mean "any circumstances of partial loss." The bye-law must either be held to do away with any claim for a constructive total loss in all cases, or it must mean that where a ship has been damaged, and then brought in safety to a port, there can be no constructive total loss, and that the assured cannot recover anything beyond the actual damage to the ship, and the expenses provided for under the suing and labouring clause. Unless this bye-law can bear one of these two constructions it can have no meaning at all.

Butt and Mathew, for the plaintiff in the second action.—It is difficult to give any meaning to this bye-law; but it is submitted that it only refers to a case of

Forwood v. North Wales Mutual Marine Ins. Co. (App.), Q.B.

partial loss; if this be so, then the words "absolute damage" have a meaning, the words, "any circumstances," also refer to a partial loss, and so are equivalent to any such circumstances. But for this bye-law it might be that an invalid notice of abandonment might be given, and that the underwriters might so act, as by their conduct to be held to have accepted that notice, and this is what is guarded against by this bye-law.

They were then stopped by the Court.

Barnes (with him *The Solicitor-General* (*Sir F. Herschell*), for the plaintiff in the first action, was not called upon.

BRAMWELL, L.J.—I am of opinion that this judgment must be affirmed. We have to construe these bye-laws as they stand, and not as, it may be suggested, they were meant to be construed. This is a valued policy. That fact, to my mind, is of use for two purposes, that is, for the purpose of a case of an actual total loss and a case of a constructive total loss. There is no reason to suppose that the value is inserted only for the purpose of meeting a case of actual total loss, for there are provisions which shew that the parties expressly contemplated that there might be an abandonment and an acceptance of notice of abandonment.

We have then to consider the bye-laws; but the bye-laws under the policy must be taken together with the policy, for they all form one document, and I do not see that they clash one with another. It is admitted that if the earlier words in the twenty-fourth bye-law stood alone, they would mean that there could be an abandonment, and that the doctrine of constructive total loss would apply. The bye-law provides "that no acts of the company or its agents under or in pursuance of the power hereby reserved to the company, shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to the company;" and then it goes on thus: "and the company, under any circumstances, shall only pay for the absolute damage caused by the perils insured against, which is in no case to exceed the sum insured." Now it is said that these latter

words shew that there can be no constructive total loss and no abandonment. That is the proposition of the defendants, and unless they prove that they must fail.

It was argued by the defendants that there might be cases of a constructive total loss in which there might be a right to recover as for a total loss, as for instance when a ship was detained by embargo or was captured, and that in such a case the assured could recover as for a total loss; but if the words "absolute damage" are held not to cut down the effect of the words "under any circumstances" in every case, why should they operate to do so in some particular case? I am unable to see why. If the bye-law is looked at critically, one may remark that the proviso is not in the proper place; it should have been the subject of an independent rule.

It may be that the construction put on it by the counsel for the plaintiff is right. I am not clear as to this; but it may be that it should be read thus: "That no acts of the company . . . shall be deemed or taken to be an acceptance or recognition of any abandonment," and then that it ought to continue, "which the assured has a right to make, and of which he has given notice." "Any circumstances may mean "any such circumstances," that is, the circumstances of their having done their best, in accordance with the proviso in the earlier part of the bye-law, to procure the safety of the ship. I repeat, I cannot say whether that is right. I think this at least is clear, this is a valued policy; an ordinary incident of a valued policy is that if there is a constructive total loss, there is also a power of abandonment, and unless that is taken away by express words, it ought, I think, to be held to be implied. The words here are ambiguous, and I do not think they ought, on the ordinary principle, to be held to exclude the implication of that power of abandonment.

BAGGALLAY, L.J.—I am of the same opinion. The appellants contend for a construction which would exclude a claim for a constructive total loss in the case of stranding, or perhaps even in any

Forwood v. North Wales Mutual Marine Ins. Co. (App.), Q.B.

case. I do not think that this can be sustained. It is clear that such a claim was in the contemplation of the parties. The twenty-fourth bye-law has three paragraphs; the first is in general terms, but the second and third are those with which we have more particularly to deal. The second provides for a certain class of cases, and gives the directors power to take certain steps; then the third provides that those acts and steps shall not be deemed to be a recognition of abandonment. That shews, I think, that no construction can be entertained which would exclude all possibility of a claim for a constructive total loss. The policy and the bye-law both recognise such a claim, and it is for the defendants to shew that that recognition is cut down by words which tell in their favour. They do not do so; the construction they suggest is not consistent with the policy and bye-law, and it cannot be accepted. I do not feel able to adopt the construction suggested by the counsel for the plaintiff; but I am nevertheless clear that the appellants have failed to make out their case.

BRETT, L.J. — The first question is, whether there can be under this policy a constructive total loss. I can understand the force of the argument which says there cannot, for if the words are taken in their ordinary grammatical sense, they would exclude such a loss. But I cannot hold that they mean that, for it would place the proviso at the end of the bye-law in direct conflict with the necessary implication of the sentence immediately preceding. That sentence implies that there can be a notice of abandonment leading to a constructive total loss. So that the last sentence of the bye-law cannot be held to exclude such a loss.

It was then urged that there could not be any constructive total loss resulting from damage to a ship which might afterwards be in safety and in the possession of the owners. But that would require us to write at least three new paragraphs into the bye-law, so that I cannot assent to that. I think that the doctrine of constructive total loss must be applied here as if the last words of this bye-law

did not exist. To what, then, does it apply? A valued policy is important in three cases: in the case of an absolute total loss, an alleged constructive total loss, and a partial loss. Take the words, "and the company shall only pay for the absolute damage caused, which is in no case to exceed the sum insured." Suppose now that an absolute total loss occurs, and that the ship is not worth the value, is the assured only to be paid the value of the ship, and not the value named in the policy? That cannot be, and the same reasoning must apply to the cases of constructive total loss and of a partial loss. This clause cannot, I think, apply to a constructive total loss. I cannot say what it does mean, or to what it does apply. I cannot, as at present advised, agree with Lush, J., nor is it necessary to do so. I cannot, as at present advised, agree with the opinion of Lord Coleridge; it is not necessary I should; nor with the suggestion of the plaintiff's counsel; but neither is this necessary. All I can say is, that the sentence does not apply to a constructive total loss. I suspect that the clause is an ingenious attempt to do what the appellants suggest; but the circumlocution of the draughtsman has not been successful. I agree that these appeals must be dismissed.

Judgment that the plaintiff in each case recover as for a constructive total loss.

Solicitors—Waltons, Bubb & Walton, for plaintiff in both cases; Wynne, agent for Forshaw & Hawkins, Liverpool, for defendants in the first case; Pritchard & Sons, for defendants in the second case.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880. }
 April 12. } THE QUEEN v. REED.*
 May 13. }

Elementary Education Acts, 33 & 34 Vict. c. 75. ss. 53, 54; 36 & 37 Vict. c. 86. s. 10—Expenses of School Board—Power of Board to borrow for temporary Purposes.

The power of school boards to borrow is defined and limited by the express enactments of the Acts under which they are constituted, so that a school board has no power to borrow money to defray current expenses when the school fund is not sufficient, and interest on such a temporary loan ought not to be allowed in the accounts of a school board.

So held by the Court of Appeal, reversing the decision of the Queen's Bench Division.

Appeal from the Queen's Bench Division.

The case is reported 48 Law J. Rep. Q.B. 729.

The Queen's Bench Division made absolute a rule calling on the auditor of the Metropolitan District to shew cause why a writ of *certiorari* should not issue, to bring up and quash the surcharge made by him of a sum of 83l. 11s. 2d. upon Sir C. Reed, the Chairman of the London School Board, that sum having been disallowed by the auditor as being a payment out of the school fund of the board for interest to the Bank of England, the treasurers of the board, upon sums of money advanced to the board for purposes other than those provided for by, and without the consent required by, section 10 of 36 & 37 Vict. c. 86.

The auditor appealed.

The Solicitor-General (Sir H. Giffard) and Anstie, for the appellant.—The question is whether a school board can borrow money and charge the ratepayers the interest which it has to pay on the loan. It is contended by the appellant that a school board cannot do so, because there are in the Acts relating to

school boards express enactments and provisions as to finance, and there is no power given to borrow money in the way in which it has been done in this case, so that it is submitted there is no power given to tax the ratepayers in order to pay interest on money which is borrowed without the authority of the Legislature.

The power of borrowing money is not a power inherent in every corporation; if indeed the very object for which a corporation is created requires that it should have power to borrow, and if without that the corporation would be unable to carry out the purposes and intention of its being, then such a power may well be held to exist; but that reasoning cannot apply here, for the School Board is in no sense a trading corporation. In *Burmester v. Norris* (1) it was held that a mining company could not exceed the borrowing powers conferred by its deed, and even if a deed profess to give powers which are really *ultra vires* it can have no effect—*Chambers v. The Manchester and Milford Railway Company* (2). *Bateman v. The Mid-Wales Railway Company* (3), in which the chief cases on this question were cited, decided that a railway company cannot draw, accept or indorse bills. *Tawney's Case* (4) shews that a rate cannot be made to reimburse an overseer, and *Waddington v. The Guardians of the City of London* (5) is to the same effect. An overseer has not by virtue of his office any power to borrow money—*Leigh v. Taylor* (6).

School boards are formed for educational purposes only; it was, however, assumed that they would have to incur expenses, and section 53 of the Act of 1870 (7) created a school fund, out of

(1) 6 Exch. Rep. 796; 21 Law J. Rep. Exch. 43.

(2) 5 B. & S. 588; 33 Law J. Rep. Q.B. 268.

(3) 35 Law J. Rep. C.P. 205; Law Rep. 1 C.P. 499.

(4) 2 Ld. Raym. 1009.

(5) E., B. & E. 371; 28 Law J. Rep. M.C. 113.

(6) 7 B. & C. 491.

(7) 33 & 34 Vict. c. 75. s. 53—"The expenses of the School Board under this Act shall be paid out of a fund called the School Fund. There shall be carried to the School Fund all moneys received as fees from scholars, or out of moneys provided by Parliament, or raised by way of loan, or in any manner whatever received by the School

* *Coram Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.*

The Queen v. Reed (App.), Q.B.

which it is enacted that the expenses of a school board shall be paid. This fund is formed by the various sources of revenue mentioned in that section, which with sections 54 (7), 55, 56 and section 10 of the Amending Act of 1873 (8), forms a complete code of finance.

The School Board claims to have the power to borrow to meet a deficiency; but any deficiency is to be met in the way provided by section 54 (7), and there are not different kinds of deficiencies. Section 54 (7) recognises the principle of paying in one year for liabilities incurred in former years. If a board could borrow by way of temporary loan, although it is difficult to discriminate between different

Board, and any deficiency shall be raised by the School Board as provided by this Act."

Sect. 54. "Any sum required to meet any deficiency in the School Fund, whether for satisfying past or future liabilities, shall be paid by the rating authority out of the local rate.

"The School Board may serve their precept on the rating authority, requiring such authority to pay the amount specified therein to the treasurer of the School Board out of the local rate. . . ."

Sect. 57. "Where a School Board incur any expense in providing or enlarging a schoolhouse they may, with the consent of the Education Department, spread the payment over several years, not exceeding fifty, and may, for that purpose, borrow money on security of the School Fund and local rate, and may charge that fund and the local rate with the payment of the principal and interest due in respect of the loan. They may, if they so agree with the mortgagee, pay the amount borrowed with the interest by equal annual instalments, not exceeding fifty, and if they do not so agree, they shall annually set aside one-fiftieth of the sum borrowed as a sinking fund. . . ."

(8) 36 & 37 Vict. c. 86. s. 10 repeals section 57 of 33 & 34 Vict. c. 75, and provides—

"Where a School Board have incurred or require to incur any expense either (a) in providing or enlarging a schoolhouse, or (b) in paying off any debt charged on a schoolhouse provided by them, or on any land acquired by them by gift, transfer, purchase or otherwise, for the purposes of this Act; or (c) in any works of improving or fitting up a schoolhouse which, in the opinion of the Education Department, ought by reason of the permanent character of such work to be spread over a term of years, they may, with the consent of the Education Department, spread the payment over such number of years, not exceeding fifty, as may be sanctioned by the Education Department; and may, with the like consent, for that purpose borrow money on the security of the School Fund and local rate, and may charge that fund and the local rate with the payment of the principal and interest due in respect of the loan. . . ."

VOL. 49.—Q.B., C.P. & Exch.

kinds of loans, there would be no need for the provision enabling the board to take any money that may be in the rating authority's hands. A school board cannot choose its own machinery, for every step which it is to take is specified by the Act, so that what is provided excludes all that is not provided, *expressio unius est exclusio alterius*, and omission is in such a case prohibition; for the code of finance is an exhaustive code.

Jeune (with him *Sir H. James*), for the respondent.—It is submitted that it is a necessary incident of the authority given to school boards that they should have power to borrow money for temporary purposes. It is indeed necessary that they should have such a power if they are to fulfil the purposes for which they are created. The money required is, at the time the loan is made, being raised by a rate, and all that the school board does is to obtain an advance to meet current expenses until the amount to be levied, and for which they have actually issued a precept, has been paid in to the general fund of the board. This, it is submitted, is very different from borrowing money in excess of the amount for which a school board has issued its precept on the rating authority. Corporations have such a power, if it is necessary that they should have it, in order to enable them to carry on their business, and it is clear that a school board which has to pay weekly salaries to a considerable amount requires such a power far more than do ordinary trading corporations. There is, moreover, a distinction between obtaining an advance from a bank where an account is kept and a mere loan. "A balance due to a bank by a company which keeps an account with it, and has had the benefit of the money, is a debt but not a loan in the proper sense," per *Stuart, V.C.*—*In re The Cefn Cilcen Mining Company* (9); and in *Waterlow v. Sharp* (10) it was held that advances by a bank to a railway company which kept an account at the bank, were an overdrawn merely and not a loan. All that a school board does in such a case as that is substantially to

(9) 38 Law J. Rep. Chanc. 78; Law Rep. 7 Eq. 88.

(10) Law Rep. 8 Eq. 601.

The Queen v. Reed (App.), Q.B.

pledge part of its property for a debt incurred in the course of its business—*Ex parte The Birmingham Banking Company* (11).

The Act speaks of money to be raised, and it is submitted that this should receive a liberal interpretation; there is no prohibition in the statute against borrowing, and unless a school board has such a power as is here contended for, the burden imposed on the ratepayers will be made heavier than it will be if the boards have this power; for the school boards will have to raise in advance more money than is actually required lest there should be a deficiency, for they cannot raise a rate to reimburse themselves for debts previously contracted—*The Queen v. The Justices of Flintshire* (12). There is in the present case no deficiency, but owing to the extent of the rateable area and the necessary delay, part of the money to be raised has not yet been paid in.

Our. ult. vult.

The judgment of the Court was read (on May 13) by

COTTON, L.J.—This is an appeal from the Queen's Bench Division, and the question is, whether or no a School Board has under the Act 33 & 34 Vict. c. 75, and the amending Act of 36 & 37 Vict. c. 86, power to borrow money for purposes and in a manner not within the 10th section of the later Act (8), and to charge the ratepayers with interest which the School Board have paid under the contract of loan. The Queen's Bench Division decided that they have such power, and from that decision there has been an appeal to this Court. The respondent in the particular case is the chairman of the London School Board, but the acts referred to and the question which is raised apply equally to all School Boards. The question arises in this way: In the accounts of the London School Board, for the half-year ending Lady-day, 1879, there was a charge of 83*l.* 11*s.* 2*d.*, for interest paid to the Bank of England, the treasurers of the School Board,

upon sums advanced as temporary loans, and amounting in the whole to 40,000*l.* This the auditor for the Metropolitan District disallowed as an illegal charge or payment, and he surcharged the sum on Sir Charles Reed, the chairman of the board. The Queen's Bench Division, on an application made to them, quashed this disallowance and surcharge.

School Boards are constituted under the Act 33 & 34 Vict. c. 75. Sections 53 to 58 of that Act direct how the expenses of the School Board are to be provided for, and of these sections, section 57 gives an express power to borrow for certain purposes and in a certain manner. This section was repealed by section 10 of the later Act (8), which gives a similar but slightly varied power of borrowing for particular purposes and in a particular manner only.

It was not contended that the loan had been contracted under the power of this section.

It was argued before us that the so-called loans might be treated as payment by the bankers of cheques drawn by the board for the purposes authorised by the Act, when there was no balance in the hand of the bankers or treasurer to meet the cheques, and that this was not borrowing. It is unnecessary, in our opinion, to decide whether this would be borrowing, inasmuch as, in our opinion, we must treat the transaction as one not of mere over-draft, but as an advance made on terms agreed upon between the banker and customer, and the counsel for the School Board in effect contended that the School Board had, independently of section 10, power to borrow such sums of money as they might think fit to raise for purposes authorised by the Act, though he conceded that to do so to an excessive amount would be an abuse of their power.

Has the School Board any such power? It was conceded that there was no express power in the Act to raise the money borrowed in the present case. But it was said that every corporation, unless restricted by its Act of incorporation, has the same power as an individual to enter into contracts, including that of borrowing money, on the ground

(11) 40 Law J. Rep. Chanc. 190; Law Rep. 6 Ch. App. 83.

(12) 6 B. & Ald. 761.

The Queen v. Reed (App.), Q.B.

that the existence of such a power is to be implied either from the terms of the Act, or as being necessary.

In our opinion this contention on behalf of the School Board cannot be maintained. In our opinion the power of a corporation established for certain specified purposes must depend on what those purposes are, and except so far as it has express power given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted.

But the counsel for the respondent also contended that School Boards had an implied power to borrow, and that the existence of such a power was to be implied either from the terms of the Acts or on the ground that such a power is necessary to enable School Boards to discharge the duties imposed upon them by the Acts.

As we understand the reasons given by the Judges in the Queen's Bench Division for their decision, neither of them adopted the proposition contended for by the respondent as to the power of corporations to borrow, but decided in favour of the School Board, either on the ground that the terms of the 53rd section (7) of the Act 33 & 34 Vict. c. 75, impliedly gave the School Board power to borrow money, or that such a power was necessary to enable them duly to discharge their duties.

The words of the 53rd section are as follows :—

"The expenses of the School Board under this Act shall be paid out of a fund called the school fund. There shall be carried to the school fund all moneys received as fees from scholars, or out of moneys provided by Parliament or raised by way of loan, or in any manner whatever received by the School Board, and any deficiency shall be raised by the School Board as provided by this Act."

The words relied upon by the Lord Chief Justice were "out of moneys raised by way of loan." In the first place, this section does not give the board any power of raising money. It only provides how

expenses are to be paid out of funds which it assumes that the board has power to raise. If there had been no express power of borrowing contained in the Act, it might have been said that the words relied upon by the Lord Chief Justice assumed that the board had an implied power of borrowing; but the express power given by section 57 of that Act (now existing under the 10th section of the later Act) is sufficient to satisfy the words relied on by the Lord Chief Justice, and, in our opinion, prevent any implication of a general power to borrow being raised by those words.

Is there anything else in the Acts which gives a school board by implication a power to borrow money?

The express power to borrow given in certain specified cases is against raising an implication of any power to borrow. But we must look at the words of the Acts. The express power to borrow given originally by the 57th section of the Act of 1870, and now by the 10th section of the later Act, is in both given only in the event of the Education Department consenting to the payment of expenses therein mentioned being spread over several years, which, in our opinion, shews an intention that, except in the cases specified in those sections and with the consent therein referred to, all expenses were to be paid as they from time to time were incurred; and section 54 of the Act of 1870 enacts that the means of making these payments, except so far as provided by the other sources mentioned in section 53, is to be provided by funds to be from time to time paid by the rating authority of each district to the school board, in accordance with a precept served by the school board. This is against implying from the words of the Act any power to borrow, and, in our opinion, there are no words in the Acts from which power to borrow money can be given by implication to the school board. It remains to be considered whether it is reasonably necessary that a school board, in order to discharge its duties, should have power to borrow. But section 54 enacts that "Any sum required to meet any deficiency in the school fund, whether for satisfying past

The Queen v. Reed (App.), Q.B.

or future liabilities, shall be paid by the rating authority out of the local rate." No doubt the school board has from time to time to make payments to a large amount; but the sum required to meet these payments can be calculated, and the 54th section enables the board to raise by precept on the rating authority the sum necessary to provide for future expenses, and if they allow a reasonable margin to meet unexpected payments, we can see no reason why, by the means pointed out in section 54, they should not, without any borrowing, provide for their current expenses. A trading corporation stands, as regards an implied power of borrowing, in a very different position from a school board. In our opinion it is not necessary to enable a school board to discharge its duties in a reasonable way, or to make the payments which it has to make, that the board should borrow money. In our opinion, with the exception of the powers given by section 10 of the Act of 1873, a school board has no power to borrow. We think that the auditor rightly disallowed the charge of interest.

But it must be remembered that under section 4 of the 11 & 12 Vict. c. 91, power is given to the Poor Law Commissioners, now vested in the Local Government Board, to allow any sum properly disallowed or surcharged by the auditors, if in their opinion it is fair and equitable that such disallowance or surcharge should be remitted.

This will obviate any injustice or difficulty, in the event of the school board, in consequence of some unforeseen emergency, finding it necessary to borrow.

In our opinion the appeal must be allowed, and the judgment appealed from must be reversed.

Judgment reversed.

Solicitors—Sharpe, Parkers & Co., for the auditor;
Gedge, Kirby, Millett & Co., for the School Board.

Clarkson Musgrave 51 & 52 & 53
PLEAS AND EXCHEQUER. [N. S.]
Morgan v. Rees 50 & 51 & 52
50 & 51 & 52

[IN THE COURT OF APPEAL]
(Appeal from the Queen's Bench Division.)

1880. { SEYMOUR v. COULSON AND AN-
April 6, 8. { OTHER; WHARTON AND OTHERS
(claimants).*

Practice—County Court Appeal—Point not argued at Trial—Notes of County Court Judge—38 & 39 Vict. c. 50. s. 6—Composition Resolutions—Validity of Bill of Sale given in Pursuance of Voidable Resolutions.

An appeal lies by motion under 38 & 39 Vict. c. 50. s. 6, from the decision of a County Court Judge on a point of law, if it appears from the Judge's note that such point was necessarily decided by him in deciding the case, whether such point was taken in argument before him or not.

It is not a condition precedent to the right of appeal that the Judge should have been requested at the trial to take a note.

Decision of the Queen's Bench Division reversed.

On the trial of an interpleader issue a County Court Judge held a bill of sale, given for valid consideration, to be void, because it was executed in pursuance of composition resolutions, and there had been fraud in procuring the resolutions; the resolutions had not been set aside.

On appeal by the claimants under the bill of sale,—

Held, that the fraud in procuring the resolutions did not affect the validity of the bill of sale, and therefore the decision must be reversed.

This was an appeal from the decision of a Divisional Court, discharging a rule to enter judgment for the claimants.

On the trial of an interpleader issue before the Judge of the County Court of Durham, holden at Darlington, the following facts were proved:—

John Prior filed a petition for liquidation by arrangement or composition on the 15th of February, 1878; two creditors of Prior, named Watson and Garbut, had previously levied execution for their debt. This execution was withdrawn, and Watson and Garbut were represented at the first meeting of Prior's creditors, which

* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

Seymour v. Coulson (App.), Q.B.

was held on the 7th of March, 1878, and insisted on a composition of 10s. in the pound. The other creditors would not assent to this proposition, and Watson and Garbut withdrew their proof. Between this and the adjourned meeting of creditors, Wharton, one of the claimants in the interpleader issue, who was a creditor for 600*l.*, and another of the creditors of Prior, entered into an arrangement to buy Watson and Garbut's debt for 10s. in the pound, and Wharton having received Watson and Garbut's proxy, voted in respect of their debt at the adjourned meeting of creditors, which took place on the 19th of March, 1878. Prior denied that he had authorised the purchase of Watson and Garbut's debt, but there was evidence that he knew of it. A resolution was passed to accept a composition of 5s. in the pound, payable by two instalments, six and twelve months from the date of the second meeting of creditors, such composition to be secured by the joint and several promissory notes of the debtor, and Wharton and the other persons who were claimants in the interpleader. Prior gave to these persons who signed the promissory notes an assignment of his property. This assignment was registered as a bill of sale in September, 1878. The plaintiff Seymour obtained judgment in the County Court against one Coulson and Prior, and a haystack which was included in the bill of sale was seized under this judgment. The haystack was sold, and the proceeds paid into Court to abide the event of the interpleader issue.

The Judge of the County Court held that the composition resolutions were invalid as being based on fraud in consequence of the purchase of Watson and Garbut's debt by Wharton, and that the whole composition and the bill of sale, being founded on this fraud, were void. The Judge was not asked to make a note of any question of law raised at the hearing, or of the evidence, but he did in fact make a note of the evidence and of the objections raised to the bill of sale, and of his decision on those objections, and this note was afterwards furnished to the claimants, together with an additional statement in writing of the grounds of

the judgment. An objection was raised that the bill of sale was void under the Act against conveyances, &c., in fraud of creditors (13 Eliz. c. 5). The Judge overruled this objection, but on the grounds above mentioned gave judgment in favour of Seymour, the execution creditor, and against the claimants under the bill of sale. The claimants obtained a rule calling on the execution creditor to shew cause why the judgment should not be set aside and entered for the claimants on the ground that the bill of sale was valid.

On cause being shewn against this rule an objection was taken that as the Judge of the County Court had not been requested under 38 & 39 Vict. c. 50. s. 6 (1), to take a note of any specific objection in point of law, the appeal could not be entertained.

The Divisional Court (Cockburn, C.J., and Mellor, J.) held that this objection must prevail, and discharged the rule without entering into the merits of the case.

The claimants under the bill of sale appealed.

Herschell and R. V. Williams, for the appellants.—Notwithstanding the objection which has been taken, the Divisional Court had jurisdiction to entertain this appeal. There were questions of law raised in the case and decided by the County Court Judge, and therefore an appeal lies. It is not a condition precedent to the right of appeal that the Judge should be asked to take a note of the point of law raised. No doubt 38 & 39 Vict. c. 50. s. 6 (1)

(1) Section 6.—“In any cause, suit or proceeding, other than a proceeding in bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction or decision of the Judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction or decision by motion to the Court to which such appeal lies, instead of by special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security or stay of proceedings as to the Court to which such motion shall be made shall seem fit. And if the Court to which such appeal lies be not then sitting, such motion may be made before any Judge of a superior Court sitting in

Seymour v. Coulson (App.), Q.B.

makes it binding on the Judge to take a note if requested, but there is nothing in the statute which takes away the right of a party who desires to appeal. The Act only alters the mode of procedure, and does not affect the right of appeal—*Cousens v. The Lombard Deposit Bank* (2), *Whiteman v. Hawkins* (3). The judgment in *Rhodes v. The Liverpool Commercial Investment Company* (4) cannot be supported, and moreover that case is distinguishable from the present, because there the note contained no mention of any point of law, and Lord Coleridge, C.J., treated the appeal as one from a decision upon fact, which clearly would not lie—*Cousens v. The Lombard Deposit Bank* (2).

Secondly, the decision of the County Court Judge was wrong on the merits. Assuming the resolutions to have been voidable, until they are set aside by the Court of Bankruptcy they are binding, and while the resolutions stand the bill of sale is good. See *Glegg v. Gibbey* (5); *In re Robinson*; *ex parte Burrell* (6).

Cave and Horace Smith, for the respondent.—The appeal could not properly be entertained by the Divisional Court, for the section makes a request to the County Court Judge to take a note a condition precedent to the right of appealing. It was intended that no question should be raised on appeal which was not taken before the County Court Judge.

chambers. And at the trial or hearing of any such cause, suit or proceeding, the Judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit or proceeding, and he shall at the expense of any person or persons, being party or parties in any such cause, suit or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, and the copy so signed shall be used and received on such motion, and at the hearing of such appeal."

(2) 45 Law J. Rep. Exch. 573; Law Rep. 1 Ex. D. 404.

(3) Law Rep. 4 C.P. D. 13.

(4) Law Rep. 4 C.P. D. 425.

(5) 46 Law J. Rep. Q.B. 7, 325; Law Rep. 2 Q.B. D. 6, 209.

(6) 45 Law J. Rep. Bankr. 68; Law Rep. 1 Ch. D. 471. 537.

As to the other point, it is fairly to be deduced from the language of the County Court Judge that he found as a fact that the bill of sale was a sham, and therefore void under 13 Eliz. c. 5, and if he did find this his finding is conclusive. Moreover in point of law these resolutions were invalid—*Ex parte Cobb*; *re Sedley* (7), and therefore the bill of sale, which is founded on them, cannot be supported.

Herschell was not heard in reply.

BRETT, L.J.—I am of opinion that we are bound to take it that the Judge of the County Court has sent a note of all the evidence; there is no statement that he has omitted anything, and I think we must assume that all the evidence which was before the Judge is given in his notes. The evidence on the notes stands thus—A composition was desired, and the claimants or one of them purchased a debt of certain other creditors, who were about to object to the composition; there was some evidence that this purchase was made with the knowledge or connivance of the debtor; the proxy of the selling creditors was used by the purchasing creditor, and a resolution was passed in favour of accepting a composition. There was evidence that the claimants undertook to secure payment of the composition by their own notes, and that this was done by them on an agreement that the debtor should give them a bill of sale; the County Court Judge believed this, and he believed that the consideration for the bill of sale was their making themselves liable. He held in law, first, that the resolution was improperly arrived at, and, following the case in the Court of Appeal, *Ex parte Cobb*; *re Sedley* (7), he held that the resolutions were void or voidable, and, as further matter of law, he held that, although the bill of sale was not void under the statute of Elizabeth (13 Eliz. c. 5) as a sham, nevertheless, because the resolutions were void, therefore the bill of sale was void, and accordingly he held that the plaintiff was entitled to the goods. That seems to appear on the Judge's note; but I agree that at the

(7) 42 Law J. Rep. Bankr. 63; Law Rep. 8 Chanc. 727.

Seymour v. Coulson (App.), Q.B.

hearing the points argued were merely that the bill of sale was not void under the statute of Elizabeth, and this, which was the only other point taken, that the resolutions were not void as in fraud of the bankruptcy law. The point was not taken that although the resolutions might be void the bill of sale could not be impeached, and the claimants did not take the point that the resolutions were only voidable. But the Judge has stated that he did decide on the ground that the resolutions were void or voidable. This appeal is brought by motion under 88 & 39 Vict. c. 50. s. 6 (1), and the Queen's Bench Division decided the case on the ground that, although it appeared on the notes that the Judge did decide the question of law, and although his decision did appear, still the appeal must fail, because the Judge was not asked to take a note of the point of law raised. The decision of the Queen's Bench Division was on the construction of section 6, that the request to take a note was a condition precedent to the right of appeal. With all deference I am of a contrary opinion on the construction of the statute, and I think that such request is not a condition precedent. The earlier part of the section gives a new form of appeal by providing that "in any cause, suit or proceeding, other than a proceeding in bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction or decision of the Judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction or decision by motion to the Court to which such appeal lies." This section gives no appeal in respect of any new subject-matter; before the Act an appeal lay only in law and not in fact, and I think that as to this the law is the same now; the one difference is that the appeal may be brought forward by motion, instead of by a special case as formerly. Then the section goes on, not by way of proviso but by way of addition, to enact that "at the trial or hearing of any such cause, suit or proceeding, the Judge, at the request of either party, shall make a note

of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit or proceeding;" and then provides that such note is to be furnished to the parties on application and used at the hearing of the appeal. This seems to me to be an enactment which is in favour of the party who proposes to appeal, and I think that although the Judge of the County Court should not consider the question of such importance that he would take a note of it of his own accord, either party may ask the Judge to make a note that the question is raised, and of the evidence given, and of his decision on it, and if the party asks this, it is imperative on the Judge to comply with such request. But I do not think that the request is a condition precedent to the right of appeal. We are not called on here to decide what would happen if, without the request being made, no note were taken, nor what would be the proper course to pursue if the Judge were requested to take a note and did not do so. Here the Judge has sent a note, which shews that the point was present to his mind, and his decision is on the note, and there is a question of law. If there are two questions of law in the case, and one of them is not present to the Judge's mind, and is not called to his attention, we need not decide how the matter would stand. But we have only to decide whether where the question is present to the Judge's mind, but he is not requested to take a note, an appeal can be brought. In the case before us I think the point of law was present to his mind, and that his being requested to take a note is not a condition precedent to the right of appeal, and therefore the appeal may be entertained.

I also think that the County Court Judge was wrong in law. I think him right in holding, that, because there was connivance, on the authority of the case cited, *Ex parte Cobb; re Sedley* (7), the resolutions were voidable, and might have been set aside. It is not necessary to decide as to the effect of their not having been set aside, because I think they did not avoid the bill of sale. It

Seymour v. Coulson (App.), Q.B.

follows, then, that if the bill of sale was not void, the goods were no longer the property of the debtor, and therefore the appeal ought to be allowed.

COTTON, L.J.—The appellants contend that the County Court Judge was wrong in point of law in his decision upon the facts stated in his notes. The Queen's Bench Division unfortunately did not enter upon the point as to whether the decision was incorrect, because they thought that section 6 of 38 & 39 Vict. c. 50 (1), excluded the appeal on two grounds, that the point of law was not raised, and that the appellants had not asked the Judge to take a note. I think this view is erroneous. Section 6 gives no new power of appeal, but only gives a particular mode of procedure. Then does the section make a request to the Judge to take a note, or the raising—that is, arguing—the point of law, a condition precedent to the right of appeal? I am of opinion that it does not. Section 6 only makes it obligatory on the Judge to take a note, and there is nothing in the section which restricts the right of appeal. I am of opinion that it is sufficient if the point of law arises, and is necessarily decided by the County Court Judge, that is, if he has necessarily decided it in arriving at the conclusion at which he has arrived on the case.

Here the only grounds on which the bill of sale could be held void were because it was a fraud on the creditors, or because it was void in consequence of being founded on invalid resolutions.

The County Court Judge was of opinion that the resolution for accepting a composition was procured by the fraud of Wharton in getting the resolutions carried, and so he held the bill of sale to be void, because its origin was in resolutions which were obtained by fraud.

Now is that right? I am of opinion that it is not. If the resolutions are standing, even if they are voidable, that is no ground for holding that the bill of sale is a nullity.

I am therefore of opinion that the proposition on which the judgment of the County Court Judge depends is erroneous, and therefore that judgment ought to be

reversed, and, for the reasons which I have given, I think we are bound to consider the appeal.

THESIGER, L.J.—Two questions come before us for decision in this case—first, whether it is competent to the claimants to appeal by motion; and, secondly, if it is, whether the County Court Judge was right in his decision.

On the only question which was decided by them, the Queen's Bench Division were of opinion that the appeal would not lie. An appeal from a County Court is given for the first time by 13 & 14 Vict. c. 61. sect. 14, which provides that, "If either party in any cause, of the amount to which jurisdiction is given to the County Courts by this Act, shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same," &c. Now it is clear on that Act that provided a point of law is necessarily involved, and the Judge has decided it, consciously or unconsciously, an appeal lies. As to the mode of appeal by that Act, it was by special case. That was found inconvenient, and therefore the Act of 1875 (38 & 39 Vict. c. 50. sect. 6) (1), introduced a new mode of procedure, leaving the right of appeal as before. The only person who can appeal is a person aggrieved by the decision, as under the old Act. The new Act provides that he may move, and, *prima facie*, on the words of the section, he could move in the ordinary way on counsel's brief, and a statement of what took place at the trial, as is done on a motion after a trial before a Judge of the High Court. But the Legislature probably thought that if the motion were made on such materials as this, on the argument of the rule, it might be met by contradictory statements of what took place at the trial, because the Judge of the County Court did not take a note of the evidence, as Judges of the High Court do. Therefore the provisions as to taking a note, which are contained in 38 & 39 Vict. c. 50. sect. 6 (1), were introduced. All those provisions are for the benefit of the party appealing. It is not

Seymour v. Coulson (App.), Q.B.

necessary to decide what would happen if no note were taken; but this is clear, that if all the materials are before the Court to which the appeal is brought, they may make the rule absolute. It is contended that the appeal does not lie, because before the note is to be taken a request must be made to the Judge, but that is a condition precedent, not to the right of appeal, but to the statutory obligation of the Judge to take a note.

In the case before us, the claimants rely on a bill of sale, and the question is whether it was valid. In two ways it might not be valid—first, by the statute of Elizabeth (13 Eliz. c. 5), on the ground that it was a sham; and, secondly, it might be void by the law of bankruptcy.

As to the statute of Elizabeth, it is clear that the Judge did decide, as a fact, that the bill of sale was not a sham, and I cannot see how he could have arrived at any other conclusion; it is obvious that it was an effective bill of sale, and there was sufficient consideration for it. Then how can it be said to be void by the law of bankruptcy? I think the resolutions were voidable, on the ground stated in *Ex parte Cobb; re Sedley* (7). I think we must take it that the Judge decided that there was connivance. But if the resolutions were voidable they ought to have been set aside, and if they are void or voidable they cannot affect the bill of sale, for which there was good consideration. In any case, there was no necessary invalidity in the bill of sale, and therefore the claimants are entitled to succeed.

Judgment reversed.

Solicitors—Williamson, Hill & Co., agents for George Webster, Darlington, for appellants; Chester & Co., agents for T. Clayhills, Darlington, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1880.

May 5.

June 10.

WOODHOUSE v. WALKER.

Waste — Tenancy for Life subject to Obligation to repair—Action by Remainder-man against Executor of Tenant for Life—3 & 4 Will. 4. c. 42. s. 2.

Where houses had been devised to A. for life, "she keeping them in repair," with remainder to the plaintiff in fee, and A. entered into possession but neglected to repair,—Held, that she was during her lifetime liable at common law to an action for waste by the remainder-man; and that consequently after her death A.'s executors were, under 3 & 4 Will. 4. c. 42. s. 2, liable to be sued by the plaintiff for such waste.

This was a special case stated on appeal from the judgment of the Judge of the County Court of Worcestershire. The action was brought by the remainder-man against the executor of the tenant for life for permissive waste permitted by the tenant for life; such waste consisting in the non-repair of some houses devised to her by an instrument which granted the property to her for her separate use during her lifetime, "she keeping the houses in repair," with remainder to the plaintiff in fee. She enjoyed the property for eight years, but did no repairs. The County Court Judge gave judgment for the defendant, holding that the case was not within 3 & 4 Will. 4. c. 42. s. 2, and that no action would lie.

Whitaker (of the Equity Bar), for the plaintiff.—The tenant for life accepted the obligation to repair with the tenancy; she could therefore have been compelled to repair in her lifetime at the suit of the remainder-man. Then the statute gives the right to the executor (1).

(1) 3 & 4 Will. 4. c. 42. s. 2:—"An action of trespass or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, &c. . . and further that an action of trespass or trespass on the case,

4 I

Woodhouse v. Walker, Q.B.

The County Court Judge held that the statute applied only to wrongs, and this being an implied contract was not within the statute; but it is submitted that if this is a contract the plaintiff can sue at Common Law—*Marsh v. Wells* (2).

[FIELD, J.—To whom do you imply the promise? Not to the testator, for he was dead, and not to the remainder-man.]

I could have enforced the obligation to repair during her life—*Caldwall v. Baylis* (3), where an injunction was granted against permissive waste by the tenant for life on the application of the remainder-man—*Gregg v. Coates* (4) and *Re Skinlay* (5) shew that a tenant for life is liable when he has taken under a condition to repair.

Then this is more than permissive waste, it is a breach of the express condition under which the tenant for life took. *Messenger v. Andrews* (6) is an authority that where a bequest is accepted the condition must be fulfilled. Similarly in *Rees v. Engelback* (7). Then in *Garth v. Cotton* (8) Lord Hardwicke held before the statute that equity would relieve.

Percy Gye, contra.—The real cause of action is the wrong done. But admitting a right of action against the tenant for life, such right or remedy died with her. If the condition was not fulfilled she might have forfeited her estate, but nothing was done in her lifetime. Then there being no gift over for the breach of the condition, the condition was void. Admitting that the remainder-man might have proceeded by injunction, that right is now gone—*Bacon v. Smith* (9).

Supposing there were five or six re-

as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as the action shall be brought within six calendar months."

(2) 2 Sim. & S. 87.

(3) 2 Mer. 408.

(4) 23 Beav. 33.

(5) 2 Mac. & G. 221.

(6) 4 Russ. 478.

(7) 40 Law J. Rep. Chanc. 382; Law Rep. 12 Eq. 225.

(8) 1 Wh. & Tu. L. Cas. 673. 2nd Edit 567.

(9) 1 Q.B. Rep. 345; 10 Law J. Rep. Q.B. 119.

mainder-men in succession, would each have a cause of action against the executors?

He cited also *Hambly v. Trott* (10).

Cur. adv. vult.

The judgment of the Court (11) was delivered (on June 10) by

LUSH J.—This is a special case stated by way of appeal from the decision of the Judge of a County Court, and it involves a point of considerable nicety. The action is brought by the reversioner against the executor of a tenant for life for permissive waste by the non-repair of some houses which had been devised to the wife of the testator for life, with remainder to the plaintiff in fee.

The devise was to the wife for her separate use during her life, "she keeping the houses in repair."

She entered into possession on the death of her husband, and enjoyed the property for several years, but neglected to keep the houses in repair, and after her death the plaintiff entered and did the necessary repairs. This action is brought to recover out of her personal estate the expense he has so incurred. It is remarkable that no direct authority is to be found for a case which must, we should suppose, have frequently occurred, and that we have to go back to first principles in order to find a solution of the question raised.

Before the statutes of Marlbridge (52 Hen. 3) and of Gloucester (6 Edw. 1. c. 5) an action for waste lay against a tenant in dower and tenant by the courtesy, but none against a tenant for life or for years. The reason was as stated by Coke in 2 Inst. 300, "for that the law created their estates and interests, therefore the law gave against them a remedy; but tenants for life or years came in by demise and lease of the owner of the land," &c., and therefore he might in his demise have provided against the doing of waste by his lessee, and if he did not it was his negligence and default."

Here it is implied that where the grantor in his grant provided against

(10) 1 Cowp. 371.

(11) Lush, J., and Field, J.

Woodhouse v. Walker, Q.B.

the doing of waste, the grantee will be liable for waste in like manner as a tenant in dower or by courtesy was liable. And this is in perfect accordance with legal principle as expressed by the maxims, "Qui sentit commodum, sentire debet et onus" and "transit terra cum onere" (Co. Litt. 231a), and see per Holroyd, J., in *Burnett v. Lynch* (12).

The first of these maxims has a very wide application in our law. See *Broom's Maxims*.

The statute of Marlbridge (cap. 24) extended the Common Law liability by ordaining that "fermors during their term shall not make waste, sale, nor exile of house, woods, nor of anything belonging to the tenants that they have to ferm, without special license had by writing of covenant, making mention that they may do it, which thing if they do and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously."

The term "fermors" here, says Coke, (2 Ins. 300), comprehended all who held by lease for life or lives or for years, by deed or without deed, and the words "do or make waste," in legal understanding in this place, as well as in the statute of Gloucester, includes as well permissive waste, which is waste by reason of omission or not doing, for want of reparation, as waste by reason of commission, as to cut down timber, trees, or prostrate houses and the like; for he that suffereth a house to decay, which he ought to repair, doth the waste."

The "special license" mentioned in the statute of Marlbridge is commonly expressed by the well-known phrase, "without impeachment of waste."

The statute of Gloucester gave as a more stringent remedy a writ of waste under which the tenant was liable to forfeiture of the thing wasted, and treble damages. The right of action against a tenant for life belonged to the owner in fee of the immediate reversion. In course of time an action on the case founded on the statute of Westminster 2nd came to be substituted for the writ of waste, as being a more simple and practical remedy,

and the writ of waste having fallen into disuse, was ultimately abolished by 3 & 4 William 4. c. 27. s. 36. But the rights and liabilities of the parties remained as before, the remedy only being changed—*Bacon v. Smith* (9).

It is not necessary in this case to enter into the question whether an action on the case for permissive waste can be maintained against a tenant for life or years upon whom no express duty to repair is imposed by the instrument which creates the estate. The modern authorities—or rather the *dicta* upon this point—appear to be strangely in conflict with the ancient reading of the statutes. See notes to *Green v. Cole* (13). We think it must be held upon the principle before mentioned, that in this case the tenant for life was liable at Common Law, and that the plaintiff, as immediate reversioner, had a right of action, and probably might have obtained an injunction against her for the permitted waste if he had made such an application in her life-time. The right of action which at Common Law would have died with the person, is continued by the 3 & 4 Will. 4. c. 42. s. 2, against the executor, "so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor shall have taken upon himself the administration of the estate and effects of such person."

The wrong of not repairing was a continuing wrong, giving a cause of action *de die in diem* up to the day of the death of the tenant for life, and the action was brought within the six months after the death. The plaintiff, therefore, is entitled to recover by virtue of this statute.

The view which we have taken makes it unnecessary to refer to the Equity Cases which were cited in the argument. We wish, however, to observe that *Gregg v. Coates* (4) and *Messenger v. Andrews* (6) are striking illustrations of the principle that he who accepts a devise accepts it *cum onere*, and is bound to performance of the conditions on which it was made. In other respects these and the other

Woodhouse v. Walker, Q.B.

cases cited have no bearing upon the present question.

The appeal must therefore be allowed, but as the amount of damages was not proved, the case must, according to the agreement of the parties, be remitted back to the County Court for the purpose of assessing them. It may save expense to the parties if we add that the proper measure of damages is, the sum which was reasonably necessary to put them in the state of repair in which the tenant for life ought to have left them.

Judgment for the plaintiff.

Solicitors—E. Doyle & Sons, agents for Jackson & Sharpe, West Bromwich, for plaintiff; Newman, Stretton & Hilliard, agents for W. Shakespeare, Oldbury, for defendant.

[IN THE COURT OF APPEAL.]

1880.

Hettleswell v. March 10, 11, 24. } COLLINS v. THE VESTRY
OF PADDINGTON.*
Practice—Appeal—Extension of Time
for appealing—When granted—Order
LVIII. rule 15.

The plaintiff moved for an extension of time for appealing from an interlocutory order of the Queen's Bench Division, and relied on an affidavit stating that immediately after the order was made, which was on the 1st of April, 1879, the plaintiff's solicitor wrote to the defendants' solicitor, giving notice of the plaintiff's intention to appeal; that on the 8th of April the defendants' solicitor sent a copy of the order to the plaintiff's solicitor who, though it was doubted whether the order was interlocutory or final, at once prepared to set down the appeal as from an interlocutory order but believed that he had twenty-one days from the 8th of April, within which to set it down; that on the 18th of April the plaintiff's solicitor had an attack of illness which prevented him from attending to business until the 25th, when he saw his client, who instructed him to set down the

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

appeal at once; that, finding it was too late to set down the appeal as from an interlocutory order, the plaintiff's solicitor, acting under counsel's advice, gave notice of appeal on the 12th of May, and set down the appeal as one from a final order.

The Court of Appeal upon these facts refused to extend the time for appealing.

Per BAGGALLAY, L.J., and THESIGER, L.J. (BRAMWELL, L.J., dissenting).—An extension of time for appealing is an indulgence which ought not to be granted, except upon strong special grounds, after an action has been tried and judgment given upon the merits.

Per BRAMWELL, L.J.—An extension of time should be granted "*ex debito justitiæ*" in all cases where the application is necessitated through some bona fide mistake, error or carelessness, and no damage has been done to the opposite party which cannot be repaired by payment of costs or otherwise.

Application by the plaintiff for an extension of time for appealing from a judgment of the Queen's Bench Division.

The facts upon which the application was founded are fully stated in the judgment of Baggallay, L.J. (*post*).

W. Digby Seymour and Bompas (Croome with them), for the plaintiff.

W. G. Harrison and Julian Robins, for the defendants.

The following authorities were referred to in argument:—*McAndrew v. Barker* (1); *The International Financial Society, Limited, v. The City of Moscow Gas Company, Limited* (2); *Re The Ambrose Lake Tin and Copper Mining Company*; *Taylor's Case* (3); *Re The West Jewell Tin Mining Company*; *Weston's Case* (4).

Cur. adv. vult.

The following judgments were (on March 24) given by—

BAGGALLAY, L.J.—This is an applica-

(1) 47 Law J. Rep. Chanc. 340; Law Rep. 7 Ch. D. 701.

(2) 47 Law J. Rep. Chanc. 258; Law Rep. 7 Ch. D. 241.

(3) 47 Law J. Rep. Chanc. 701; Law Rep. 8 Ch. D. 643.

(4) 48 Law J. Rep. Chanc. 425; Law Rep. 8 Ch. D. 806.

Collins v. Vestry of Paddington (App.), Q.B.

tion by the plaintiff under the 15th rule of the 58th Order, for an extension of the time for appealing from an order made by the Queen's Bench Division on the 1st of April, 1879 (reported 48 Law J. Rep. Q.B. 345).

Notice of appeal having been given on the 12th of May, it was treated as an appeal from a final order, and came on for hearing on the 23rd of February in the present year.

An objection was then taken that the order appealed from was an interlocutory order, and that the time within which the appeal could be brought had expired before the notice was given.

The objection was allowed, but leave was given to the plaintiff to move for an extension of the time for appealing (reported 49 Law J. Rep. Q.B. 264).

He accordingly moved on the 10th instant, and in support of his motion relied upon an affidavit sworn by his solicitor, Mr. Macmullen, on the 6th.

The affidavit so sworn contained statements to the effect that, immediately after the judgment given on the 1st of April, the plaintiff determined to appeal, and that, in accordance with his instructions, the following letters were sent by Mr. Macmullen to Mr. Wills, to whom the action had been referred, and to the defendants' solicitor.

"Collins v. The Vestry of Paddington.

April 3, 1879.

"Dear Sir,—The Court having decided this case in favour of the defendants, I am instructed by my client, Mr. Collins, the plaintiff, herein to inform you that it is his intention to appeal from the decision to the Court of Appeal. You will therefore be good enough not to let your award herein go from you until after the decision of such appeal.

"Yours faithfully,

"R. M. Bristow Macmullen,

"Plaintiff's Solicitor.

"To Alfred Wills, Esq., Q.C.,

"The Arbitrator in the above-named action."

"Collins v. The Vestry of Paddington.

April 4, 1879.

"Dear Sir,—Please say by return of post whether or not it is your intention

to draw up the judgment of the Court herein on the Special Case, and when? For in default of your doing so forthwith and serving me with a copy as soon as practicable—say on or before Tuesday next, I shall proceed to draw up such judgment, as I hereby give you formal notice by and on behalf of my client, the plaintiff herein, that it is his intention to appeal as soon as practicable against such judgment.

"Yours truly,

"R. M. Bristow Macmullen,

"Plaintiff's Solicitor.

"To John H. Hortin, Esq.,

"Defendants' Solicitor."

These two letters were, in terms, distinct intimations of the plaintiff's intention to appeal, but whether, at the time when the letter of the 4th was written, it was intended as a notice of appeal or only as a threat may be doubted.

Then follow statements in the affidavit to the following effect—that on the 8th of April, the plaintiff's solicitor received from the defendants' solicitor a copy of the order made on the 1st, and at once prepared to set down the appeal, having determined, in order to avoid any question, to treat the order as interlocutory, but believing that he had twenty-one days from the 8th, within which to set it down; that on the 18th he had an attack of gout which incapacitated him from business until the 25th; that had it not been for his illness he should have set down the appeal on the 19th or 21st, the 20th being a Sunday; that on the 25th he was for the first time well enough to see the plaintiff and obtain his further instructions, and that on that day he was instructed by the plaintiff to set down the appeal at once; that on the following day, the 26th, he saw his counsel, who informed him that the time for appealing ran from the 1st and not from the 8th, and that it was consequently too late to set down the appeal as from an interlocutory order; and that, in accordance with the advice of counsel, he gave the notice of the 12th of May, and set down the appeal as an appeal from a final order.

The statements so made by Mr. Macmullen in his affidavit are in my opinion very unsatisfactory.

The first question that suggests itself

Collins v. Vestry of Paddington (App.), Q.B.

is, why if the letter of the 4th of April was intended as a notice of appeal, was it not acted upon by setting down the appeal between that date and the 18th? The omission to do so is inconsistent with the extreme urgency of the language of the letter that there might be no delay in drawing up the order, and of thus putting the plaintiff in a position to appeal. The counsel for the plaintiff has relied upon *Little's Case* (4) as one in which the Court of Appeal held that a notice of an intention to appeal should be treated as a notice of appeal, but in that case, application was made to the Registrar in due time to set down the appeal, and it was in consequence of his declining to do so, on the ground that the notice was not a notice of appeal, but only of an intention to appeal, that the matter was brought before the Court of Appeal, and the order then made was an order, not to extend the time for appealing, but to set down the appeal upon the footing that a sufficient notice had been given.

Again, Mr. Macmullen has stated in his affidavit that he should have set down the appeal on the 19th or 21st of April had he not been prevented by illness. If he had done so it would have been within twenty-one days from the 1st, but it is difficult to understand how it is that that gentleman can now make the positive assertion that, but for his illness, he would have set down the appeal on the 19th or 21st, when he had already let ten days go by without doing anything, and was still under the impression that he would not be out of time until the 29th, and it is even more difficult to understand why, if Mr. Macmullen had received his instructions to proceed with the appeal before his illness, and but for such illness would have set it down on the 19th or 21st, he deemed it necessary on the 25th to seek for and obtain instructions from his client for setting it down; in other words, for doing that which he had already received instructions to do.

When considering the effect to be attributed to this affidavit, it is impossible to forget that Mr. Macmullen, when preparing it, was, by reason of the previous discussion in Court, well aware of the

difficulties that he had to surmount, in order to obtain for the plaintiff relief from the consequences of the mistakes which he, the deponent, had undoubtedly committed. His mistake in treating the order as final instead of interlocutory was not of itself sufficient to support the application, and he was consequently driven to fall back upon the suggestion that the letter of the 4th of April was sufficient notice of appeal from the interlocutory order of the 1st, and had been given in due time; but here again it was met with the difficulty that, even if that letter could be treated as a notice duly given, the appeal had not been set down in time. Ignorance of the fact that, according to the recognised practice, the twenty-one days should be reckoned from the 1st instead of from the 8th, could in no way assist him, and we accordingly have the case suggested that an intended setting down on the 19th or 21st, which would have been in good time, was prevented by illness.

I have already pointed out how unsatisfactory are the statements of Mr. Macmullen upon the suggestion so made.

But in addition to these difficulties in the way of the appellant, there is the further, and, as it appears to me, insuperable difficulty, that when Mr. Macmullen found that, owing partly to his original mistake, and partly to his illness, he had let the twenty-one days go by, he did not at once apply for an extension of time to appeal from the order which up to that time he had been treating as interlocutory, but had endeavoured to prosecute the appeal as one from a final order. In my opinion the application must be refused.

The opinion which I have thus expressed is, I believe, concurred in by the other members of the Court, and I should not have deemed it necessary to make any observations as to the general principles upon which the Court of Appeal has been in the habit of acting when dealing with similar applications, had it not been that Lord Justice Bramwell has intimated to me that the present is, in his opinion, a convenient opportunity for him to express his views upon that subject.

Collins v. Vestry of Paddington (App.), Q.B.

He has allowed me to see the memorandum which he proposes presently to read, and as I am unable to concur in all that he has written, I propose to point out, as concisely as the subject will permit, wherein my views differ from his.

In the memorandum to which I have referred, the Lord Justice has enunciated the rule upon which, during his long experience at chambers, he invariably acted when dealing with applications for an extension of time for doing or taking any act or proceeding in the course of an action.

From the rule so enunciated I should express no dissent, if its operations were limited to applications for an extension of time made previous to the trial or hearing of the action; but there is, in my opinion, a great distinction, greater, I think, than the Lord Justice recognises, between applications for an extension of time in cases such as those to which I have referred, and applications to extend the time for appealing after the action has been tried and judgment given.

Such a distinction was recognised before the Judicature Acts came into operation, as well in Courts of Common Law as in the Court of Chancery.

Speaking from my own experience of the practice in the latter, I can state that the enrolment of a decree could not be vacated on the ground of mistake or oversight, nor, as it was put by Lord Chelmsford in *Wildman v. Locke* (5), except upon strong grounds of surprise, or something approaching deception or *mala fides*. I cannot rely upon any similar experience of the practice in Courts of Common Law, but I believe that I am correct in stating that the general rule of 1853, which provided that no motion for a new trial, or for other objects of a similar character, should be allowed after the expiration of four days, was rigidly enforced, except under very particular circumstances, and that the exceptions were of rare occurrence.

And the same distinction is recognised and maintained by the rules which are now in force under the Judicature Acts.

The several rules contained in the orders numbered from 1 to 57, as scheduled in the Act of 1875, have reference to acts and proceedings in an action from its commencement to judgment, including any proceedings that may be necessary for giving effect to a judgment; and the 6th rule of the last of these orders provides in general terms that a Court or a Judge shall have power to enlarge the time appointed for doing any act or taking any proceeding, upon such terms, if any, as the justice of the case may require.

Provision having thus been made for regulating the acts and proceedings during the progress of an action, the several rules of the 58th order regulate the proceedings connected with appeals to the Court of Appeal as distinguished from appeals from a Master to a Judge, or from a Judge to a Divisional Court, or other appeals of a similar kind. By the 15th rule of this order the times within which appeals may be brought are limited in peremptory terms.

The rule provides that no appeal shall, *except by special leave of the Court of Appeal*, be brought after the expiration of the times therein mentioned. The contrast between the affirmative language of the Order LVII. rule 6, and the negative language of Order LVIII. rule 15, ought not, in my opinion, to be disregarded.

Nor has it been disregarded by the Court of Appeal in the cases which have come under its consideration. It is unnecessary to refer to these cases in detail; it is sufficient to say of them that they illustrate the principles upon which the Court of Appeal has acted, and the nature of the discretion which it has exercised in granting or refusing the indulgence when it has been applied for. I use the term "indulgence," as it appears to me that the granting of an extension of the time for appealing is an indulgence, and should be treated as such, though Lord Justice Bramwell would prefer to treat it as *ex debito justitiæ*. The principles upon which the Court of Appeal has acted, if they are to be estimated by the way in which they have been applied, are, in my opinion, in accordance with the spirit of

Collins v. Vestry of Paddington (App.), Q.B.

the provisions of the rules, though an expression may have occasionally fallen from a Judge when refusing an application, which, read by itself, and unconnected with the circumstances of the case, or with the arguments which may have been addressed to him, may appear to confine the classes of cases in which the indulgence may be properly granted within too narrow limits. The Lord Justice states, as the obvious reasons for the rule which he adopted in chambers, that it was to do justice between the parties, and so bring about the result that the litigant should succeed according to the goodness of his case, and not according to the blunders of his adversary, and that it is for those who impugn it to say why. The former object of doing justice between the parties is one which I hope and believe all Judges have in view, whatever may be the rule by which they regulate their practice; the latter, highly important as it is in theory, and to a very great extent in practice also, must of necessity be subjected to certain limits, and may in many cases be a matter of considerable difficulty. The test which the Lord Justice would apply is this—has the mistake or carelessness of the applicant or his advisers been real and unintentional, and can any damage which may be occasioned to the respondent by granting the indulgence be repaired by costs or otherwise? If so, grant it—if not, refuse it. This test is a good one, as I have already intimated, if applied to proceedings in the action, but it is one which, in many cases, would be very difficult, and in some impossible of application after the action has been tried. If such a test were adopted, how great would be the temptation to those who have been negligent to endeavour to conceal their negligence under a plea of illness or accident, or even of ignorance of the law which it is their duty to know; and how difficult would be the task imposed upon the respondent of ascertaining whether the excuses so alleged are real or well founded. The case which we have had under our consideration suggests, if it does not illustrate, such considerations as those to which I have alluded. Again, how impossible it would

be, in many cases, for a respondent to prove the damage which would be occasioned to him by an extension of the time for his adversary to appeal, though it might be reasonably probable that substantial damage would be sustained by him, and especially in cases in which he has been the defendant in the action.

But over and above these considerations, we must bear in mind the additional anxiety that must of necessity be occasioned to a successful litigant, if he is left under the apprehension, for an indefinite period, that he may be again put to defend the right which he has once established, upon some allegation of unintentional mistake or carelessness on the part of his adversary, or of his adversary's solicitor.

It is unnecessary for me to pursue these observations further. Others of a similar character will readily suggest themselves to those who consider the question in all its bearings; but, having regard to the terms of the memorandum which the Lord Justice is about to read, and which cannot be regarded otherwise than as intimating a dissent from the views hitherto acted upon by the Court of Appeal, I have thought it well to express my own conviction of the propriety of its decisions.

BRAMWELL, L.J.—I entirely agree in the opinion of Lord Justice Baggallay, that this application should be refused, but I do so for the reasons which he has shewn as to the particular case, and not on the general considerations presented to us by Mr. Harrison. I could not do so without admitting a long period of mistake in myself, and as I believe in my brethren on the bench. I would admit that mistake if I believed it existed. But I do not. I believe our practice was right, and that I ought to say so, and why. During the twenty years I attended at Judges' chambers, when I had to deal with applications for an extension of time to do anything required in the course of an action, or set aside a judgment, or other step taken, and with other applications which are applications to the indulgence of the Court, the necessity or occasion of them arising from

Collins v. Vestry of Paddington (App.), Q.B.

the mistake, error or carelessness of the applicant, I have acted on the following rule:—If the mistake, error or carelessness of the applicant had been real and unintentional, and no damage had been done to the other side that could not be repaired by payment of costs or otherwise, I granted the indulgence, as it is called—erroneously so called, as I think; for it seems to me a right, a thing *ex debito justitiæ*. If I believed the occasion for the application to have been wilful, or *mala fide*, or the application itself to be, or that to alter the state of things would be to do irreparable hurt to the other side, I refused the application.

I state this as shewing the principle of my rule. To state the practice, with all its qualifications and exceptions and to its full extent, would require pages. This rule I cite, not because it has my authority only (though after the thousands of cases in which I have applied it, even that might be of some value), but because I never knew it dissented from by the Courts to which an appeal from its application might have been made. The reason of it is, to my mind, obvious. It is to do justice between the parties; it is to bring about the result that the litigant succeeds according to the goodness of his case, and not according to the blunders of his adversary. It seems to me that nothing more need be said in its favour. It is for those who impugn it to say why. But this further may be said, that by an opposite practice the penalty for blundering depends not on the amount of the blunder, but on the amount at stake in the case. It may be right to punish a blunder, but not to punish it with a 50*l.* fine, if that is the amount in dispute, and at the same time to punish the same blunder with a 5,000*l.* fine, if that is the amount. Now what are the reasons the other way? It is said that the other side has a vested right in the benefit of the mistake. Be it so. But his vested right is also a defeasible one, namely, on the Court being satisfied that relief ought to be granted. And it may well be asked why is the power to grant that relief given, unless it is to be exercised? As to saying it is to be granted in the case of accident, as where a man is too

late, or his train is, or a solicitor's clerk falls down in a fit, why is this the limit? Why is there a greater right in the result of the litigant's blunder than in that of his misfortune? The solicitor's clerk has a fit—give relief; the solicitor's clerk absconds with the fee—what then? He is not the applicant; it is the suitor who is. Is not his case the same in either event? He has had the misfortune to employ a solicitor whose clerk had a fit or absconded, so judgment was signed against him. It is said that if this principle prevailed, there would be no rule. That is equivalent to saying that there is no rule whenever there is an exception. The rule would prevail; it would be the rule. The applicant would have to bring himself within the exception, and pay the appropriate penalty of costs. I fully admit there is a difference between strictly interlocutory proceedings, such as pleadings and an appeal; and I admit that the Judicature rules seem to recognise that difference. But, in my opinion, the rule I have mentioned is the one that should govern in such cases, though it should be applied with more strictness and severity. It is more painful and disappointing to a litigant who thought his case ended to have it opened, than it is to one who knew it was going on to find he has lost some advantage from a slip. Still the general principle should be the same, and I doubt very much whether I and the Lord Justice Baggallay should differ in its application.

THE SINGER, L.J.—I agree that this application must be refused, and I should not have deemed it necessary to add anything to what has been said by Baggallay, L.J., but for the observations on the general question which have been made by Bramwell, L.J. I agree with what he has said, so far as his remarks are limited to proceedings in an action down to a judgment given on the merits by a competent tribunal. Down to that judgment the two litigating parties are on an equal footing; the question between them may be looked on as open; it cannot be assumed that either one or the other is right. The question in dispute is one

4 K

Collins v. Vestry of Paddington (App.), Q.B.

which each party has a right to have determined by a competent tribunal on the merits of the case, and Courts and Judges are wont to do everything consistent with justice to facilitate the proper trial of the question. Blunders occur in many cases and on many grounds, and it would be unjust to say that a blunder which occurs during interlocutory proceedings should entail on the party the penalty of never having the question tried at all. Blunders which occur during interlocutory proceedings may be paid for by costs or by conditions being imposed upon the party who has blundered, or on whose behalf the blunder has been committed.

But a very different class of considerations apply, in my opinion, to proceedings in an action after a judgment by a competent tribunal. The parties are no longer on an equal footing; the question is no longer open; the presumption is in favour of the party who has the judgment of the Court on his side; the presumption is that the judgment of the competent tribunal is right.

It is the interest of the public that a decision of such a tribunal should stand, unless, on certain conditions which should be strictly adhered to, an appeal is brought within a certain specified time.

But apart from the interest of the public, the party who has obtained the judgment of a competent tribunal has, as has been said in the Court of Appeal at Lincoln's Inn, a vested right in that judgment, and has a right to claim that that judgment should be effectual.

The Legislature and the Court have acted on the distinction between interlocutory proceedings and proceedings after a judgment both before and since the Judicature Act.

All the proceedings to which Bramwell, L.J., has referred were interlocutory proceedings at chambers on appeal. Whether it was an appeal for a new trial, or for error on the record, or an appeal to the Exchequer Chamber, the practice was always very stringent. A party had no right before the Judicature Act to have his blunders set right, and I think that the Judicature Act contemplated that the distinction between interlocutory

proceedings and proceedings after judgment should continue. The judgment of Baggallay, L.J., points out the difference between the wording of the rules which apply to proceedings before and those which apply to proceedings after judgment, and to appeals. In the one case some laxity may be allowed, in the other considerable strictness has always been required. The practice of the Court of Appeal has been tolerably consistent since the coming into operation of the Judicature Act. Here and there an expression can be found in a judgment which might seem to enlarge the discretion of this Court as to the extension of time for appealing; but the general course of decision has been, I think, correct, and it has been the practice to look with strictness on applications of this nature. I think that the observations of Bramwell, L.J., do not sufficiently allow for the distinction between interlocutory and final proceedings, and therefore I have added these observations.

Application refused.

Solicitors—Macmullen, for plaintiff; J. H. Horton, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]
1880. }
April 22. }

HAWKINS v. MORGAN.

Practice—Transfer of Action—Personal Injury resulting from Collision of Ships—Limitation Action.

A collision having occurred between two ships, by which besides damage to cargo, personal injuries were occasioned to a fireman on board one ship, an action in the Admiralty Division by the owners of that ship resulted in the other ship being adjudged solely to blame.

The owners of the latter having thereupon instituted a limitation action also in the Admiralty Division, the fireman, the present plaintiff, issued a writ in the Queen's Bench Division, claiming 1,000l. damages

Hawkins v. Morgan, Q.B.

for personal injuries from the owners of the delinquent ship. By the statement of claim in the limitation action, it was alleged that the fireman's was the only claim arising out of the collision in respect of personal injuries, and that it was for 500*l*. The defendants, of whom the fireman was nominally one, replied that his claim was for 1,000*l*. Judgment was given in the limitation action on this basis. Under these circumstances the fireman's action was transferred from the Queen's Bench Division to the Admiralty Division upon application made by the defendants under Order LI. rule 2.

This was an appeal against an order of Field, J., at chambers, transferring the action from the Queen's Bench Division to the Admiralty Division, under Order LI. rule 2.

The plaintiff, a fireman on board a steamship, brought this action to recover damages for personal injuries sustained by him in a collision between his ship and that of the defendants.

The circumstances appearing to the learned Judge and the Court were as follows:—

The collision occurred on the 6th of September, 1879. On the 8th of September, 1879, an action *in rem* was commenced in the Admiralty Division, in which the owners of the ship, on board of which the plaintiff was fireman, the owners of the cargo and freight and the master and crew proceeding for their effects, were plaintiffs. The plaintiffs in that action insisted on the defendant giving bail before the ship should be released to the amount required by section 54 of the Merchant Shipping Act, 1862, in cases where personal injury, together with damage to ship and merchandise, has been occasioned by collision, namely, to the amount of 15*l*. per ton, expressly on the ground of the injury done to the fireman. But for this contention the defendant need have given bail only to the statutory limit of 8*l*. per ton. On the 3rd of December, the Admiralty Court found that the defendant's ship was alone to blame.

On the 4th of December, 1879, the Board of Trade decided not to institute an inquiry under the Merchant Shipping

Act, Part IX. in respect of personal injuries received by the plaintiff, and on the 7th of January, 1880, the defendant issued a writ against the owners of the other steamship in a limitation action. In that action the statement of claim alleged that there was no claim for personal injury caused by the collision except the claim of the plaintiff Hawkins for 500*l*. The statement of defence in the limitation action alleged that Hawkins' claim was 1,000*l*.

A decree was made in the limitation action on the 23rd of March, that the defendant was answerable at the limited rate of 8*l*. per ton to the owners of the other steamship, and that on payment of that amount into Court, and on giving bail in the sum of 1,000*l*. to answer the claim of the fireman Hawkins, for personal injuries, all proceedings should be stayed, and referring all claims brought in or thereafter to be brought in in the action to the Registrar assisted by merchants to assess the amount thereof.

Hawkins had issued his writ in the present action on the 3rd of February, 1880, and delivered statement of claim on the 18th of February, claiming 1,000*l*. damages and naming Cardiff as the place of trial.

The summons before Field, J., to transfer was taken out on the 8th of April, and the order now appealed against was made transferring the action to Sir Robert Phillimore.

A. B. P. Gaskell, for the plaintiff, contended that the plaintiff had an absolute right to have his case tried by a jury, and that his claim for personal injury was quite irrespective of the proceedings in the Admiralty Court. His claim there was for the value of his effects as one of the crew, and it was not possible for him then to claim in respect of personal injuries, until the Board of Trade had come to a decision, which was in fact after the decree holding the defendant's ship liable for the collision.

J. G. Witt, contra.—The present plaintiff was a plaintiff in the original Admiralty suit. He was also a defendant in the limitation suit. In both these actions he insisted on the liability of the

Hawkins v. Morgan, Q.B.

defendant to him being secured by bail being given. That being so, he ought not to be allowed to proceed with an action in another division when there is machinery provided in the Admiralty Division where he has already been proceeding in respect of the very same matter for estimating his damages.

By section 514 of the Merchant Shipping Act, 1854, the Court of Chancery had power to entertain a suit for the purpose of determining the amount of any liability alleged to have been incurred by any owner in respect of personal injury and to stop all actions pending in any other Court in relation to the same subject-matter, and those powers are given to the Court of Admiralty by the Admiralty Court Act, 1861. If this power is taken away by the Judicature Act the reason is because the exercise of the power of transfer or stay will effect the same object. Here a limitation suit has been instituted, and the Admiralty Division can determine the amount of liability and arrange for the distribution of the amount among the claimants. It is therefore just such a case as is contemplated, and one where the Court of Chancery would have restrained. The Judge at chambers was therefore right to transfer.

COCKBURN, C.J.—I think that this appeal must be dismissed. This was an application not to stay the action brought in this division but to transfer it for trial to the Admiralty Division, and it was in the discretion of the Judge at chambers to grant or refuse such application. We find that the Court of Chancery and subsequently the Court of Admiralty had power up to the passing of the Judicature Acts to restrain actions in other Courts where there was pending in their own Court a suit involving the determination of the amount for which a ship-owner was liable in respect of personal injuries, and that power could before 1875 have been exercised in a case like the present where the plaintiff has made a claim for damages in the limitation action in what was the Admiralty Court. That being so, it seems in accordance with the previous practice and with the intention of the Judicature Acts, that separate

actions relating to the same subject-matter should not be allowed to proceed in different divisions at the same time, and I think that my brother Field was right in transferring this action to the Admiralty Division where the enquiry into the amount of the plaintiff's damages is about to be held under the decree in the limitation action.

FIELD, J.—I retain the opinion which I formed at Chambers. Before the Judicature Act the Court of Admiralty would have restrained this action, and would have made orders for distribution of the fund in Court to the various persons having claims for damage. By section 24, sub-section 5, of the Judicature Act, 1873, the power to stay proceedings is now given to this Court, but such power would not be exercised unless it were just to do so. Here it seems to me that an order to transfer this action to the Admiralty Division would be just. The money is there, and there is a proper officer to whom the assessment of damage can be referred, and the enquiry can be conveniently held before him.

Appeal dismissed.

This case came before the Court of Appeal on the 6th of May, when the order was upheld by Brett, L.J., Cotton, L.J., and Thesiger, L.J., who declined to interfere with the discretion exercised by the Judge at Chambers and the Divisional Court in ordering the transfer of the action.

Solicitors—Ingledeu & Ince, agents for Ingledeu, Ince & Vachell, Cardiff, for plaintiff; Pritchard & Sons, agents for Bateson & Co., Liverpool, for defendant.

[IN THE EXCHEQUER DIVISION.]

1880. } THE ATTORNEY-GENERAL v.
March 8, 23. } DOWLING.

*Revenue—Succession Duty—Mortgage of
Base Fee—Re-Settlement.*

*Conveyance to the use of the grantor for life, with remainder to his sons successively in tail male, remainder to his daughters in tail general. The grantor died, leaving two sons Edward (a lunatic), and Reginald, and one daughter, Frances. Reginald conveyed, subject to Edward's estate, to the use of himself in fee, and then mortgaged the base fee so created to a bank for 124,000*l.*, being more than the fee simple value of the property. Subsequently by arrangement between all interested, Reginald, Frances and the husband, whom she had in the meantime married, with the consent of the Lord Chancellor as protector of the settlement, conveyed the property to trustees in fee, subject to Edward's estate tail, discharged of the mortgage and Reginald's equity of redemption, upon trust after the death of Edward to raise 37,000*l.* by sale, and after paying off the mortgage to convey to the use of other trustees, in trust for Frances for life, with remainder to her husband for life, with remainder to their sons in succession in tail male, with remainders over. Edward died without issue. Frances and her husband died, leaving the defendant, their eldest son:—Held, that the defendant derived his succession for the purposes of succession duty from his mother, Frances, and not from his uncle Reginald.*

This was an information for succession duty. The facts were contained in the information and answer, the Attorney-General not replying but moving for judgment on admitted facts.

By indentures of lease and release, dated respectively the 30th of September and the 1st of October, 1800, Edward Blewitt conveyed the Llantarnam Abbey property to trustees, *inter alia*, to the use of himself for life, with remainder to his sons successively in tail male, with remainder to his daughters successively in tail general.

Edward Blewitt died on the 1st of March, 1832, leaving two sons, Edward Francis Blewitt and Reginald Blewitt,

and a daughter, Frances, who afterwards married Richard Brinsley Dowling, and by him was the mother of the defendant. Edward Francis entered into possession, but in April, 1832, was found a lunatic by inquisition.

In May, 1834, by indentures of lease and release, Reginald Blewitt conveyed the property to a trustee in fee, subject to the estate of Edward Francis Blewitt, the lunatic, to the use of himself, his heirs and assigns, thus creating a base fee expectant upon the estate in tail male of Edward Francis Blewitt. In the same year Reginald Blewitt conveyed his base fee to the Monmouthshire Banking Company to secure 124,000*l.* due from him to the banking company, with a covenant to convey to the bank the fee simple in the event of his surviving his brother. The sum of 124,000*l.* was in excess of the full fee simple value of the property.

In June, 1834, Frances Blewitt married Richard Brinsley Dowling, having, in contemplation of the marriage, undertaken to settle any real property which she should acquire in her own right during the marriage. Reginald Blewitt, for the purposes of the case, was treated as the only issue of the marriage. In 1852, the Monmouthshire Banking Company was wound up and official managers appointed.

By a writing dated the 1st of May, 1855, it was arranged that 37,000*l.* should be further secured to the bank, and that the bank and Reginald Blewitt and Frances Dowling should resettle the property on Frances Dowling and her children.

By indenture dated the 29th of February, 1856, Reginald Blewitt, Frances Dowling and her husband, and the official managers of the bank, conveyed, with the consent of Lord Chancellor Cranworth and the Lords Justices, the property to trustees in fee, subject to the estate tail of Edward Francis Blewitt, discharged of the mortgage of the bank and the equity of redemption of Reginald Blewitt, upon trust on the termination of the estate of Edward Francis Blewitt, to raise 37,000*l.* by sale or mortgage, and to stand possessed thereof for the benefit of the bank, and subject thereto to convey

Attorney-General v. Dowling, Exm.

to the uses of the indenture next mentioned. By that indenture, which was dated the same day, it was declared that the trustees should, subject as aforesaid, stand seised of the property to the use of other trustees during the life of Frances Dowling, in trust for her separate use, with remainder to the use of her husband for life, with remainder to the use of their sons successively in tail male, with remainder to the daughters in tail general.

Edward Francis Blewitt died in February, 1868, without issue. The 37,000*l.* were raised by the trustees and paid to the official managers of the bank. The father of the defendant died in 1859, and his mother in 1875, and thereupon he entered upon the property. Reginald Blewitt is still living.

The Solicitor-General (Sir Hardinge Giffard) and W. W. Karlake, were for the Crown.—The defendant is chargeable with duty at the rate of 3 per cent., Reginald Blewitt, his uncle, being the predecessor. He was settlor in the instrument under which the defendant is entitled. No doubt Mrs. Dowling consented to the conveyance, but consent is not disposition. The question has been so decided in *The Lord Advocate v. Earl Glasgow* (1). They also relied on *Lord Braybrooke v. The Attorney-General* (2).

Southgate and Jason Smith, for the defendant.—Mrs. Dowling was the settlor in every real sense. It was she who enabled the 37,000*l.* to be raised. She, in effect, purchased for that consideration the ultimate uses in fee in her favour. They relied on *Fryer v. Morland* (3), *The Attorney-General v. Baker* (4), and *In re Jenkinson* (5).

The Solicitor-General in reply.

Cur. adv. vult.

The following judgments were delivered (on March 23) by

KELLY, C.B.—I am of opinion that the defendant is entitled to the judgment of

(1) 12 Scottish Law Reports, 215.

(2) 9 H.L. Cas. 150; 31 Law J. Rep. Exch. 177.

(3) 45 Law J. Rep. Chanc. 817; Law Rep. 3 Ch. D. 675.

(4) 24 Beav. 64.

(5) 4 Hurl. & N. 19.

the Court, on the ground that he claims under his mother, Mrs. Frances Mary Ann Dowling, who became entitled to the Llantarnam Abbey estate, not under any settlement by Reginald Blewitt, or any other person, but under a purchase from the managers of the Monmouthshire Company, who had purchased the whole estate of Reginald, the purchase having been effected in consideration of the sum of 37,000*l.*, which, with the consent of Mrs. Dowling, was raised upon the estate; the result of which was, that the estate in reversion upon the determination of the estate tail of the lunatic, by his death without issue, passed to Mrs. Dowling, charged with the sum of 37,000*l.*, which, as it is said, has since been paid by her, or the defendant, or, if not paid, which must be paid by the defendant, as the purchase money of the conveyance of the estate to Mrs. Dowling. And although Reginald Blewitt was of necessity a party to the deeds under which this conveyance was effected, he had no interest in the estate, and could not, therefore, settle it upon the Dowlings, or any other person or persons, he having parted with his interest to the Monmouthshire Company, who afterwards conveyed to the managers who became the parties, and the only parties, conveying, and having power to convey, the estate to the Dowlings, and to whom the purchase money of 37,000*l.* has been or must be paid by the Dowlings, under and according to the terms of the conveyance.

To prove that such is the real nature and effect of the deeds of the 29th of February, 1856, it is necessary to consider only the real condition of the several parties to those deeds, and their respective interests in the estate. First, Reginald Blewitt, at the time of the execution of the deeds, had ceased to possess any interest whatsoever in the estate. He had, before, converted it into a base fee, but he had mortgaged the property to the Monmouthshire Company, from whom it had passed to the managers, for 124,000*l.*; and if the estate had been dealt with immediately before the execution of the deeds, it must have been sold, and upon the sale the purchase-money received by the managers

Attorney-General v. Dowling, Exch.

of the Monmouthshire Company, unless it had produced more than 124,000*l.* But, immediately upon the execution of the deeds of the 29th of February, 1856, the estate passed, subject to the death without issue of Francis, the lunatic, and subject to the charge of 37,000*l.*, and certain expenses incurred in raising that sum, for life to Mrs. Dowling, with remainder to Richard Brinsley Dowling, the present defendant. This appears clearly and indubitably from the provisions of the deed (par. 24), by which the several parties to the deed, with the consent of the Lord Chancellor and Lords Justices, conveyed the estate to the trustees and their heirs in fee simple, subject only to the estate tail in Edward Francis Blewitt, "but freed and absolutely discharged from the before recited securities of the Monmouthshire Company, and from all right or equity of redemption of Reginald James Blewitt:" in trust with all convenient speed after the determination of the estate of the lunatic, by sale or mortgage of the estate to raise 37,000*l.* and a further sum for certain expenses to be incurred; and then to stand possessed of the sum, when raised, for the benefit of the managers of the Monmouthshire Company, and subject thereto, upon trust to convey, settle and assure the same estate upon trust, as declared by the other deed (par. 25), that is to say, to Mrs. Dowling for life, to her separate use, with remainder to her sons in tail male, and to her daughters in succession in tail general; in other words, to Richard Brinsley Dowling, the present defendant.

What, then, is the substance of this entire transaction? The Monmouthshire Bank, and afterwards the managers who were the mortgagees of the estate for 124,000*l.*, compromised their claim, upon the estate being charged for their benefit with 37,000*l.* Reginald had ceased to possess any interest whatever in the estate; for, first it was mortgaged to the bank for 124,000*l.*, though he still retained the equity of redemption, which it is obvious, however, was valueless. But by the deeds he expressly parted with the equity of redemption, and with all other interest that he had possessed, or could thereafter possess in the estate, in consideration of

the bank, and afterwards the managers, releasing him in effect from the large debt of 124,000*l.*, and compromising it for a charge upon the estate of 37,000*l.* He therefore gave up all that he ever had possessed, and all that he ever could possess, by the execution of the deeds. The managers gave up their claim to 124,000*l.*, in consideration of the charge upon the estate of 37,000*l.*, to which they would become, as they have since, in fact, become entitled. And this sum of 37,000*l.*, thus charged upon the estate, and so diminishing its value by that amount, has been paid or must be paid by the Dowlings, into whose possession the estate passed, immediately upon the death of the lunatic without issue. On the other hand, the Dowlings, whose consent to and participation in the arrangement was made the condition by the Lord Chancellor of his authorising and giving effect to the arrangement at all, gave up their right of succession under the entail, upon the deaths of the lunatic and of Reginald Blewitt without issue and without having barred the subsequent entails; but they also agreed to take the estate, if they should become entitled to take it at all, under the deeds charged with the debt of 37,000*l.* and upwards, and which, as already observed, the defendant has paid or is liable to pay. All the parties were open to the risk of the lunatic recovering from his insanity, and converting his estate tail into a fee, or marrying and having issue; and to the risk, likewise, of his surviving one, or more, or all of them. It was therefore manifestly to the interest of the bank and managers to agree to the compromise, and execute the deeds, in order to obtain the sum of 37,000*l.*, which, without the consent of the other parties, they must lose altogether. So, it was obviously to the interest of Reginald Blewitt that he should agree to the compromise, in order to be free from a debt of 124,000*l.*, which he had not the chance of being ever able to pay. And with respect to the Dowlings, without whose consent the Lord Chancellor never would have sanctioned the compromise at all, they were content to sacrifice upwards of 37,000*l.*; and take the estate subject to a charge to that amount, which, sooner or

Attorney-General v. Dowling, Exch.

later, they must pay in order to obtain the estate, as they did obtain it, upon the death of the lunatic. And this compromise, as it affected all the parties to it, was expressly sanctioned and approved by the Lord Chancellor. It is clear, therefore, that the effect of this compromise was not a settlement by Reginald upon the Dowlings, but a purchase by the Dowlings, not of Reginald but of the bank or of the managers, for upwards of 37,000*l.* Being, then, a purchase, and not a purchase of the alleged settlor, but of his vendees, the managers of the bank, by the Dowlings, who have paid the price of upwards of 37,000*l.*, or become liable to pay it, it is not a settlement at all but a purchase for a valuable consideration. And it comes directly within the authority of the case of *Fryer v. Morland* (3). The marginal note is this:—"A conveyance or assignment by way of *bonâ fide* sale does not create a succession within the meaning of the Succession Duty Act, 16 & 17 Vict. c. 51. Where the purchaser of a reversionary life interest in settled property had contracted to sell it to D., the tenant for life in possession, in consideration of a sum of money paid down and a further sum payable on the death of D., secured by a charge on the reversion—Held, that there was no succession created within the meaning of section 2 of the Act, and that no duty would be payable on the death of D. in respect of the said charge."

Upon these grounds I am of opinion that the defendant does not take this estate under a settlement by Reginald Blewitt as a predecessor or otherwise, but that he takes it in succession to his mother, Mrs. Dowling, who took the estate by purchase for a valuable consideration and not of Reginald Blewitt at all, but of the managers of the bank.

HAWKINS, J.—The question in this case is, whether the defendant became possessed of the Llantarnam Abbey property on a succession derived from his uncle Reginald Blewitt, or on a succession derived from his mother Frances Dowling. In the former event he is liable to the succession duty of three per cent. claimed by the Crown. In the latter to one per cent. only—which sum he is willing to pay.

By the Succession Duty Act (16 & 17 Vict. c. 51), s. 2, it is provided that every "disposition" of property by reason whereof any person has or shall become beneficially entitled to any property upon the death of any person shall be deemed to confer on the person entitled by reason of such disposition "a succession." Did the defendant then succeed to the property upon a "disposition" of his uncle or of his mother?

The material facts are by no means complicated, and for the purposes of the present case it will be sufficient to commence with a settlement of the property by Edward Blewitt, the defendant's grandfather, in the year 1800.

By indentures of lease and release dated respectively the 30th of September, and the 1st of October, 1800, Edward Blewitt conveyed the Llantarnam Abbey property to trustees, *inter alia*, to the use of himself Edward Blewitt for life, with remainder to his first and other sons in tail male, with remainder to his daughters in tail general. Edward Blewitt died in 1832, leaving two sons, Edward Francis Blewitt (a lunatic), and Reginald Blewitt, and a daughter Frances, who afterwards became the wife of Richard Brinsley Dowling, and by him the mother of the defendant. On the death of Edward Blewitt, Edward Francis, his lunatic son, became possessed of the property as tenant for life in tale male. In May 1834, by indentures of lease and release, Reginald Blewitt conveyed the property to a trustee in fee, to hold the same (subject *inter alia*, to the life estate of Edward Francis Blewitt, the lunatic), to the use of himself the said Reginald Blewitt, his heirs and assigns, thus creating in himself a base fee in remainder expectant upon the estate in tail male of his lunatic elder brother.

After May, 1834, Reginald Blewitt mortgaged his base fee to the Monmouthshire and Glamorganshire Banking Company (called hereafter "the bank"), for 124,000*l.*, with a covenant, in the event of his future ability so to do, to convey to them also by way of mortgage the absolute fee simple. The sum for which the property was so mortgaged was in excess of its full fee simple value, so that

Attorney-General v. Dowling, Excn.

Reginald Blewitt's equity of redemption was valueless. In 1852 the bank was wound up and official managers appointed whom I will still call "the bank." In June, 1834, Frances Blewitt married Richard Brinsley Dowling, having immediately before and in contemplation of such marriage covenanted with trustees to settle any real estate which she in her own right should during the continuance of her marriage acquire, to her own use during her life, with remainder to her intended husband during his life, with remainder to the first and other sons of that marriage in tail male. Reginald Blewitt Dowling, the defendant, may (for the purposes of this case), be treated as the only issue of that marriage.

Before referring to the subsequent arrangements and dispositions of the property in 1855 and 1856, it will be convenient shortly to consider the position of all parties immediately before such arrangements and dispositions were made. The lunatic Edward Francis Blewitt was in possession as tenant in tail male. Reginald Blewitt was next in succession, but he had so mortgaged his estate in remainder that he had no longer any beneficial interest in it, and was moreover incumbered with a personal liability for 124,000*l.* "The bank" had advanced that sum upon the security of Reginald's interest. If he died in the lifetime of the lunatic without acquiring a fee simple absolute that security would vanish. Frances Dowling (defendant's mother) and her issue were under the settlement of 1800 next in succession to her brother Reginald Blewitt, but their possession of the property was contingent upon the deaths of Edward Francis (the lunatic) and Reginald without male issue, and upon the non-barring of the estate by Reginald. If once Reginald acquired an estate in fee simple absolute, all the hope of Frances Dowling would be at an end, for the bank mortgage would absorb everything.

In this state of uncertainty all parties, save the lunatic whose life estate was unaffected, were naturally anxious for some arrangement by which each might acquire and secure to him or herself some certain definite advantage.

VOL. 49.—Q.B., C.P. & EXCH.

First, Reginald to relieve himself from a load of personal debt; secondly, the bank to obtain certain payment of a portion of that which was owing to them in lieu of the very uncertain security they held for the whole of it; thirdly, Mrs. Dowling to obtain certain and immediate possession (subject to the life estate only of the lunatic) of a property which possibly, in the then existing circumstances, might never become hers at all, though if it did it would no doubt come to her free from the incumbrances which Reginald had endeavoured to heap upon it. To acquire and secure this certainty Mrs. Dowling was willing to allow the fee simple of the property to be absolutely charged with a sum of 37,000*l.* to be paid to the bank. The bank were willing to accept that sum in satisfaction of their claim, and Reginald was willing to make a legal conveyance of his valueless equity of redemption.

By a document in writing dated the 1st of May, 1855, to which the bank, Reginald Blewitt, and Mr. and Mrs. Dowling were parties, an arrangement, in substance such as that I have referred to, was made, but it needed the consent of the Lord Chancellor, who was protector of the existing settlement of 1800 (the tenant for life being a lunatic) before it could be carried into execution. His Lordship thought the proposed arrangement reasonable, and gave his assent to it accordingly. The arrangement so approved was carried out by two deeds, each bearing date the 29th of February, 1856. Upon the true effect and construction of these deeds the question before us depends.

By the first of them Reginald Blewitt, Mr. and Mrs. Dowling, with such consent as aforesaid, and the bank, conveyed the Llantarnam Abbey property to trustees for an estate in fee simple absolute, subject to the estate in tail male of the lunatic, discharged of the mortgages of the bank and the equity of redemption of Reginald Blewitt, upon trust immediately after the determination of the estate of the lunatic by sale or mortgage of the property to raise 37,000*l.*, and to stand possessed thereof for the benefit of the bank and subject thereto, to convey

4 L

Attorney-General v. Dowling, Exch.

the estate to the uses and upon the trusts declared by the indenture next mentioned.

By the second of such indentures of the 29th of February, 1856, it was declared that the trustees named in the first indenture should (subject as in that indenture mentioned) stand seised of the said Llantarnam Abbey property to the use of other trustees (named therein) during the life of Mrs. Dowling upon trust for her separate use, with remainder to the use of her husband for life, with remainder to the use of the first and every other son of the said Frances and Richard Dowling in tail male, &c. The lunatic Edward Francis Blewitt died in February, 1868, without issue. The father of the defendant died in 1859 and his mother in 1875, and thereupon he entered into possession of the property. Reginald Blewitt is still living.

Under these circumstances it is that the question arises whether the defendant succeeded to the property upon the disposition of Reginald Blewitt, or of Mrs. Dowling his mother. After carefully considering the matter, and not without hesitation, I have arrived at the conclusion that the defendant derived his succession from his mother, Mrs. Dowling, and not from his uncle Reginald.

It was contended for the Crown that the arrangement of 1856 ought to be treated as a disentailing and re-settlement of the property by Reginald. It was argued, moreover, that the consent of Mrs. Dowling, without which the Lord Chancellor would, as protector of the settlement, have refused his assent, was an immaterial circumstance, for that it in no way operated nor could operate as a disposition of the property by Mrs. Dowling, but that the re-settlement of the property emanated from Reginald, in whom alone was vested (subject to the life estate of the lunatic, the mortgages to the bank, and the consent of the Lord Chancellor) the power to make such new disposition. And this is true enough. In *Lord Braybrooke's Case* (2) Lord Campbell, L.C., said—"It cannot be argued that a person whose consent is necessary to a disposition of property makes that disposition." And the

language of the consent, as set forth in the 22nd paragraph of the information, is sufficient to shew that in form the disentailment and conveyance to new uses of the property could only proceed from Reginald Blewitt. He was an essential party to the conveyance to the new uses, so also was the bank to the extent of the interest it had acquired from him. Mrs. Dowling, however, was no necessary party to that conveyance; her consent, it is true, was required by the Lord Chancellor before he would sanction the barring of the entail, but that consent had no legal operation.

In form, therefore, the conveyance to the new uses was a disposition by Reginald Blewitt and the bank. We have not, however, to deal with the mere form, but the substance and true nature of the transaction. This brings me to consider what I deem, apart from technical language, to be the substantial question in this case, namely, whether the estate which the defendant took upon the death of his mother was in substance and reality purchased by her for good consideration, or whether, to adopt the language of the Master of the Rolls in *Fryer v. Morland* (3), he succeeded to it by gratuitous title under a disposition made by his uncle Reginald. I think the true answer is, that the property was purchased by Mrs. Dowling for good consideration, such purchase being carried out by the deeds of 1856. The expression of this opinion naturally gives rise to two inquiries:—

First. What were the subject-matters of the purchase? Secondly. What was the consideration given for it by Mrs. Dowling?

To the first my answer is, the estate of Reginald Blewitt, the interest of the bank as mortgagees, the release of Reginald Blewitt from an overwhelming personal debt, and the certain possession of an estate which, but for the arrangement, probably would never have come to her at all, for her possession depended on many contingencies which I have pointed out.

To the second inquiry my reply is, that Mrs. Dowling, who, if the property had ever come to her as one of those

Attorney-General v. Dowling, Excs.

entitled in remainder under the settlement of 1800, would have been entitled to it as a gratuitous succession free from all incumbrances created by Reginald, and might have altogether ignored the claim of the bank, was content to forego her right in that respect, and consented to saddle the estate, or allow it to be saddled, with an absolute charge of 37,000*l.* as the consideration for the certain acquirement by her of those valuable subject-matters of the purchase to which I have just adverted, and this consent it was which induced the Lord Chancellor to sanction and approve of the deeds under which the defendant has now succeeded to the property. To put it shortly, in substance she agreed to purchase the estate of her brother Reginald, his equity of redemption, the interests of the bank, her brother's freedom from debt, and (subject to the lunatic's life estate) the immediate and certain possession of the property; and as a consideration she agreed to forego any contingent right she might have to possess the property free from incumbrances, and consented that it should be absolutely charged in fee with a sum of 37,000*l.* This consent, it must be observed, might very well be a valuable consideration for a contract of purchase, though of no operation whatever as an actual disposition of the property.

I think this case falls directly within the principle upon which the Master of the Rolls acted in the case of *Fryer v. Morland* (5), upon which the defendant relied in the argument before us. In substance the transaction amounted to a purchase by Mrs. Dowling and an alienation by Reginald Blewitt of the fee simple (subject to the estate of the lunatic) for valuable consideration, and the conveyance to the uses mentioned in the deed of the 29th of February, 1856, must be looked at as though, she having purchased the fee simple, had directed it to be conveyed at once and direct by the vendor to the uses declared, instead of going through the form of first taking a conveyance to herself and then settling

it as it was settled by the deed of the 29th of February, 1856.

For these reasons I am of opinion that the defendant took upon a succession from his mother, Mrs. Dowling, and not from his uncle Reginald, and that he is entitled to our judgment.

Judgment for the defendant.

Solicitors—Solicitor of Inland Revenue, for the Crown; R. S. Taylor, Son & Humbert, for defendant.

Benick & Graham 50 L. 96 & 597. *Campagne*
 [IN THE COURT OF APPEAL.] *Financiere*
 (Appeal from the Queen's Bench Division.) *Peruvian*
 1880. } JONES v. THE MONTE VIDEO GAS *Guano* 52
 April 21. } COMPANY.* *29 62 182*
 May 12. }

Practice—Discovery of Documents—
Sufficiency of Affidavit in Answer—Further
Affidavit in Reply—Rules of Court, Order
XXXI. rule 12.

When an affidavit of documents has been made in answer to an order for discovery, no affidavit will be allowed in reply, unless it appear from the first mentioned affidavit itself, or from admissions on the pleadings of the party making it, or from documents mentioned therein, that it is not a sufficient compliance with the order.

So held by the Court of Appeal, reversing the judgment of the Queen's Bench Division.

Appeal from the Queen's Bench Division.

Action for wrongful dismissal.

Defence that the dismissal was justified under the terms of engagement, on the ground of disobedience and failure to make certain reports as required.

The plaintiff obtained an order for discovery under Order XXXI. rule 12 (1).

* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

(1) Rules of Court, Order XXXI. rule 12:—
 "Any party may, without filing any affidavit, apply to a Judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action.

"13. The affidavit to be made by a party against whom such order as is mentioned in the

(5) 45 Law J. Rep. Ohanc. at p. 818; Law Rep. 3 Ch. D. at p. 681.

Jones v. Monte Video Gas Co. (App.), Q.B.

The defendants by their secretary made an affidavit setting out the documents in their possession or control.

The plaintiff took out a summons for a further and better affidavit, and in support of this application he made an affidavit in which he specified certain documents which the defendants had not disclosed, but which the plaintiff knew had been in their possession or control, and which he believed still to be so.

An order was thereupon made upon the defendants for further discovery.

The defendants then made an affidavit, in which they stated that no documents referred to by the plaintiff, and not already referred to by them, were in any manner relevant to the plaintiff's dismissal.

The plaintiff thereupon applied for and obtained an order for further discovery; the defendants appealed, and the Judge at chambers adjourned the case in order to give the plaintiff an opportunity of making a further affidavit. The plaintiff accordingly made an affidavit specifying the documents to which he referred, and shewing in detail how they were relevant to his cause of action. The Judge affirmed the order of the Master for further discovery. The defendants appealed, and the Queen's Bench Division affirmed the order of the Judge.

The defendants appealed.

S. Will (Farwell with him), for the appellants.—It is contended that the further affidavit by the plaintiff is not admissible, and that the defendants' affidavit is conclusive.

[BRETT, L.J.—It would seem that the second affidavit by the plaintiff should not be admitted.]

The rule will be found in *Morgan's Chancery Acts and Orders* (5th ed.), p. 522; and it is clear that the practice of the Courts of Chancery has been to accept an affidavit as conclusive, unless there is an admission by the party making

it which throws discredit on it—*The Welsh Steam Collieries Company v. Gaskell* (2) and *Bustros v. White* (3).

An affidavit in answer to an application for discovery must be construed strictly, and the reason is that it cannot be contradicted, nor can the party making it be cross-examined on it—*Gardner v. Irwin* (4).

[COTTON, L.J.—That was so, and no further affidavit could be ordered unless on the affidavit or pleadings of the party from whom discovery was sought, there was something which amounted to an admission that he had further documents.]

He was stopped by the Court.

Archibald, for the plaintiff.—The practice as laid down in the Chancery authorities is certainly not favourable to the contention of the plaintiff; but it is submitted that that practice is not conclusive; that there has been a wider construction given to the rule, and a more liberal practice in other Courts; and that the oath of the defendant should not be held to be conclusive, especially when, as here, the plaintiff is able definitely to specify certain documents which the defendants acknowledge to be in their possession. In such a case the plaintiff is entitled to have the opportunity of judging for himself whether the documents are relevant, for the claim of the defendants is not a claim of privilege; it is merely an assertion of a right to decide for themselves whether these documents are relevant. The further affidavit was used before the Judge at chambers.

[BRETT, L.J.—You must treat the case here as though that affidavit did not exist. You must shew that, apart from that affidavit—and indeed it must be upon the pleadings or affidavits of the defendants—there is an admission that they have the documents of which you seek discovery.]

It is not contended that this is possible, although one paragraph of the defend-

(2) 36 Law Times Rep. 352.

(3) 45 Law J. Rep. Q.B. 642; Law Rep. 1 Q.B.D. 423.

(4) 48 Law J. Rep. Exch. 223; Law Rep. 4 Ex. D. 49; *Daniell's Chancery Practice*, 5th ed., p. 1,680.

last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it may be in the Form No. 9 in Appendix (B) hereto, with such variations as circumstances may require."

Jones v. Monte Video Gas Co. (App.), Q.B.

ants' affidavit does refer to reports which it is submitted must be reports as to the same matters as those to which the documents now said to be irrelevant must relate. The authorities on the practice seem to be all collected in *Morgan's Chancery Acts*, p. 522.

Cur. adv. vult.

The following judgments were (on the 12th of May) delivered by

BRETT, L.J.—In this case, on an order made by a Judge, a party to an action made an affidavit of documents, and on that more than one summons was taken out and more than one order has been made. Again, on a contentious affidavit being made by the appellant, a further order was made for a further affidavit of documents, and the question before us is whether that order was properly made.

Now this matter as to affidavits of documents depends, since the Judicature Act, upon the construction of the Rules of Court, and in particular upon rule 12 of Order XXXI. (1); it no longer depends on the Common Law Procedure Act, or on any orders which may have been made and obtained in the Court of Chancery, or on the traditional practice of the Courts of Equity or Common Law. The whole matter is governed by the rules of Court, and I adhere to what was said by Baggallay, L.J., and myself in *The Welsh Steam Collieries Company v. Gaskell* (2).

These Rules of Court were drawn by Judges and afterwards adopted by Parliament, so that they have the force of a statute. They were on this point drawn with especial reference to the 11th subsection of section 25 of the Judicature Act of 1873, for the purpose of carrying out the substantial object of the legislation of the Judicature Acts, the object of which was that the same rules of practice should obtain in every division of the High Court. On this point, therefore, according to the true interpretation of the Judicature Act, it was intended that the practice of the Courts of Equity should prevail and be followed.

We never doubted what the result of the appeal in this case must be, but we desired, if we might be so permitted, to

come to some final conclusion on this point, and to express a definite rule of practice which should have the general concurrence of the Judges of this Court. We desired to make that rule as elastic as the fundamental proposition would allow. We consulted, therefore, the other Judges of the Court of Appeal who are accustomed to act in interlocutory matters, to see if we could agree on a rule of practice, and I proceed to state what we consider to be the rule on the point.

The right to discovery is by order that the opposite party should make an affidavit of documents. If, when such an affidavit has been made, it can be shewn from anything which appears on the face of the affidavit, or from admissions on the pleadings of the party making the affidavit, or from documents mentioned therein, that the affidavit is not a sufficient answer to the order for discovery, and if the Judge is satisfied as to that, he would make a further order for a further affidavit; but if the Judge is not so satisfied, and satisfied on those grounds only to which I have referred, then no right to a further order can be established by any further affidavit which the party applying for discovery may make—that is, on a contentious affidavit by the aggrieved party. That was the practice in the Court of Chancery, and that is the rule in the High Court now.

It did seem, however, that a party might be defeated by a wrongful reticence or refusal of the party ordered to give discovery, and we were, therefore, anxious to render the rule as elastic as possible; but the contention of the respondent cannot prevail, for that never was the practice in the Court of Chancery, and cannot be the practice of the High Court now.

We are, however, satisfied that a party who feels that he is aggrieved is not without a remedy; he can interrogate the party who makes the affidavit, and so he can get the information which he seeks. If he is in time he can do that without any order; if he is out of time he can then do so by an order made on summons. It is obvious that we should in this case infringe upon the rule if we allowed this order for a further affidavit to stand un-

Jones v. Monte Video Gas Co. (App.), Q.B.

cancelled, and it must, therefore, be cancelled, and this appeal must be allowed.

COTTON, L.J.—I am of the same opinion. The old Chancery practice was that a party who applied for and got an order for discovery could not contradict or cross-examine upon the affidavit; he had to take it for better or worse, subject to the rule which has just been stated by Brett, L.J.

There is reason in the rule, for if it did not exist there would be a contest on affidavits, and interlocutory expenses would be greatly increased. The question is whether the affidavit is technically sufficient—that is, whether it does or does not shew anything on the face of it which discloses that the party making discovery is not disclosing the whole truth. The old practice of the Court of Chancery is now the practice of the High Court, and should be generally adopted.

THESIGER, L.J.—I agree both with the decision in this case and the rule that has been laid down.

I confess to having entertained some apprehension as to what might be the effect of a hard and fast rule. It is, however, so desirable to reduce the expenses of interlocutory applications that I think it is only reasonable that the old rule of Chancery practice should prevail. It was not absolutely necessary to adopt that rule, although rule 12 of Order XXXI. is founded on the old Chancery practice; but it appears to have been a reasonable rule, and one which is for the interest of the parties to the suit. There is, I think, sufficient security against improper affidavits of discovery: first, by the use of interrogatories; and secondly, by the power given to the Judges over costs. I may add that I am of opinion that, now this rule is established, Judges should be strict, and even severe, on parties who may in any degree be wanting in good faith in making affidavits of discovery.

Appeal allowed.

Solicitors—T. H. Devonshire, for plaintiff; G. M. Clements, for defendants.

[IN THE HOUSE OF LORDS.]

1880.
May 7, 10, 11. } POSTLETHWAITE v. FREE-
June 7. } LAND AND ANOTHER.

Charter-party—Cargo “to be discharged with all Despatch, according to the Custom of the Port”—*Demurrage*.

In an action for demurrage upon a charter-party, which contained the following clause:—“The cargo is to be discharged with all despatch, according to the custom of the port,”—

Held, that the charterers were not liable for delays caused by the insufficiency of the appliances for unloading provided at the port of discharge, and the rules regulating their user.

This was an appeal from a judgment of the Court of Appeal, affirming one of the Exchequer Division. The case is reported in the Courts below—48 Law J. Rep. Exch. 353; Law Rep. 4 Exch. D. 155.

The facts are fully stated in the judgments.

Butt and Cohen (Bigbam with them), for the appellant.—The rule which governs the case is that laid down in *Randall v. Lynch* (1), and followed in many cases since, namely, that the charterer is liable for delay in discharging the cargo, though arising from causes beyond his control. It is true, that in those cases a time was fixed in the charter-party, within which the cargo was to be discharged, but there are authorities that where no time is named a reasonable time must be taken to be intended by the contract—*Ashcroft v. The Crow Orchard Colliery Company* (2); *Tapscott v. Balfour* (3). If, therefore, there is delay beyond such reasonable time, the charterer is liable in the absence of any reference to the custom of the port. In *Adams v. The Royal Mail Steam Packet Company* (4), where no

(1) 2 Campb. 352.

(2) 43 Law J. Rep. Q.B. 194; Law Rep. 9 Q.B. 540.

(3) 42 Law J. Rep. C.P. 16; Law Rep. 8 C.P. 46.

(4) 5 Com. B. Rep. N.S. 492; 28 Law J. Rep. C.P. 33.

Postlethwaite v. Freeland, H.L.

time was fixed, it was held to be no answer that the delay was caused by an unforeseen accident beyond the charterers' control. The charterer takes the risk if there are not sufficient appliances at the port for loading or unloading—*Wright v. The New Zealand Shipping Company* (5).

Here, however, the custom of the port is referred to in the contract. The question therefore arises, what is the meaning of that reference? It is contended that it could not be treated as the custom of the port that there should be only four lighters capable of discharging the cargo. The custom might refer to the mode of unloading, and the preference to be given to certain vessels, but not to an insufficiency of lighters, which there is nothing to shew that the respondents might not have supplied from some other port. *Ford v. Ootesworth* (6) is not an authority against the appellant, for the principle of that case is, that the contract implied by law, in the absence of stipulation, is that "each party shall use reasonable diligence in performing his part of the delivery at the port of discharge, the merchant being ready to receive in the usual manner, and the owner, by his captain and crew, to deliver in the usual manner." Now, here it was expressly stipulated that the cargo should "be brought to and taken from alongside at merchant's risk and expense."

The following cases were also referred to—*Kearon v. Pearson* (7); *Cunningham v. Dunn* (8); *Davies v. M'Veagh* (9); *Burmester v. Hodgson* (10); and *Rodgers v. Forresters* (11).

Watkin Williams and Macleod, for the respondents.—The words, "custom of the port," are intended to refer to the nature of the appliances in use, and to the regulations affecting their user. The

system under which the lighters were supplied had been in practice a long time, and it must be taken that the parties were aware of it, and of the limited number of the lighters, when they entered into the contract. It could not have been in the contemplation of the parties that the charterers should import lighters or machinery for unloading. There is evidence to shew that they would not have been allowed to do so; and besides, there is no other port within a reasonable distance whence they could have obtained lighters.

Ashcroft v. The Orow Orchard Colliery Company (2) is distinguishable from the present case; for there the delay arose from the charterers having several other ships to load in priority to the plaintiff's, and it was held that they were themselves responsible for the delay. In *Tapscott v. Balfour* (3) there was no reference to the custom of the port. Coals were to be loaded "in the usual and customary manner," and it was held that these words referred only to the mode of loading.

Cohen, in reply, referred to *Tiss v. Byers* (12).

Our. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE).—The question in this case is, whether demurrage is payable for delay in discharging a cargo of steel rails at the Port of East London in South Africa, under the following circumstances.

By the charter-party the appellant's ship *Cumberland Lassie*, was to take on board at Barrow-in-Furness, and to deliver at East London "at any safe wharf where ships can always lay safely afloat, as ordered on arrival, or so near thereto as he, i.e., the master, can safely get," the cargo in question, which was "to be brought to, and taken from, alongside at merchant's risk and expense," and "to be discharged with all dispatch according to the custom of the port." For the loading at Barrow, a fixed number of days was agreed upon, with demurrage at a fixed rate, if that time was exceeded.

East London is a port with a dangerous

(12) 45 Law J. Rep. Q.R. 511; Law Rep. 1 Q.B. D. 244.

(5) Law Rep. 4 Exch. D. 165.

(6) 38 Law J. Rep. Q.B. 52; 39 Law J. Rep. Q.B. 188; Law Rep. 4 Q.B. 127; Law Rep. 5 Q.B. 544.

(7) 7 Hurl. & N. 386; 31 Law J. Rep. Exch. 1.

(8) 48 Law J. Rep. C.P. 62; Law Rep. 3 C.P. D. 443.

(9) 48 Law J. Rep. Exch. 686; Law Rep. 4 Exch. D. 265.

(10) 2 Campb. 488.

(11) 2 Campb. 483.

Postlethwaite v. Freeland, H.L.

bar at its entrance, over which ships heavily laden (as this ship was) cannot pass till they are lightened by the discharge of great part of their cargo. This is done by means of lighters propelled by manual labour along a main rope or warp, running from a quay inside the harbour across the bar, to a buoy outside, from which they are hauled to the ship's side by means of branch warps. The main warp and the whole supply of lighters at the port were in the hands and under the management of the Colonial Government till 1873, when they were transferred by the Government to a company called "The East London Landing and Shipping Company." It is stated in the appellant's case (paragraph 11) that "prior to 1873 the warp had been the property of the Colonial Government, but in that year it was taken over by the Company." Mr. Jameson, a director of the company, gave evidence (pages 92 and 93) to the effect that in 1875, and for some time afterwards, they had a control over the use of the warp; and this is consistent with other parts of the evidence, particularly what appears at pages 21, 23, 35, namely, that when the company had once begun the discharge of a vessel, they "would not allow" any interference, even by the Government surf-boats; and that "when the Government" (which seems to have reserved to itself some sort of concurrent right with the company) "had commenced the discharge of a ship they acted in the same way." The company in 1875 had nine lighters, of which only seven were in working order; and only four were fit to discharge such a cargo as that of the *Cumberland Lassie*, at the time when that ship arrived. The Government had usually two, and they appear to have brought in three more about that time, or soon afterwards, from Port Elizabeth in Algoa Bay, more than 150 miles off, which was the nearest port where any additional lighters could have been obtained. The rails on board the *Cumberland Lassie* were shipped on account of the Crown Agents in the Colony; but I do not find in the evidence any proof that, consistently with the usage of the port (as already described), any of the Government lighters were or could have

been made available for the discharge of this particular cargo by any arrangement within the charterer's power. When (as happened on the arrival of this ship, and as seems to have usually happened at the same time of the year) there were more ships lying off the bar than the lighters in the port could simultaneously discharge, every ship was discharged in her turn, according to the order of her arrival, as reported at the Port Office; one lighter *per diem* being sent to her on every working day till she could cross the bar. If no lighter was ready, suitable for her particular cargo, she might lose her turn for the day; which, however, did not happen in this particular case.

There were twenty-four working days during which the *Cumberland Lassie* lay idle off the bar at East London, from the 31st of August to the 6th of October, 1875, ready (as far as her master was concerned) to discharge her cargo, but prevented from doing so by the priority in the use of the warp, and of the lighters then available at the port, allowed by the custom of the port to ships which had arrived before her. Her turn came on the 6th of October; and no complaint is now made of any subsequent delay. The question before your Lordships is, whether demurrage is payable for her detention there during those twenty-four working days? At the trial before Lord Coleridge, a verdict was given for the defendants, the charterers, under the direction of that learned Judge. A rule *nisi* was obtained for a new trial; but this, after argument, was discharged by the Lord Chief Baron, and Mr. Justice Hawkins, sitting as a Divisional Court. Their judgment was affirmed by a majority (Lords Justices Brett and Thesiger) in the Court of Appeal, Lord Justice Cotton dissenting. The appeal to your Lordships is from that decision, and my opinion is that the judgments appealed from ought to be affirmed.

There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo, when a ship which has been chartered arrives at her destination and is ready to discharge, lies (generally) upon the charterer. If by the terms of the charter-party he has

Postlethwaite v. Freeland, H.L.

agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If on the other hand there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time, that is (as was said by Lord Blackburn in *Ford v. Cotesworth*) (6), "a reasonable time under the circumstances." Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or practically defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence ought (I think) to be taken into consideration.

These distinctions are well illustrated by three cases in Campbell's Reports, which were referred to in the arguments at your Lordships' bar. In *Randall v. Lynch* (1) the charterer was held liable for demurrage, a particular time being fixed by the charter-party for the discharge of the cargo. In *Rodgers v. Forresters* (11) (where the contract was to discharge the ship "within the usual and customary time for unloading such a cargo,") and in *Burmester v. Hodgson* (10) (where the Court thought this to be the contract which the law ought to imply from the terms of the charter-party) the charterer was held not liable for demurrage. In all those three cases, the circumstances which caused the detention of the ships were the same—namely, the crowded state of the London Docks, in which the ships were, by Act of Parliament, obliged to unload.

If your Lordships should agree that the present appeal ought to be dismissed, you will, I think, be adhering to the principle of *Rodgers v. Forresters* (11) and *Burmester v. Hodgson* (10), which do not appear to

me to be in principle inconsistent with later authorities.

Two recent cases were much relied upon in the argument of the appellant's counsel at your Lordships' bar—*Ford v. Cotesworth* (6) and *Wright v. The New Zealand Shipping Company, Limited* (5). *Ford v. Cotesworth* (6) appears to me to be perfectly consistent with the earlier cases. The judgment of the Court of Error turned upon a *vis major*, which the Court held to have impeded the master of the ship, as well as the agent of the charterer, from performing his part in the discharge of the vessel. But at the trial the jury was told by the Lord Chief Justice of England (in my opinion correctly, nor do I perceive that the Court of Error thought otherwise) that "the question whether the time was reasonable or unreasonable ought to be judged with reference to the means and facilities available at the port, and to the facilities and course of business at the port."

In the other case (*Wright v. The New Zealand Shipping Company, Limited*) (5), which is at first sight much more favourable to the appellant, there were special circumstances on which the decision might very well have been founded, but to which (as it does not appear to me to have been in fact founded upon them) I do not more particularly refer. The distinctions between that case and the present (whether the doctrine laid down in it can be supported or not) are, that there no express reference was made in the contract to the custom of the port, and that if such a reference ought to be implied, no custom or other circumstances existed which would have made it impossible for the charterer, by the use of any reasonable diligence, to have provided himself with lighters for the discharge of the cargo earlier than he did. What the Lords Justices in that case held was (in Lord Justice Cotton's words), that "an obligation was imposed upon the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port;" and it was expressly added that he would not have been bound to provide appliances which were not in use there, but which might be in use at other ports.

Postlethwaite v. Freeland, H.L.

In the present case it appears to me to be the true result of the evidence that the *Cumberland Lassie* was "discharged with all dispatch according to the custom of the port." In the construction of this contract I think that the words, "according to the custom," &c., ought to be read in connection with the word "dispatch." Looking at the natural conditions, and the rules of the port, its distance from any other port, the necessity for the use of the warp, and the control over the warp possessed by the East London Landing and Shipping Company, I do not think that the insufficiency of the number of lighters available to discharge simultaneously all the ships lying outside the bar of East London when the *Cumberland Lassie* arrived there, can be regarded as an impediment to the due discharge of that ship, collateral to or separable from the custom and practice of the port, against which the charterers ought to have provided, or for which they ought (as between themselves and the shipowner) to be held responsible.

I therefore propose to your Lordships to dismiss the present appeal with costs.

LORD HATHERLEY.—The appellant was the owner of the ship called the *Cumberland Lassie*, and as such chartered her to the respondents, the Freelands, by a charter-party dated the 28th of April, 1875. The ship was to proceed to Barrow-in-Furness, and to take on board a cargo of steel rails and fastenings, and to proceed to East London (Cape of Good Hope), "to discharge at any safe wharf where ships can always lay safely afloat as ordered on arrival, or as near thereunto as she can safely get, and there deliver the same." The document contained the following provisions: "The cargo to be brought to and taken from alongside at merchant's risk and expense." "Twelve running days, Sundays and holidays excepted, are to be allowed the merchants if the ship is not sooner despatched, for loading the cargo as above, any days on demurrage over and above the said laying days at 5*l.* per day." "The cargo is to be discharged

with all dispatch, according to the custom of the port."

Now the facts proved in evidence are that East London is a bar harbour requiring great care and attention in unloading vessels, because they cannot safely carry on the operation until the vessel to be unloaded has been lightened of a great part of her cargo by means of lighters, which are guided across the reef into the harbour by a process of warping along a hawser taken over the reef to which other ropes are fastened. The supply of lighters appears to be scarcely adequate to the need, when there are many ships to be attended to; and, according to the evidence, in the autumn months, when there are sometimes (as was the case in this instance) thirteen ships to be attended to, Mr. Walker, a retired harbour-master, says that three months would be required for discharging a ship of the size of, and laden with a cargo like, the *Cumberland Lassie*. This scarcity of lighters seems to arise from a practical monopoly of the lighters and the warping rope, the business of unloading being acquired by the Government originally, and afterwards by a company who bought the concern from the Government. As a consequence of the supply of lighters not being adequate to the discharge of all vessels as they arrive, there has arisen a custom, or rather a usage of the port, by which any vessel arriving is marked for its turn according to the arrival, but with a preference to Government steamers. It appears that the *Cumberland Lassie* was unloaded in the usual way, and that the days occupied, including those in which she had to wait for her turn (being the days in question in this suit) were not more than the number of days usually occupied, during the period of the year when she was there, by vessels of her size and burthen.

Now, it appears to me, from the evidence and the cases cited at the bar, that the charterers (the respondents) have not been in any default in respect of the engagements entered into on their part in the charter-party, namely, "to discharge the ship with all dispatch, accord-

Postlethwaite v. Freeland, H.L.

ing to the custom of the port." The cases shew that when a specific time is named, either in words or by necessary implication, the party who has contracted to unload a ship within the time must bear the loss occasioned by any excess of time, although the delay was not occasioned by any default on his part; for, as was said by Lord Tenterden in his work on shipping (in a passage quoted by my noble friend opposite), in delivering the judgment of the Court in *Ford v. Cotesworth* (6), "he has engaged that it shall be done." But all that is engaged to be done here is "to proceed with all dispatch according to the custom of the port." Such an engagement might not, perhaps, excuse the merchant from the consequence of any unusual accident arising to delay the discharge of the vessel beyond the customary time of discharge (see *Barker v. Hodgson*) (13), because the merchant has contracted that the discharge shall take place within a given time, namely, that of the usual period for discharge of a like vessel in that particular port, and the shipowner is entitled to have his ship back at the expiration of that time or to be paid demurrage, whatever be the cause of delay. But when the contract merely engages that the merchant shall, with all dispatch, according to the custom of the port, unload the vessel, he will be, as it appears to me, fulfilling his contract if he employ all the usual methods of dispatch, and especially the warps and lighters usually so employed, and especially when, in fact, a dispatch was obtained as great as in the case of any other ship of the same size and burthen.

I do not think that the merchant has engaged that he will use any other means of dispatch than those used habitually at the port. It is suggested that he should have taken care that the supply of lighters should be adequate without delay to attend to his ship. But this would be to adopt a course which there is no evidence that anybody frequenting the port ever adopted. So far is that from being the case, that no ship is shewn

(13) 3 M. & S. 269; cited also in *Ford v. Cotesworth*.

ever to have adopted any other course than that which was used by the defendants; nor has the argument suggested any usual course as having been omitted by the merchant, which will also be a course coinciding with the usage of the port. Any other course would be outside the contract, and if it failed, as it probably might when adopted for the first time, the consequent result would be a breach of the existing contract, to which the demurrage might be attributed. The course taken as to turns seems to me part of the usage.

I agree, therefore, with my noble and learned friend, the Lord Chancellor, that the appeal should be dismissed with costs.

LORD BLACKBURN.—The question in this case, in my mind, depends on what is the true construction of the ordinary clause in a charter-party, "the cargo to be brought to and taken from alongside at merchant's risk and expense." Is the extent of the implied undertaking on the part of the merchant to provide lighters or other appliances for taking the cargo from alongside? The parties to the charter-party may, by any stipulations they please, alter the undertaking which would otherwise be implied; but in the charter-party now before this House, I think they have not done so. The only other reference to the discharge of cargo is, "the cargo is to be discharged with all dispatch according to the custom of the port." I do not think that this alters the question, as the express reference to the custom of the port of discharge is no more than would be implied. For I take it that a charter-party, in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be (see *Hudson v. Ede*) (14), though it was expressly found in the case that the shipowner and his broker were not aware of the usage. In the case of *Wright v. The New Zealand*

(14) 36 Law J. Rep. Q.B. 273; 37 Law J. Rep. Q.B. 166; Law Rep. 2 Q.B. 586; Law Rep. 3 Q.B. 412.

Postlethwaite v. Freeland, H.L.

Company (5) the Court of Appeal were of opinion, as Lord Justice Bramwell expressed it, that the merchants "were bound to have lighters ready to discharge her forthwith, and were not entitled to excuse the omission to do so on the ground that, at the port of discharge, there was only a certain number of lighters, and when the plaintiff's vessel arrived, other ships belonging to other persons required those lighters, and the defendants got lighters for unloading the cargo as soon as they could." "To my mind," says he, "those circumstances afford no answer to the plaintiff's complaint; the defendants having undertaken to unload the vessel, were bound to be ready to do it, and to finish it within a reasonable time." And the other members of the Court express the same idea.

I think that if the true construction of the clause, "cargo to be brought to and taken alongside at merchant's risk and expense," is, that the merchant undertakes to be ready with lighters to discharge the vessel, the subsequent clause inserted in this charter-party for the shipowner's benefit that "the cargo is to be discharged with all dispatch according to the custom of the port," could not have been intended to relieve the merchant from that undertaking. But the question now to be decided, as I think, is whether there is an undertaking to that extent.

The facts which are sufficient to raise the question in the present case are few, and are not in dispute. By the charter-party between the plaintiff (as managing owner of the *Cumberland Lassie*) and the defendants, the ship was to proceed to Barrow-in-Furness, and there load a cargo of steel rails and fastenings, "and, being so loaded, shall therewith proceed to East London, Cape of Good Hope, to discharge at any safe wharf where a ship can always lay safely afloat, as ordered on arrival, or so near thereunto as she can safely get, and there deliver the same, on being paid freight as follows:—" "The cargo to be brought to and taken from alongside at merchant's risk and expense, twelve running days, Sundays and holidays excepted, are to be allowed the said merchants (if the ship is not sooner dispatched) for

loading the cargo, as above. Any days on demurrage over and above the said lying days, at 5*l.* per day. The cargo is to be discharged with all dispatch according to the custom of the port."

The ship sailed with the cargo on board, and arrived off East London on the 31st of August, 1875. East London is a bar harbour, and a vessel of the burthen of the ship in question could not cross that bar until a considerable part of her cargo was discharged; and it is not disputed that the *Cumberland Lassie* brought up at the usual place of discharge, about a mile outside the bar, and was there on the 1st of September, 1875, and there remained, with the captain and crew ready to do their part in discharging her as soon as any lighter came alongside. No lighter came alongside till the 6th of October. The plaintiffs (the shipowners) can in nowise be considered the authors of this delay, which, *prima facie* at least, was an unreasonable time to keep the ship waiting for lighters, and the question seems to me whether the merchants are to be considered the authors of this delay, or, in other words, whether they, the respondents, shewed a sufficient excuse for this delay. The facts proved seem not disputed.

It appears that the Colonial Government had laid down a warp, which was anchored inside the bar in the river, and carried across the bar, and anchored outside to a buoy, and this warp had been made over to a company called the East London Loading and Shipping Company. The lighters in use at the port are decked boats fitted with two horns, and by placing the warp between these horns and along the deck the crew of the lighter are enabled to warp the vessel out across the bar to the buoy outside. From the buoy the lighter is taken to the ship, being hauled either by lines sent from the ship, or sometimes by tugs. The loaded lighter is brought back to the buoy, and then warped back over the bar. Lighters cannot be thus taken across the bar by means of the warp except when the weather permits it to be used. But between the 1st of September and the 6th of October there were twenty-five days in which the warp could be worked. The

Postlethwaite v. Freeland, H.L.

company had only four lighters there fit to carry rails. The Government, who were the consignees of the railway iron, obtained three more, so that there were seven in all; and it is not in dispute that, as far as concerned the use of the warp, more lighters could have been utilised if they had been there. There were waiting for discharge thirteen ships which had arrived before the *Cumberland Lassie*. The seven available lighters were appropriated to the ships in turn as they had arrived, and the *Cumberland Lassie* did not get her turn till so many of those thirteen were discharged as to set a lighter free. The discharge of the ships before her was proceeded with as rapidly as was possible with that limited number of lighters. But if there had been either fewer ships waiting or more lighters available, she would not have been kept so long. There was evidence that the number of ships was unusually great, owing to the fact that the railway material was then being discharged.

The counsel for the appellant did not, at your Lordships' bar, think it necessary or desirable to enter further into the facts; as, if the delay in beginning to unload was not excused, the verdict for the defendant ought not to stand.

The case came on for trial on the 13th of March, 1878, before Lord Coleridge and a special jury. The jury were told, and I think quite correctly, that "custom" in the charter-party did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port, and then left it to them to say whether there was such an established custom, and if the *Cumberland Lassie* was unloaded with all dispatch under the circumstances. And in leaving this to the jury he told them in effect that they were to take into account the circumstances as they were, though the number of ships was unusually great, and the number of available lighters fewer than could have been worked by the warp. I should observe that it appears to be clear that no lighters could have been obtained from any other port in a less time than was occupied in discharging the ships that had arrived before the *Cumberland Lassie*;

so that no question was raised as to whether, if there had been such, the merchant ought to have obtained them. The only question raised on the facts was that on which Lord Coleridge thus directed the jury. It is not disputed that if the direction was right, the verdict for the defendants was justified. It seems to me clear that if the view of the law afterwards laid down by Lords Justices Bramwell and Cotton, and, I incline to think (as reported), by Lord Justice Thesiger also, in *Wright v. The New Zealand Shipping Company* (5), is correct, this was a misdirection.

The present cause was brought before the Court of Appeal, then consisting of Lords Justices Brett, Cotton and Thesiger, shortly after that Court, then consisting of Lords Justices Bramwell, Cotton and Thesiger, had given judgment in *Wright v. The New Zealand Shipping Company* (5). Lord Justice Cotton adhered to the view of the law he had taken in that case, and thought there should be a new trial. Lord Justice Thesiger distinguished the two cases, not, to my mind, successfully, and thought the direction in the present case right; and, as Lord Justice Brett agreed with him, judgment was given for the defendants. The appeal is against that judgment. As the two decisions, that in the present case and in *Wright v. The New Zealand Shipping Company* (5) were almost contemporaneous, and were on applications for new trials in cases tried at the same Assizes, and almost contemporaneously, I think this must be treated as an appeal from both these cases. So that your Lordships have the opinion of Lord Justice Bramwell and Lord Justice Cotton on the one side, and Lord Justice Brett and Lord Justice Thesiger on the other, a balance of authority as nearly equal as could well be.

It is very singular, considering how long charter-parties having a clause in this form have been in use, that there should be no direct authority on the subject; but so it is. At least the counsel at your Lordships' bar were able to cite none, and I have not been able myself to discover any. It is almost as singular that the question should at last have been

Postlethwaite v. Freeland, H.L.

raised in two cases almost at the same time, and that the Court of Appeal should be equally divided in opinion. I think your Lordships must decide on analogy to other cases and on general principles of law; and though I have felt, and still feel, that there is a great deal to be said in favour of the view of the law taken by those Judges who are in favour of the appellant, I have come to the conclusion that the ruling of Lord Coleridge and the judgment below were right, and that the appeal should be dismissed with costs.

As the merchant, if not himself resident at the port of discharge, at all events has a consignee and correspondent there resident, he presumably knows all about the means and appliances for discharging a ship there better than the shipowner. It therefore seems very reasonable that the shipowner, in making his bargain, should require the merchant to make an estimate of the probable time of discharging the ship, and take on himself the risk of that time being exceeded; and then the shipowner can fix the payment he is willing to take with reference to this; and this has long been done by providing lay days and demurrage for the discharge.

In the last edition of *Abbott on Shipping*, published in *Lord Tenterden's Life* (5th edition), page 180, it is said, "The usual clauses purporting that it is covenanted and agreed by and between the parties that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful to detain the vessel for those purposes a further specified time on payment of a daily sum, constitute a contract on the part of the freighter that he will not detain the ship for those purposes beyond the two designated periods; and if he does so detain her he is liable to an action on the contract in the form adapted to the nature of the instrument. If a ship be so detained the daily rate of demurrage mentioned in the charter-party will in general be the measure of the damages to be paid; but it is not the absolute or necessary measure; more or less may be payable as justice may require, regard being had to the expense and loss incurred by the owner, and the amount

must be settled by a jury, if the parties cannot agree. And where the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done.*" These last words are put in italics by Lord Tenterden. It still remains the more usual form of charter-party to insert lay days and demurrage days. In many of the cases cited on the argument at the bar the charter-parties were of this nature, and the question only was whether the lay days had begun to run. *Tapscott v. Balfour* (3) was of this nature; for though the charter-party did not name a specific number of days, it provided that the ship was "to be loaded by the defendants at the rate of 100 tons per working day;" and as the burthen of the ship was known, and *id certum est quod certum reddi potest*, this was equivalent to naming a certain number of days. No question could have been made, if there had been lay days in the present charter-party, that they would have begun to run on the 1st of September.

Neither does *This v. Byers* (12) bear on the present case. The Court there says:—"We took time to look into the authorities, and are of opinion that where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that from the time when the ship is at the usual place of discharge he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay days." Had there been lay days in this case, that would have had a bearing on the question, whether the days on which the weather prevented lighters from crossing the bar were to be reckoned as lay days or not. The parties can by express agreement prevent any dispute as to this, as was done in *Hudson v. Ede* (14), though, as that case shews, they may, unless they are cautious, produce results which they did not anticipate.

But, for whatever reason, the parties who framed the charter-party in this case, and that in the case of *Wright v. The*

Postlethwaite v. Freeland, H.L.

New Zealand Shipping Company (5), did not choose to have lay days for the discharge of the vessel, and, consequently, it is left to the Court to say what is the contract implied by law, not qualified in any way in the charter-party in *Wright v. The New Zealand Shipping Company* (5), and in the present case only qualified, if at all, by the provision that the cargo is to be discharged with all dispatch, according to the custom of the port. The strongest argument in favour of the appellant is, I think, this:—"The merchant," says Lord Ellenborough, in *Barker v. Hodgson* (13), "is the adventurer who chalks out the voyage, and is to furnish at all events, the subject-matter out of which the freight is to accrue." And on this principle it was held in that case, and has been held in several others, that there is an absolute contract on his part to furnish a cargo, and that he is bound to pay damages if it becomes impracticable to do so; though it would be otherwise if it became illegal to do so. The cases of *Adams v. The Royal Mail Steamer Company* (4) and *Kearon v. Pearson* (7) proceed on this principle. The parties may, and often do, provide, by express qualification, that strikes, quarantine or other impediments, shall excuse the merchant. And perhaps the same effect may be produced if it appear that the contract was framed with reference to any particular state of things—*Harris v. Dressman* (15). I am not aware of any case contradicting the doctrine that, in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute. And if the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. And this seems to be the basis of the judgments of Lords Justices Bramwell and Cotton, and, as it rather seems to me, of Lord

Justice Thesiger, also, as then expressed (though he does not adhere now to that opinion) in *Wright v. The New Zealand Shipping Company* (5), and of Lord Justice Cotton in the case now at the bar. But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo. There is no case in which it has been held so to do; and, as far as I can find, there is nothing in any of the text books in support of the doctrine that it does; and, as it seems to me, what authority there is (I agree it is not very direct), is against the position.

In *Rodgers v. Forresters* (11) the charter-party expressly stated that "The said freighter should be allowed the usual and customary time to unload the ship or vessel at her port of discharge." The facts appearing to be that the cargo (wines) was of such a nature that it was usual and customary to unload in a bonded warehouse, and that the delay in this particular case was owing to an unusual crowd of shipping in the docks, Lord Ellenborough's ruling was that the usual and customary time was that which would be taken to discharge into a bonded warehouse in the then state of the docks. In *Burmester v. Hodgson* (10), which came on before Chief Justice Mansfield three days afterwards, the point was still more clearly raised. There was no charter-party, the question arising on a bill of lading; but as the defendants were consignees of the whole cargo of brandies, that did not, I think, make any difference. The bill of lading was silent as to the period of discharge. It appeared that the ship entered the docks and did not complete her discharge for sixty-three days. "It appeared"—says the report—"to be the invariable practice to bond cargoes of this sort. Even when the cargo is bonded, if the docks are not overcrowded, twenty or twenty-three days are a sufficient space of time for unloading." Chief Justice Mansfield said, "Here the law would only raise an implied promise to do what was in *Rodgers v. Forresters* (11) stipulated for by an express covenant, namely, to discharge the ship in the usual and customary time

Postlethwaite v. Freeland, H.L.

for unloading such a cargo. That has been rightly held to be the time within which such a cargo can be unloaded in her turn into the bonded warehouses. Such time has not been exceeded by the defendant. If the brandies were to be bonded they could not be unloaded sooner, and the defendant seems to have been as anxious to receive as the plaintiff was to deliver them." This was an express decision that the merchant was not responsible for the forty days' delay occasioned by the unusually crowded state of the docks. I cannot see on what principle the merchant can be responsible for the lighters being too few to unload the unusual number of ships, if he is not to be responsible for the dock being too small to unload the same unusual number.

In *Ford v. Cotesworth* (6) it was held that the contract implied by law was not, as Chief Justice Mansfield held, a contract to discharge in the usual and customary time, but one that the merchant and ship-owner should each use reasonable dispatch in performing his part. But this does not in the least affect the point for which the ruling in *Burmester v. Hodgson* (10) is in this case valuable,—that in considering what is reasonable dispatch under the circumstances, the number of ships there, though unusually large, is one of the circumstances to be taken into account. In *Taylor v. The Great Northern Railway Company* (16), it was laid down that a "reasonable time" meant what was reasonable under the circumstances. Justice Byles there says, "My brother Hayes treats ordinary time and reasonable time as meaning the same thing; but I think reasonable time means a reasonable time looking at all the circumstances of the case. The delay in this case was an accident, as far as the defendants were concerned, entirely beyond their control, and therefore I think they are not liable."

This is, I think, right and applicable to the present case.

The only other case which it is necessary to notice is *Ashcroft v. The Crow Orchard Colliery Company* (2). There the regulations of the docks, which were

known to both parties, were, amongst others: "No coal agent to be allowed to load more than two flats at the cranes at the same time, nor to have more than three vessels in the docks loading and to load at the cranes at one time."

By the charter-party the vessel was to load in the docks: "To be loaded with the usual dispatch of the port."

The facts were that the defendants acted as their own coal agents, and had at the time thirteen ships which had priority over the plaintiffs'; and the ship was in consequence kept outside the dock for thirty days after she was at the disposal of the defendants, before the dock company would admit her. The decision of the Court was that the contract was to load with the usual dispatch, and that this self-imposed liability on the part of the charterers to do so was no defence, even if the plaintiffs had known of it, which in fact they did not. I think this, which is probably right, has no bearing on the present case.

The result is, that I come to the conclusion that the ruling of Lord Coleridge was right, and that the appeal should be dismissed with costs. This is hard on the shipowner, who is in no default, and who probably never would have entered into a charter-party in those terms if he had thought he thereby incurred such a risk of delay. All that a Court of law can do is to construe the contract as the parties have made it, so as to make it as clear as can be what the legal effect of such a contract is. The parties can, by altering the terms of their contracts in future, avoid any inconvenience that arises from that construction. It is no doubt not an easy thing to introduce a new form of contract into mercantile use, but it can be done.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Chester, Urquhart & Co., agents for R. B. D. Bradshaw, Barrow-in-Furness, for appellant; Allin & Greenop, for respondents.

[IN THE COMMON PLEAS DIVISION.]
1880. } *In re* THE WEST BROMWICH
April 26. } SCHOOL BOARD.

Elementary Education Acts, 1870 & 1873 (33 & 34 Vict. c. 75 and 36 & 37 Vict. c. 86)—School Board Election—Mode of questioning Election—Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60).

The Corrupt Practices Municipal Act, 1872 (35 & 36 Vict. c. 60), does not apply to a school board election, and therefore such election cannot be questioned by petition under that Act.

A. Wills (*Austie* with him) moved for an order that a petition against the election of certain members of the West Bromwich School Board which had been presented under the Corrupt Practices Municipal Act, 1872 (35 & 36 Vict. c. 60) should be taken off the file of the Court on the ground that that Act does not extend to School Board elections. The mode of election of a school board is provided for by section 31 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and section 33 enacts that "in case any question arises as to the right of any person to act as a member of a school board under this Act, the education department may, if they think fit, inquire into the circumstances of the case and make such order as they deem just for determining the question, and such order shall be final unless removed by writ of *certiorari* during the term next after the making of such order." The validity of a school board election may therefore be enquired into by the Education Department under this 33rd section. It may also, perhaps, be enquired into by a *quo warranto*, but it cannot be questioned by petition under the Corrupt Practices Municipal Act, 1872. That Act does not apply to such election.

The polling at a school board election is to be by ballot according to the Ballot Act. That is the effect of the Elementary Education Act, 1873 (36 & 37 Vict. c. 86). The schedules to that Act by section 26 are to be of the same force as if enacted in the body of that Act, and the second schedule, which gives rules for the

election of members of a school board, declares that "any poll shall, so far as circumstances admit, be conducted in like manner in which the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted and, subject to any exceptions or modifications contained in any order of the Education Department made in pursuance of this Act, the Ballot Act, 1872, shall apply in the case of the election of a school board in like manner as if the provisions thereof were herein enacted with the substitution of school board election for municipal election."

The Ballot Act, 1872 (35 & 36 Vict. c. 33), by section 20, applies the mode of taking the poll by ballot under that Act at a parliamentary election to the poll at a contested municipal election.

[LORD COLERIDGE, C.J.—Section 33 of the Elementary Education Act, 1870, is not repealed.]

No; and there is nothing which applies the Corrupt Practices Municipal Act, 1872, to school board elections. That Act is not incorporated with or made part of the Ballot Act, 1872, and, therefore, the application of the Ballot Act to the school board election does not also make the Corrupt Practices Municipal Act, 1872, applicable to such election.

[He was then stopped by the Court.]

Jeune, for the petitioners.—Between the passing of the Elementary Education Acts, 1870 and 1873, the Ballot Act of 1872 (35 & 36 Vict. c. 33) was passed, and that Act applied its provisions for taking the poll at parliamentary elections to a poll at a contested municipal election. Then section 2, sub-section 2, of the Corrupt Practices Municipal Act, 1872 (35 & 36 Vict. c. 60), enacts that that Act "shall, so far as is consistent with the tenor thereof, be construed as one with the Acts for the time being in force relating to boroughs and to elections in boroughs." That in effect incorporates it, therefore, with the Ballot Act, 1872, and as by the 2nd schedule of the Elementary Education Act, 1873, the Ballot Act, 1872 is to apply to the election of a school board in like manner as if its provisions were enacted in the Elementary Education Act, "with the substitution of

In re West Bromwich School Board, C.P.

school board for municipal election," so the Corrupt Practices Municipal Act, 1872, must, therefore, also apply to a school board election.

[LORD COLERIDGE, C.J.—The 35 & 36 Vict. c. 60. s. 2. sub-sect. 2 does not say that that Act is to be deemed as one with the Acts relating to elections in boroughs, but that it shall be construed as one with such Acts.]

That is in effect the same. "Construed as one" must mean that the provisions applicable to the one Act shall be applicable to the other.

Wills replied.

LORD COLERIDGE, C.J.—I am of opinion that Mr. Wills is entitled to succeed in this application and that the petition must be taken off the file of this Court. The Elementary Education Act, 1870, contains certain provisions as to the election and constitution of school boards, and section 33 points out a mode for inquiring into and determining any question as to the right of any person to act as a member of such board. [His Lordship here read that section.] It appears to me that that was clearly the state of the law at that time. There was to be an election in a certain form, and the mode of questioning it was to be by the education department. At that time the Ballot Act had not passed. It did so in 1872, and in 1873 an Act was passed to amend the Elementary Education Act, and the legislature thought proper by that Act to apply the election by ballot to school board elections, and accordingly in the second schedule it enacted that the poll should be taken by ballot in like manner as the poll at a contested municipal election, and that the Ballot Act should apply in the case of the election of a school board, as if the Ballot Act had been part of the Elementary Education Act, 1873. In that same Act, by a subsequent schedule, namely, the 4th schedule, certain parts of the Elementary Education Act, 1870, are repealed, but not section 33, and that section remains, therefore, unrepealed and stands as it was before the Act of 1873. The argument which Mr. Jenne has addressed to us is, that as the Act of 1873

has applied the Ballot Act to a school board election, as if the latter were a municipal election, the Corrupt Practices (Municipal Elections) Act, 1872, which is to be construed as one with Acts relating to borough elections, is to be read as applying, therefore, to a school board election; but the Ballot Act is one enactment, and the Corrupt Practices Act is another and different enactment, and the legislature which says the proceedings at the school board election shall be according to the one Act carefully leaves out the other Act. It is said that the one is to mean the other because one of these statutes says it is to be construed as one with Acts which would include the other Act, but I think that the Act, namely, the Elementary Education Act, 1873, means what it says, and does not mean what, on behalf of the petitioner, it is contended it does.

GROVE, J.—I am of the same opinion. I had, and still have, some difficulty about what is the meaning of the words "construed as one" in section 2 of the Corrupt Practices Municipal Elections Act, 1872. Still if that Act is to be deemed as one with the Ballot Act in relation to borough elections, the 33rd section of the Elementary Education Act, 1870, has not been repealed, and therefore a school board election must be questioned as there provided.

Order granted.

Solicitors—Edward Doyle & Sons, agents for Jackson & Sharpe, West Bromwich, for petitioners; F. Needham, agent for E. Caddick, West Bromwich, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]
1880. } WILLIAMS AND ANOTHER (appellants)
Feb. 19. } *lants*) v. ELLIS (respondent).

Turnpike Toll—Carriage drawn by Steam or other Power—Bicycle.

[For the report of the above case, see 49 Law J. Rep. M.C. 47.]

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1880.
March 22, 23. } LORD AVELAND v. LUCAS.*

*Highways—Locomotives on Roads—
Highways and Locomotives Amendment
Act, 1878 (41 & 42 Vict. c. 77), s. 23—
"Excessive Weight" and "extraordinary
Expenses," how ascertained.*

Section 23 of the *Highways and Locomotives Amendment Act, 1878*, enacts that where by a certificate of their surveyor it appears to the authority which is liable to repair any highway that, "having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway, by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon," the authority may recover in a summary manner the amount of such expenses from the person by whose order the weight or traffic has been conducted.

The appellant used on a highway a locomotive engine and waggons in order to carry goods and materials for the ordinary purposes of his estate. The engine was constructed and used in accordance with the *Locomotives Acts, 1861 and 1865*, and the weight of the engine and the width of its wheels were in compliance with section 28 of the *Highways and Locomotives Amendment Act, 1878*. Justices having made an order for the payment by the appellant of a sum to cover extraordinary expenses incurred by the highway authority by reason of the damage caused to the road by the use of the engine and waggons, it was—

Held, on a case stated by the justices, that the question of what was "excessive weight" and "extraordinary traffic" within section 23, must be determined with reference to the ordinary traffic of the road, and its capacity for bearing weights, and not with reference to abnormal traffic merely, or to weight in excess of that authorised by

statute, and therefore that the order of the justices was rightly made.

Decision of the Common Pleas Division affirmed.

Appeal from a judgment of the Common Pleas Division, on a Case stated by justices under 20 & 21 Vict. c. 43.

Upon an information laid by the surveyor of highways for the parish of Edith Weston, in the county of Rutland, against Lord Aveland, justices at petty sessions, holden at Oakham, ordered that Lord Aveland should pay to the highway authority of Edith Weston the sum of 40*l.*, being the amount of extraordinary expenses alleged to have been incurred by the highway authority in repairing a highway within the parish, by reason of the damage caused by excessive and extraordinary traffic on the highway through the use by Lord Aveland of some locomotive engines and trucks laden with bricks, &c.

The sum was claimed under and in pursuance of section 23 of the *Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77)*.

At the request of the defendant the justices stated a case which (so far as is material) was as follows:—

1. The respondent is a landed proprietor, and the surveyor of highways in the parish of Edith Weston, which parish is not situated within the district of any highway board, or of any urban sanitary authority.

2. The appellant is a large landed proprietor, having real estate in the parish of Edith Weston, and in the adjacent parishes of North Luffenham and Normanton and in other parishes. Included in his estate are a mansion and grounds where he resides at Normanton, adjoining the parish of Edith Weston towards the north, and also brick and tile works in the parish of North Luffenham, which last-mentioned parish adjoins the parish of Edith Weston towards the south. At these brick and tile works, bricks and tiles, drain pipes and similar goods are, and for several years have been, manufactured for use on the appellant's estates, and also for sale. These works are connected with the Peterborough and Syston branches of

(1) *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

Aveland v. Lucas (App.), C.P.

the Midland Railway Company by a siding, and goods made at such works and not used (with other goods) on the appellant's estate as hereinafter mentioned, are either taken away by purchasers in carts and waggons drawn by horses, or are carried away by train from the siding.

3. Prior to the 30th of July, 1877, the mode of conveyance of goods used on the appellant's estate was cartage with horses.

4. On the 30th of July, 1877, the appellant first used a traction engine, which with the waggons thereto has since been used for the traffic between the North Luffenham railway station and various parts of the appellant's estates. In going to and from the railway station the traffic has been in part over the highway in the parish of Edith Weston. Since the 5th of February, 1878, the appellant has used a second traction engine for similar purposes, and upon the same roads. These engines usually draw two waggons, each of which is capable of carrying six tons. The total weight of an engine and trucks when loaded would be about twenty-four tons.

5. The engines and waggons have been employed solely for the carriage of materials and goods used for ordinary purposes on the appellant's estate, such as materials for repairing the mansion, farm-buildings, farm-houses and labourers' cottages, for repairing fences and roads, drain tiles, fuel and other similar things.

These engines and waggons have not even been used for carrying bricks or other things which have been sold by the appellant, or in any way whatever for purposes unconnected with the use and occupation and maintenance or repair of his estate; and all the materials or things carried by them over the road in question would, if the engines and waggons had not been used, have been carried in carts and waggons drawn by horses.

6. The weight of one of the engines was six and of the other nine tons, or with coals and water, the weight was nine and ten tons respectively. The weight of each of the waggons was thirty cwt., the tires of the wheels of the engines were sixteen inches wide, and the tires of

the wheels of the waggons eight inches wide; and the engines and waggons were constructed and used, according to the evidence of Mr. Aveling, the maker of the appellant's engines and waggons, and of the superintendent of the appellant's agricultural and general works (which was not contradicted) in accordance with the provisions of the Locomotive Acts and the Acts amending the same. According to the evidence the waggons might legally carry eight tons, but they were so constructed as only to carry six tons.

7. The weight of an ordinary agricultural waggon drawn by horses varies from fifteen to twenty-five cwt. The width of the tires is from three to four-and-a-half inches. Such waggons carry loads of from two to four tons. [Here followed a calculation of the bearing weight per inch upon the road of the engines, and the different sorts of waggons used by the appellant.] There was no evidence as to the kind of waggons or carts used by the appellant previous to his using the locomotives and the waggons drawn by them.

8. The engines and waggons, in passing between the North Luffenham railway station and the appellant's estate, pass over a highway in the parish of Edith Weston, the length of which is about three-quarters of a mile.

9. The total length of the highways in the parish of Edith Weston is seven miles, six and three-quarters furlongs. The total cost of the repair of the said highways for the year ending the 31st of March, 1877, was 142*l.* 10*s.* 6*d.*; for the year ending the 31st of March, 1878, 144*l.* 0*s.* 9*d.*, and for the year ending the 31st of March, 1879, 189*l.* 11*s.*, being an increase in the latter year of 45*l.*

No separate accounts were kept previous to the passing of the Highways and Locomotives Act, 1878, of the cost of repairs of the highway mentioned in the information, over which the engines and waggons of the appellant pass; but the above-mentioned accounts for the years 1877, 1878 and 1879, of the cost of the repairs of the highways in Edith Weston included the cost of repairing the highway mentioned in the information.

[The remainder of clause 9 set out

Awland v. Lucas (App.), C.P.

items of expenditure by which it appeared that for the year ending the 31st of March, 1879, out of the 189*l.* 11*s.* 10*d.*, being the total cost of repair of all the highways in the parish of Edith Weston, 81*l.* 8*s.* 5*d.* was the cost of the repair of the highway mentioned in the information.]

10. The respondent and his witnesses stated that the additional outlay in the year ending the 31st of March, 1879, was rendered necessary in consequence of the use of the locomotives, which usually went five times a week along the highway mentioned in the information; that the locomotives cut deep ruts, and spoilt the shape of the road by making the middle part of the road the lowest, when it should be the highest; that the weight of the locomotives being, as hereinbefore stated, in excess of the weight of an ordinary waggon drawn by horses, made (the respondent and his witnesses contended) the road bulge, that the wheels would bite on and tear up the road and tear great pieces up, and that the ruts required to be constantly filled up or the road would have become impassable; that they did not complain of the goods or materials that were carried by the engines and waggons, but of the mode in which they were conveyed, and of the excessive weight of the engines and trucks and the wheels together. It was the weight of the engine and the bite of the wheels by which they alleged that the damage was done and the additional outlay caused. It was proved that the roads in Edith Weston were properly constructed, and had been well drained and in good condition before the appellant used the engines, and that they were very good previous to last winter, but were much deteriorated since.

11. [The case then stated the expense per mile for repairing highways in three adjoining parishes to Edith Weston during 1877, 1878 and 1879.] For the year ending the 31st of March, 1879, the expense of repairing all the highways in the parish of Edith Weston, except the highway mentioned in the information, was at the rate of 15*l.* 6*s.* 11*d.* per mile. The expense of repairing the last-mentioned highway during the same

period was at the rate of 102*l.* 7*s.* 2*d.* per mile.

12. Except as aforesaid there was no evidence to shew what proportion of the expense of repairing the highways in Edith Weston was caused by the appellant's engines and waggons passing along the said portion, nor what part of such expenses was caused since the passing of the Highways and Locomotives Act, 1878.

13. Evidence was given by the appellant's witnesses to shew that the locomotives did not exceed nine feet in width, and that they were respectively eight and nine tons in weight, and, as before mentioned, constructed and used in accordance with the Locomotives Acts; that the bearing weight per inch of the wheels of the waggons and carts drawn by horses was greater than that of locomotive engines and waggons similar to those of the appellant; that the use of such locomotives and waggons did not cause so much damage to ordinary roads as would be caused thereto by the carriage of the same goods thereover by carts and waggons drawn by horses; that, whether a road be made as an ordinary road in an agricultural district, or made as roads are usually made in urban districts, the wear and tear of materials conveyed by locomotives and waggons such as the appellant's would be less than if the same materials were conveyed in waggons and carts drawn by horses; that the injury described as done to the road was, in the opinion of the witnesses, impossible to have been caused by the locomotives and waggons of the appellant; and that the roads in Normanton parish (an adjacent parish in which the appellant had property) had cost less in keeping in repair since these locomotives and waggons had been used; but no evidence was given shewing the comparative cost of such last-mentioned roads before and after the user of the locomotives, nor as to the cost of such roads.

14. It was proved that locomotives of much greater weight than those used by the appellant are made, and that some of such locomotives are largely used by Government.

15. The following is a copy of the cer-

Aveland v. Lucas (App.), C.P.

tificate given by the respondent, and produced at the hearing:—

“To the Highway Authority of the Parish of Edith Weston, in the County of Rutland.

“I, Richard Lucas, of Edith Weston Hall, in the parish of Edith Weston, in the county of Rutland, do hereby certify that, having regard to the average expenses of repairing highways in the neighbourhood, extraordinary expenses to the extent of 40*l.* have been incurred by the said highway authority in repairing a certain highway in the said parish of Edith Weston leading from North Luffenham to Normanton, by excessive weight passing along the same and extraordinary traffic thereon, to wit, certain steam locomotive engines drawing trucks laden with bricks, coals, granite, timber, and other materials; and that such excessive weight and extraordinary traffic have been conducted by the order of the Right Hon. Baron Aveland. Dated, &c.

“(Signed) Richard Lucas.”

16. It was contended on behalf of the respondent that the extra cost of repairing the highways in the parish was caused by reason of the appellant using the said locomotives and waggons on the highways mentioned in the information, and that consequently the respondent was entitled to recover from the appellant the sum claimed in the information under the provisions of the Highways and Locomotives (Amendment) Act, 1878, 41 & 42 Vict. c. 77. s. 23.

17. It was contended on behalf of the appellant that, inasmuch as the weight of the locomotives and waggons was not in excess, but less than the weight authorised by the Locomotive Acts, 1865 and 1878 (namely, fourteen tons), it could not be said to be excessive within the meaning of the said section; and that, as they were used by the appellant only for the ordinary purposes of his estate, he was not liable for any sum by reason of the use of such engines and waggons as aforesaid in respect of the expense of repairing the highway; and further, that if he was liable at all, there was no evidence to shew what proportion of such expenses was attributable to and chargeable against the use of the said engines and waggons.

18. The magistrates were of opinion that the traffic had been excessive and extraordinary, and that extra expenses had during the year ending the 31st of March, 1879, and since the passing of the Highways Act of the last session, been incurred by the surveyor of the parish to the amount of 40*l.* in repairing the highways in the parish by reason of the damage caused by the engines and waggons passing along the highway mentioned in the information, and they consequently ordered the appellant to pay the said sum of 40*l.* and costs to the respondent.

If the Court should be of opinion that the increased expenses incurred by the surveyor of the highways, under the circumstances hereinbefore stated, were extraordinary expenses within the meaning of the section, and that there was sufficient evidence of the proportion of the said expenses attributable to the use of the said engines and waggons, the order was to be enforced. If the Court should be of the contrary opinion, the order was to be quashed and the information dismissed, with costs.

The Common Pleas Division (Grove, J., and Lindley, J.) held that the expenses incurred by the highway authority for Edith Weston were “extraordinary expenses” incurred by reason of damage caused by “excessive weight passing along” the highway within section 23 of the Highways and Locomotives (Amendment) Act, 1878 (1); but the Court were of opinion that there was not sufficient evidence to shew that 40*l.* was the correct

(1) Section 23 of 41 & 42 Vict. c. 77, enacts that “Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway, by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted, the amount of such expenses as may be proved to the satisfaction of the Court having cognisance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid.”

Aveland v. Lucas (App.), C.P.

measure of damage caused by the excessive weight of the engines used by the appellant, though some damage had been caused by them. On the parties agreeing that the amount should be reduced to 20*l.*, judgment was given for the respondent, with leave to appeal.

W. Graham (Herschell with him), for the appellant.—There is no sufficient evidence to support the conviction. There was no “extraordinary traffic” or “excessive weight” within the meaning of section 23 of the Act of 1878. By “extraordinary traffic” the framers of the section aimed at traffic, not extraordinary with reference to the bearing capacity of the road, but extraordinary in the sense of being abnormal *quoad* the user of the road. Here the case finds that the engine and waggons were employed solely for the ordinary purposes of the appellant’s estate. Nor was there “excessive weight” within the section, because the engine was within the weight sanctioned by the Locomotives Acts, 1861 (24 & 25 Vict. c. 70) and 1865 (28 & 29 Vict. c. 83), and also within the requirements as to the weight and the width of the wheels of locomotives of section 28 of the Act of 1878. “Excessive weight” in section 23 must mean weight in excess of that which by statute may be imposed upon the road.

Bompas and J. Etherington Smith, for the respondent, were not required to argue.

BRAMWELL, L.J.—The magistrates have found in effect that, having regard to the average expense of repairing highways in the neighbourhood, there had been “excessive and extraordinary” traffic on the highways of the parish of “Edith Weston,” and that extra expenses had been incurred by the surveyor of the parish by reason of the damage caused by these engines and waggons passing along the highways. They have found, therefore, that the case is within the section. I think their finding was right. It is objected to, not as being against evidence, but because it is said that there was no evidence at all to support it. I think it clear that there was, and, if so, it is found

that Lord Aveland has thrown a burden upon the ratepayers beyond that which the ordinary and normal use of the road would throw upon them. It is said that he has only done that which he was entitled to do. I agree; he was entitled to use a locomotive on the roads. The Locomotives Acts do not enable a thing to be used on the roads which could not have been used before. Those Acts only recognised that the thing had been used before, and provided the conditions under which it should be used in the future. It is asked, by what standard are you to determine whether the use of the road is excessive? That abstract question is not capable of an abstract answer. I do not see how a rule could be laid down. The question must depend upon the circumstances of each particular case, and it must be considered with reference to the ordinary traffic of the road and its capacity for bearing weights. It is impossible to contend that the Locomotives Acts authorise this use of the road in the sense that a person so using it is not liable to make good the damage he causes. I doubt whether he would not be liable to an indictment for a nuisance, and the Locomotives Act, 1865, expressly provides that nothing contained in it shall interfere with rights which existed against owners of locomotives before the Act was passed. Section 23 of the Act of 1878 substitutes a money payment for the indirect remedy by indictment at common law. Mr. Graham says that if the Legislature intended to tax the use of locomotives on roads express words would have been used. In my view it was meant, not to tax locomotives, but to avoid throwing an additional tax on the ratepayers. I think the order of the magistrates was right, and should be affirmed.

BAGGALLAY, L.J.—I am of the same opinion. In this case the surveyor of highways having made a survey of the road pursuant to the Act has certified that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by the highway authority in repairing the highway, and that those extra expenses were caused by the appel-

Aveland v. Lucas (App.), C.P.

lant's engines; and the justices have found in effect that there was an excessive and extraordinary traffic on the highway by reason of the use of the engines, and that increased expenses have been incurred through it. It is suggested that inasmuch as the locomotives had been lawfully used by the appellant in accordance with the power and authority conferred upon him by the Locomotives Acts, he is not subject to any increased charges in respect of that use under the Highways and Locomotives (Amendment) Act, 1878. I can see nothing in that Act which imports that the expenses mentioned in section 23 are to be borne by persons using locomotives only in the event of their not complying with the Locomotives Acts. Those Acts, I think, contemplate the probability that by reason of the lawful use of the engines extra expense in repairing and keeping the roads will be incurred, for which the person using them is to be liable.

THESIGER, L.J.—I am of the same opinion, and for the same reasons.

Judgment affirmed.

Solicitors—Whyte, Collisson & Prichard, agents for J. E. Atter, Stamford, for appellant; Crowder, Anstie & Vizard, agents for Owston & Dickinson, Leicester, for respondent.

Robb H. Smith Eastern Ry 51 L.J. 214

[IN THE COMMON PLEAS DIVISION.]

1880.	} THE MAYOR, &C., OF BRIGHTON v.
April 29.	
May 6.	
	THE GUARDIANS OF THE POOR
	OF BRIGHTON.

Statute of Limitations—3 & 4 Will. 4. c. 27, 37 & 38 Vict. c. 57—Licensee—Effect of Statutory Prohibition against Alienation.

Commissioners, under the authority of a local Act, erected a town hall at B., and afterwards by a subsequent Act passed in 1850, they purchased an estate called the P. estate. By this Act of 1850 the said commissioners were empowered to sell and convey such estate, provided that no such sale

should be without the consent of the inhabitants of the parish in vestry assembled. From the time of the erection of the town hall until 1853, the guardians of the poor of B. had the use of portions of the town hall for offices, and in 1853 they removed to a part of the P. estate, which by arrangement with the said commissioners they were to be permitted to have for their permanent use in lieu of their offices in the town hall. The said guardians laid out money in rendering this part of the estate suitable for their offices, and they used the same as such from that time until November, 1879, without paying any rent or giving any acknowledgment in writing of the title of the commissioners or of the plaintiffs to whom the property of the said commissioners was transferred by statute in 1855. In March, 1863, the plaintiffs wrote to the said guardians for an acknowledgment in writing that they held the offices from the plaintiffs on sufferance, but the guardians refused to give such acknowledgment.

In an action brought in November, 1879, by the plaintiffs against the guardians to recover possession of the said offices,—

Held, that under the above circumstances the plaintiffs had been out of possession for more than twelve years and were barred by the Statute of Limitations.

Held also, that the statutory prohibition against alienation without the consent of the inhabitants in vestry did not prevent the plaintiffs from being so barred by the Statute of Limitations.

Action to recover land, being part of the Pavilion Estate, in Church Street, Brighton, occupied by the defendants as offices.

The action was commenced on the 19th of November, 1879.

The following Case was stated for the opinion of the Court pursuant to Order XXXIV. rule 1 :—

By an Act, 6 Geo. 4. c. clxxix., passed in 1825, commissioners were appointed to manage and control the affairs of the town and parish of Brighton (then called Brighthelmston), in the county of Sussex, and powers given for continuing the body by election. By the same Act powers were given for the inhabitants in vestry to elect directors and guardians of the

Mayor, &c. of Brighton v. Guardians of Brighton, C.P.

poor for the said parish in Easter in each year. By section 139 of the said Act the commissioners were empowered to erect a town hall with such offices attached thereto as they should deem proper for the purpose of holding their meetings in and for the convenience of the officers appointed by them, and for holding public meetings, and such other purposes as the commissioners should think proper. The Act directs when the meetings of the directors and guardians shall be held but appoints no place for such meetings. Before the town hall was finished the directors and guardians met at the Sea House Hotel, where the commissioners also met, but after the town hall was completed the directors and guardians met and had the use of the offices in different portions of the town hall appropriated for that purpose, and this so continued until the year 1853. By an Act, 18 Vict. c. v., passed in 1850, the said commissioners were empowered to purchase, and did acquire by purchase in 1850, the Pavilion Estate and grounds at Brighton. By the 18th section of the above last-mentioned Act it was enacted as follows:—

“And be it enacted that it shall be lawful for the said Brighton Town Commissioners to let from year to year, or for any shorter period at will, and also by deed to demise or lease for any longer term or terms of years, and either in possession or reversion, and either for the purpose of building, repairing or improving, or any other purpose or purposes, all or any part or parts of the said land, building and hereditaments so to be purchased by such commissioners as aforesaid, and any houses or buildings or conveniences which shall be erected, built or made upon the same or any part thereof pursuant to this Act, or other the property for the time being held hereunder, and not for the time being required to be held by such commissioners in their discretion for the general purposes of this Act, to any person for such rent or rents, and upon such terms as such commissioners shall think fit, and that to every such lease shall be incident as well the usual powers of distress, as also a power for the commissioners or the person en-

titled to the reversion expectant on any such lease, or any person authorised by the reversioner to enter and absolutely make void such lease, in case the rent which may be thereby reserved, or any part thereof, shall be in arrear for the space of thirty days, and that without any demand for the same rent having been made, and that every rent shall be also recoverable by an action of debt in any of Her Majesty's Courts of Record against the person to whom any such lease shall have been made, his executors, administrators and assigns: Provided nevertheless, that no letting, demise or lease of all or any part of the said lawn and pleasure grounds, part of the said purchased property, shall at any time be made or take place under the power hereinbefore given without the consents of the inhabitants of the parish of Brighton in vestry assembled first had and obtained thereto, and further that no part of the ground-floor or lower suite of rooms fronting eastwardly in the said building, forming the Royal Pavilion, shall, without the like consent first had and obtained thereto, be let under such power otherwise than from time to time for short periods not exceeding one week, and then only for the purpose of public lectures, scientific or charitable objects, concerts, recreations or amusements, or other like objects or purposes: Provided also, that no letting, demise or lease, except as last aforesaid, shall take place or be made under this present clause save by public tender, to be publicly advertised for at least one week before the same shall be made or received, in each of the newspapers usually published in Brighton, but to be conducted and accepted in and upon such manner and upon such terms or to be rejected as the said Brighton Town Commissioners shall in their discretion think fit.”

By the 19th section of the above Act last-mentioned it was enacted as follows:—

“And be it enacted that notwithstanding anything hereinbefore contained it shall be lawful for the said Brighton Town Commissioners at any time or times after such purchases shall have been made as aforesaid, to sell and dispose of the ground,

Mayor, &c. of Brighton v. Guardians of Brighton, C.P.

buildings, premises or property purchased or acquired under or by virtue of this Act, or any part or parts thereof, either together or in parcels by public auction, with power to buy in the same at any auction, and resell the same at any subsequent auction to such person or persons as shall be willing to purchase the same, and subject to such special or other conditions as to title or otherwise as shall be thought fit, and to convey and assure the property so sold accordingly, and that all and every the provisions in the said Brighton Town Act contained (other than the provisions therein contained for offering the premises to the owners of land adjoining, before sale thereof as therein mentioned, and which shall not extend to this present Act) with reference to the sale and disposal of property held thereunder, shall, so far as the same may be necessary or expedient for carrying the provisions of this Act into effect and be applicable hereto, apply and extend to this Act, and the purposes hereof, in the same manner in all respects as if such provisions were herein repeated and made expressly applicable hereto.

"Provided nevertheless, that no such sale as hereinbefore authorised shall be made to take place without the consent of the inhabitants of the parish of Brighton in vestry assembled, first had and obtained thereto."

In the year 1854, the town of Brighton was incorporated, and by the statute 18 Vict. c. vi., passed in 1855, the powers of the said commissioners and their property were transferred to the corporation of the said town.

From 1841 to the 19th of May, 1852, frequent communications passed between the said commissioners and the said directors and guardians respecting increased accommodation for the latter at the town hall.

In 1852 it was proposed that the offices of the guardians should be removed from the Town Hall to a portion of the Pavilion Estate. The following minutes of the commissioners and guardians respectively shew the result of such proposal:—

"April 21, 1852.

"At an adjourned general meeting of

the commissioners the committee appointed to confer with the directors and guardians as to the accommodation afforded to that body at the town hall, presented a report—

"Resolved,—That the report be received and entered at the foot of these minutes.

"Resolved,—That the report be considered at the next meeting.

"Report of the committee appointed to confer with the directors and guardians relative to the accommodation afforded them at the town-hall.

"Your committee have had a further conference with the committee of the directors and guardians on this subject, and the joint committees have inspected the Pavilion stables, with the view of ascertaining whether any portion of that property might not, with advantage to the public convenience, be appropriated to the uses of the directors and guardians of the poor for parochial purposes.

"As a result of this conference, the committee recommend that the directors and guardians be permitted to use as offices and board-room the portion of the Pavilion estate fronting to Church Street, as shewn on the accompanying plan, the guardians making such arrangement in the rooms as they may find requisite, so that no alteration be made in the external arrangement or form of the external buildings.

"And the committee recommend that the offices of the directors and guardians be removed from the Town Hall to the Pavilion accordingly."

[Here followed the signatures of the committee.]

"5th May, 1852.

"At the general meeting of the commissioners, the report of the committee appointed relative to the accommodation afforded to the directors and guardians in the Town Hall was considered—

"Resolved,—That the recommendation of the committee be adopted, agreeably to the plan as altered, in respect to the windows to the eastward, the necessary works being performed under the inspection of the surveyor.

"At the general meeting of directors and guardians of the parish of Brighton,

Mayor, &c. of Brighton v. Guardians of Brighton, C.P.

held this 11th of May, 1852: Present, Mr. W. Bowdidge, chairman (and a full board).

"At this meeting, the committee appointed to confer with a committee of commissioners, in reference to the inadequate accommodation afforded at the directors and guardians' clerk's office, presented a report, together with a letter from the commissioners, offering a portion of the Pavilion estate.

"Resolved,—That such report be received, and entered on the minutes.

"Resolved,—That the offer of the commissioners to appropriate a portion of the Pavilion estate, for the permanent use of the directors and guardians, in lieu of their offices in the Town Hall, be accepted.

"Resolved,—That the matter be referred back to the committee, for the purpose of instructing the surveyor to prepare a plan, specification and estimate, and that they do report thereon to an early meeting.

"(Signed) W. Bowdidge, chairman."

"Report of the committee appointed to consider the inadequate accommodation at the clerk's office—

"Your committee have had several conferences with a committee appointed by the commissioners on this subject, and regret that sufficient accommodation cannot be obtained at the Town Hall. They now report that the commissioners have submitted to the consideration of the board an offer of a portion of the Pavilion estate, which will meet the requirement of the directors and guardians for parochial purposes. Your committee recommend the board to accept such offer, upon the commissioners appropriating the same to the permanent use of the directors and guardians. A letter from the commissioners, continuing the offer referred to, accompanies this report."

[Here followed the signatures of the committee.]

"19th May, 1852.

"At an adjourned general meeting of the commissioners the clerk submitted copy of the proceedings of the directors and guardians of the poor of this parish, in reference to the proposed appropria-

tion of a portion of the Pavilion estate to the use of that body.

"Resolved,—That the same be entered at the foot of these minutes."

The guardians thereafter removed their offices to the said portion of the Pavilion estate; they made alterations therein to render it suitable for their use as offices, and from the 7th of March, 1853, till the present time, the guardians have used the said premises as their offices.

On the 16th of March, 1853, at a general meeting of the commissioners, the clerk reported that the offices of the directors and guardians had been removed from the Town Hall to the said new parochial offices in Church Street, part of the Pavilion estate.

On the 19th of March, 1863, the plaintiffs wrote by their town clerk to the defendants the following letter:—

"Brighton Town Hall,
"19th March, 1863.

"Dear Sir,—I forward on the other half-sheet a copy of a resolution passed yesterday by the Town Council of Brighton, relating to that portion of the Pavilion property which is in the occupation of the directors and guardians, and on behalf of the council I beg to apply to the directors and guardians for an acknowledgment in writing, that they hold the premises in question from the corporation on sufferance. Will you be so good as to submit this communication to the directors and guardians, and to inform me of their determination on the subject of it?

"I remain, dear sir, yours truly,

"David Black,
"Town Clerk.

"Alfred Morris, Esq.,

"Clerk to the directors and guardians of the poor of Brighton.

"P.S.—Although mention is made in the resolution of that part of the property which is in the occupation of the military authorities, the present application does not touch that, but is confined to the premises in the occupation of the directors and guardians. "D. B."

And on the 8th of September, 1863, the following:—

Mayor, &c. of Brighton v. Guardians of Brighton, C.P.

"Town Hall, Brighton,
"8th September, 1863.

"Dear Sir,—I am instructed to apply for an answer to my letter of the 19th of March last, requesting an acknowledgment that the directors and guardians occupy that part of the Pavilion estate which is in their occupation on sufferance. May I ask the favour of your bringing the subject before the directors and guardians, or the committee to whom they have referred it?

"I remain, dear sir, yours faithfully,
"David Black,
"Town Clerk.

"Alfred Morris, Esq.,

"Clerk to the directors and guardians of the poor of Brighton."

No answer appears to have been made to such letters, but the plaintiffs received from the defendants the following letter, in answer to a subsequent application made on the 29th of March, 1865.

"5th April, 1865.

"Dear Sir,—With reference to your letter of the 29th ult., and former communications on the subject of tenure of that portion of the Pavilion property which is in the occupation of the directors and guardians, I am instructed by the board to reply, first, that it appears, from the minutes of the proceedings of the Town Commissioners, and of the board of the directors and guardians, at the period of the appropriation of the premises in question (in the year 1852) that the directors and guardians accepted the offer of the commissioners, on the understanding that the said premises should be set apart for the permanent use of the board; second, that the Poor Law Board was induced to sanction the outlay for the conversion of the premises into offices for the parochial purposes on that understanding. I am therefore directed to inform you, that the directors and guardians decline, under such circumstances, to give an acknowledgment in writing that they hold the premises from the corporation on 'sufferance.'

"I am, dear sir, yours faithfully,
"(Signed) Alfred Morris,

"Clerk.

"D. Black, Esq., Town Clerk."

The plaintiffs did not press further for the acknowledgment requested in the said letter.

In the year 1871, by virtue of an order of the Local Government Board, the designation of the said directors and guardians became as follows—"The guardians of the poor of the parish of Brighton," and they have since been known by that designation.

Until 1878 the property of the plaintiffs was not assessed to the poor rate, but in 1878 the overseers of the poor of the parish assessed the Pavilion, Town Hall and other property of the plaintiffs, and charged the same with the new poor rate made on the 28th of March, 1878.

This led to a correspondence, which was set out in the case between the town clerk and the clerk to the guardians, by which, as an equivalent for such assessment, it was sought, on behalf of the town corporation, to make the guardians pay to the corporation funds a fair sum, by way of rent for the parochial offices. This was declined by the guardians, who, however, expressed their willingness to join with the Town Council in a friendly case, for the opinion of this Court, and to abide by its decision.

The case stated that on the 19th of September, 1878, the defendants were served by the plaintiffs with a notice to quit.

The case also stated that no vestry meeting of the inhabitants of Brighton had been held upon the subject of any of the matters therein stated under the Pavilion Act.

The question for the opinion of the Court was whether, upon the facts above stated, the plaintiffs were entitled to recover possession of the said premises from the defendants.

Finlay, for the plaintiffs.—The defendants say in the first place that what took place between the commissioners and the guardians amounted to a gift of these offices, and next that they are protected by the Statute of Limitations. There is nothing in the first point. The offer which the commissioners made was only to give the guardians the use of a portion of the Pavilion estate.

Mayor, &c. of Brighton v. Guardians of Brighton, C.P.

[*Joseph Brown*, for the defendants.—“The permanent use.” No doubt, however, the real question is whether the defendants have got these premises under the Statute of Limitations.]

Then with reference to the Statute of Limitations. The defendants were only in the position of lodgers or licensees occupying from time to time such portion of the Town Hall as the commissioners chose to assign for their use, the possession always remaining in the commissioners and no tenancy being ever created. The removal from the Town Hall to the portion of the Pavilion estate which was appropriated for the use of the guardians did not alter the nature of the occupation and the possession remaining in the plaintiffs, the Statute of Limitations never began to run. “Permanent use” would mean only for a long time. Moreover, the plaintiffs are only trustees of this property, and section 19 of the Pavilion Estate Act, 13 Vict. c. v., provides that no sale of the Pavilion estate can be made without the consent of the inhabitants in vestry. That enactment would be evaded, if, without such consent, the plaintiffs could give away any portion of this estate which would be the effect if the defendants were allowed to succeed in this action through the laches of the plaintiffs.

The Magdalen College Case (1); and *The Earl of Abergavenny v. Brace* (2) support this view.

J. Brown, for the defendants.—By section 3 of 3 & 4 Will. 4. c. 27, the right to bring an action to recover land shall be deemed to have first accrued at such time as is therein mentioned, that is to say; when the person claiming such land shall have been in possession or in receipt of the profits of such land, “and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession.” Here the plaintiffs, at all events, discontinued their possession, even

if the guardians were only lodgers when the latter refused, as they did in April, 1865, to give an acknowledgment that they held the premises on sufferance. That being more than twelve years ago would bar the plaintiffs according to the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which has substituted twelve years for twenty for the limitation of the right of action for the recovery of land. The legal effect of what took place between the town commissioners and the guardians of the poor of Brighton was to create a tenancy at will in these offices. If so, according to section 7 of 3 & 4 Will. 4. c. 27, the right must be deemed to have accrued at the end of one year next after the commencement of such tenancy though it might accrue sooner by the actual determination of the tenancy. *Doe d. Bennett v. Turner* (3); and *Dug v. Day* (4). With regard to the statutory prohibition against alienation, if the letting was contrary to the Act, the right of re-entry arose at once and the plaintiffs are now barred by the Statute of Limitations—*The Governors of Magdalen Hospital v. Knotts* (5).

Finlay replied.

Cour. adv. vult.

The judgment of the Court (6) was (on May 6) delivered by

LOPES, J.—This is a special case stated in an action of ejectment brought by the plaintiffs to recover from the defendants possession of certain offices occupied by them in Church Street, in the parish of Brighton. The defence relied on is the Statute of Limitations, the plaintiffs contending that in the circumstances stated the statutory period of twelve years has not run, the defendants that it has.

Down to 1853 the defendants had the use of offices in the town hall, when they removed their offices to buildings forming part of the Pavilion estate, which had become vested in the commissioners ap-

(3) 7 Mee. & W. 226; 10 Law J. Rep. Exch. 213.

(4) 40 Law J. Rep. P.C. 35; Law Rep. 3 P.C. 751.

(5) Law Rep. 8 Ch. D. 709; Law Rep. 4 App. Cas. 324.

(6) Denman, J., and Lopes, J.

(1) 11 Co. 66 b.

(2) 41 Law J. Rep. Exch. 120; Law Rep. 7 Exch. 145.

Mayor, &c. of Brighton v. Guardians of Brighton, C.P.

pointed under an Act of 1825, pursuant to an Act of 1850, empowering them to purchase that estate, and spent large sums of money to render them fit for their use. The property of the commissioners was transferred to the plaintiffs in 1855 by statute upon the incorporation of Brighton.

From the 7th of March, 1853, until the bringing of this action (November, 1879), the defendants have had the exclusive use of these offices and have paid no rent and given no acknowledgment in writing of the plaintiffs' title. In March, 1863, the plaintiffs wrote to the defendants asking for an acknowledgment in writing that they, the defendants, held the offices from the plaintiffs on sufferance, but the defendants refused to give such acknowledgment. The plaintiffs did not further press the matter, and nothing more was heard from the plaintiffs until 1878, when the plaintiffs were for the first time assessed to the poor rate. The plaintiffs then demanded a fair sum by way of rent for the offices, which the defendants declined to pay. Eventually, on the 19th of November, 1879, the writ in this action was issued to recover possession of the offices, and this case was stated for the opinion of the Court.

In these circumstances we consider the plaintiffs have been out of possession for more than twelve years and that they are barred by the Statute of Limitations.

It was contended that the defendants were mere licensees and had no possession of the premises, the possession remaining in the plaintiffs. We cannot accede to that contention and think that it is disproved by the facts. It is admitted that the defendants had the exclusive use of the offices and that they never paid any rent, nor gave any acknowledgment in writing. How it can be said in these circumstances that the possession remained in the plaintiffs we are at a loss to understand. In 1863, fearing, no doubt, the consequences which have since happened, the plaintiffs asked for an acknowledgment; it was refused. Still they took no steps to defeat the operation of the statute until 1879.

It was also argued that section 19 of 13 Vict. c. v., set out in the case, prevented

the Statute of Limitations applying. It was said that the plaintiffs could not sell without the consent of the vestry, and, therefore, could not by neglect lose that which they could not alienate without the consent of the vestry. The case of *The Earl of Abergavenny v. Brace* (2) was cited. That case is distinguishable from this in every respect. There there are found words in the private Act apt to exclude the operation of any Statute of Limitations in existence when the Act was passed; here there are no words apt to exclude or capable of excluding the operation of the Act now in force. There the estates were made in the first instance inalienable absolutely; here an express power is given to sell with the consent of the vestry. There are no words in the 19th section which can control the effect of the Statute of Limitations or can have any reference to the loss of an estate by want of possession for a length of time.

Assuming that a tenancy at will existed at any time between the plaintiffs or the commissioners and the defendants, more than twelve years have elapsed, during which no rent has been paid and no acknowledgment in writing has been given. Therefore section 7 of 3 & 4 Will. 4. c. 27 would apply, and the plaintiffs might have entered more than twelve years ago, if at all.

We think that the defendants, having been in possession ever since 1853 without payment of rent or acknowledgment in writing, are entitled to judgment.

Judgment for defendants.

Solicitors—Clarke & Catkin, agents for Somers Clarke, Brighton, for plaintiffs; Tilleard, Godden & Holme, agents for J. Freeman, Town Clerk, Brighton, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. } HORNER v. OYLER AND
 June 26. } ANOTHER.

Practice—Costs on Higher Scale—Injunction—Principal Relief sought—Rules of the Supreme Court (Costs), Order VI. rules 2 and 3.

The plaintiff, the lessee and owner of a market, brought an action to recover damages for breaches of covenant against the tenants of certain houses within the market, and claimed an injunction to restrain the defendants from further breaches. The Judge, before whom the action was tried, holding that the injunction was the principal relief sought, and that the action was brought to establish a right, made an order, allowing the plaintiff costs on the "higher scale."

The Judge who tries the action has jurisdiction to make such an order under rule 3 of Order VI. of the rules as to costs, and should, in the exercise of his discretion, regard the intention of the Legislature, as expressed in rule 2 of the same Order.

This was an action brought by the plaintiff, who is the lessee and owner of Spitalfields Market, against the defendants, who are tenants of Nos. 113, 115, and 117, Commercial Street, within the market, to recover damages for breaches of certain covenants contained in a lease, of which the defendants are assignees. The plaintiff was the assignee of the defendants' lessor.

The writ was indorsed with a claim for damages, in the nature of tolls, for the use of the market, and with a claim for an injunction. The action was tried on the 15th and 16th of June, at Westminster, before Field, J., without a jury, when his Lordship gave judgment for the plaintiff, and granted an injunction.

An application was then made for an order that the plaintiff be allowed costs on the "higher scale."

Gates (Tapping and J. G. Witt with him) for the plaintiff.

Finlay and Gore, for the defendants.

The following judgment was (on June 26th) delivered by

FIELD, J. (1).—This is an action which was tried before me. It was an action brought by a lessee of a market at Spitalfields, and he brought the action indorsing his writ in this way. "The plaintiff claims 100*l.* and some shillings for duties and tolls payable to him, and for damages for breach by the defendants of certain covenants, entered into by him in a lease." Then later on, after going through some heads of claim, "The plaintiff claims an injunction." Judgment was given by me in favour of the plaintiff, and thereupon his counsel applied to me for costs on the higher scale, alleging his claim to be founded on the second rule of Order VI. of the 12th of August, 1875, which rule is in these words. [His Lordship read the rule (2).] And it was nominally under that rule that the application was made to me; but rule 3 may perhaps apply. I think I am justified in acting under rule 3, which will come to the same result. According to the decision of *Chapman v. The Midland Railway Company* (3), it is not the Judge at the trial or any Judge who has primarily the jurisdiction vested in him of deciding under rule 2 whether the costs are to be on the higher or the lower scale; the proper person to take that matter before is the Master; the proper course will be for the party who claims costs to be taxed on the higher scale to carry in his bill on the higher scale; then the matter will come before the Judge by way of appeal; and therefore if this matter is strictly within that rule, I should entertain some doubt whether I had jurisdiction to make the order prayed for. But section 3 does apply to the

(1) The judgment was not written.

(2) Rules of the Supreme Court (Costs), Order VI. rule 2. "Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'higher scale' in the schedule hereto; in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements, patents and copyrights, and other similar cases, where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed 'lower scale,' are hereby made applicable."

(3) *Ante*, Q.B. 449.

Horner v. Ogler, C.P.

Judge, and gives that power. [His Lordship read the rule (4).] There is here a very large discretion vested in the Court or a Judge. I am the Judge, and therefore have that discretion vested in me, and I was the Judge who tried the cause. Now there are no grounds stated here, and no limitation, but I think that in exercising my discretion, I may very fairly look at what the Legislature has done in rule 2, and if I come to the conclusion upon my knowledge of the cause—I am certainly the best person, so far as knowledge is concerned of the cause, to decide the question—that the cause for which the action was brought, and the relief which was sought, are within the terms of rule 2, I may properly make the order.

Now in this case the action was undoubtedly brought for breach of covenant and for the establishment of a right, and unquestionably it was a case which, if it had been brought in the old Court of Chancery for an injunction, an injunction would have been granted. As was pointed out in *Chapman v. The Midland Railway Company* (3), there is now only one kind of injunction. Therefore this is a case in which a Court of Equity before the Judicature Act, and the combined Courts of Justice since, would have granted an injunction in respect of these things; but we have to see whether or not the injunction was the principal relief sought; because I should not exercise my discretion in favour of the plaintiff if it were not so. Now I refused to make the order in *Chapman v. The Midland Railway Company* (3) at Chambers, because I thought there that the principal object of the plaintiff was to get money from the railway company for a temporary trespass on his property, and not to obtain an injunction extending for all time. It was a mere temporary use by the railway company of the property, and I thought that that was not a case within the meaning of Order VI. rule 2, and the Court of Appeal upheld that ruling. But in the

present case, I have to decide whether an injunction was the principal relief sought. Now the plaintiff claimed 100*l.*, which is a considerable sum to some people. It might be that the 100*l.* was the principal thing the plaintiff wanted—it *might* be. On the other hand, he was in this position, that he was a lessee under the owner in fee of the market, and the rights of market depend to a great extent upon the exercise of acts of ownership and are dependent upon user; and therefore in this case there was a very important reason why the action should not be confined merely to the past claim for damages. Moreover, I think I understood at the trial, that so far as the amount is concerned, no great desire was expressed on the part of the plaintiff to insist upon that. It was then so stated, and I think an offer was made and accepted on the other side, which would have shewn that the plaintiff's main object was to stop the breach of covenant and to exercise his right. I therefore come to the conclusion on the facts of this particular case that the injunction was the principal relief sought, and therefore under rule 3 I direct the plaintiff to have his costs on the high scale.

Solicitors—S. Betteley & Co., for plaintiff; Turner & Son, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1880. { SPEAR (*appellant*) v. THE GUARDIANS OF THE BODMIN UNION
May 4. { (*respondents*).

Poor Rate—Liability to be Rated—Market—Occupier of Stall.

[For the report of the above case, see 49 Law J. Rep. M.C. 69.]

(4) Rule 3. "Notwithstanding these rules, the Court or Judge may in any case direct the fees set forth in either of the said two columns to be allowed to all, or either, or any of the parties, and as to all or any part of the costs."

[IN THE EXCHEQUER DIVISION.]

1879.
 Nov. 13. } LONDON AND SOUTH WESTERN
 1880. } BANK (LIMITED) v. WENTWORTH.
 March 1. }

*Bill of Exchange—Blank Acceptance—
 Drawing and Indorsement by apparent
 Drawer forged.*

*The defendant accepted a bill of exchange
 in blank. Drawing and drawer's indorse-
 ment were afterwards forged by the person
 to whom the defendant gave the bill. The
 plaintiffs took the bill for value without
 notice:—Held, that the forgery of the
 drawing and indorsement did not prevent
 the defendant from being liable to the
 plaintiffs.*

Rule nisi obtained by the defendant for
 a new trial on the ground of misrejection
 of evidence and of misdirection by Pol-
 lock, B., at the trial of the action before
 himself and a jury, in May, 1879.

The facts and arguments sufficiently
 appear from the judgment of the Court.

Digby Seymour and Castle (on Nov. 13,
 1879), for the plaintiffs, shewed cause.

Gaskell (R. V. Williams with him), for
 the defendant.

Our. adv. vult.

The judgment of the Court (1) was (on
 March 1, 1880), delivered by—

POLLOCK, B.—The plaintiffs sued as
 indorsees of a bill of exchange for 500*l.*
 alleged to be drawn by "S. H. Head"
 upon the defendant, accepted by him
 and indorsed by "S. H. Head" to the
 plaintiffs. At the trial the plaintiffs
 proved by their manager that the bill
 had been brought to them by one Villars,
 who was senior partner of a well-known
 firm of upholsterers who had an account
 with the plaintiffs, and who had on former
 occasions brought to them trade bills to
 cover advances; that the bill was drawn
 and indorsed in the name of "S. H.
 Head" in the same handwriting, and
 accepted by the defendant; that the
 manager, after making enquiries at the
 defendant's bankers, and receiving a

satisfactory reply, made an advance equal
 to the full value of the bill. Villars
 stated that his firm had furnished one
 Samuel Head's offices, and it was ad-
 mitted that the plaintiffs took the bill in
 good faith and without notice of any irre-
 gularity.

On the part of the defendant he him-
 self was called, and proved, that being in
 want of money he applied to an adver-
 tising money-lender calling himself Til-
 lotson Smith, who undertook to obtain for
 him a loan of 400*l.* upon his giving a bill
 for 500*l.*, and that upon the faith of this
 he gave to Smith a piece of paper bear-
 ing a sufficient stamp, with his, the defen-
 dant's, signature across where acceptances
 are usually written; nothing was said as
 to who should draw or indorse the bill,
 but the person calling himself Tillotson
 Smith gave to the defendant a receipt as
 follows:—

"March 12, 1878.

"Received of Captain W. D. Went-
 worth an acceptance for 500*l.*, dated to-
 day, for the purpose of negotiation, and
 if not discounted by the 14th inst., to
 be returned at once.

"Tillotson Smith & Co."

And Mr. Samuel Heath Head proved
 that he was a solicitor having offices in
 the same house as Tillotson Smith & Co.
 He was then asked whether the indorse-
 ment of the bill was in his handwriting;
 but the question was objected to on the
 ground that it was immaterial and I re-
 jected it.

Upon these facts and an admission that
 the plaintiffs were *bona fide* holders for
 value, I ruled that they were entitled to
 recover, and directed the verdict and
 judgment to be entered for them.

An order nisi for a new trial was sub-
 sequently obtained on the ground that I
 ought to have admitted the evidence ob-
 jected to, inasmuch as if the indorsement
 could be shewn to be irregular, the plain-
 tiffs could not succeed, and that although
 the defendant by his signature must be
 taken to have admitted the drawing by
 "S. H. Head," he was not precluded
 from shewing that the indorsement was
 unauthorised. These questions were fully
 argued before my brother Hawkins and

4 P

London and South Western Bank v. Wentworth, Exm.

myself, and we took time to consider what our judgment should be.

Before dealing with the rules of law by which the case should be governed, we think it well to state what we consider to be the result of the facts proved.

It was manifest that the defendant had been cheated out of the blank acceptance (2), but it was equally clear that he had given it for the purpose of having the name of a drawer and indorser inserted, and of its being negotiated to raise money. The name of the drawer and indorser was perfectly immaterial to the defendant, and could the name used be taken to be a fictitious name, the defendant would be liable. It was also admitted upon the argument that the defendant could not dispute that he was bound by the drawing of the bill, but it was said that he might dispute the indorsement. Now the indorsement may be treated in two ways. It may be said that although a Mr. Samuel Heath Head was called to state that he never indorsed or authorised the indorsement of his name, this does not shew that it was a forgery, for S. H. Head might not mean Samuel Heath Head, and there might be several S. H. Heads, or the signature might be wholly fictitious, in which case as the drawer's and indorser's names were in the same handwriting they would be binding on the defendant.

But the evidence, taken as a whole, seemed rather to shew that Smith, when he had obtained the blank acceptance, wrote the name of S. H. Head upon it with the full knowledge that there was a Samuel Heath Head who had had dealings with Villars, and that he did this, not with the intention of defrauding the defendant, nor indeed under the impression that Head would in fact be defrauded, since he supposed, no doubt, that the bill would be met by the defendant, but because if Head's name was on the bill he would the better be able to pass it on to Villars to discount, and as against the plaintiffs who objected to the evidence of Head, we think this is the fair assumption; and we also think it ought to be assumed that if Head had

been allowed to answer he would have said that he usually signed his name "S. H. Head," and consequently that the use of his name was as against him a forgery, the effect of which would be to cast an apparent liability upon him if the defendant did not pay the bill.

This is the most favourable way of putting the case for the defendant, because it may be said that although by giving the blank acceptance he authorised the person to whom he gave it to insert some name, even a fictitious name, as drawer and indorser, he could not have intended to authorise him to commit a forgery, and if effect is to be given to this argument it would equally hold good with respect to the drawing as to the indorsing.

This, no doubt, raises a novel question, and one of some difficulty. It must be governed by the rules of law applicable not to cases in which the acceptor has signed his name after that of the drawer has been inserted, and so upon the faith of that name, but by those which ought to prevail where the acceptor has signed his name upon a blank piece of stamped paper, or upon a paper on which a drawing in blank has been written. In such a case, the acceptor is liable to a *bona fide* holder for value without notice if the name of a stranger, or a fictitious name, be inserted as drawer, and the reason for this is not because the acceptor gave authority for this or that name to be inserted—for in truth he gave no such authority—but because in favour of commerce it is essential to uphold the negotiability of bills of exchange. That this is so may be further illustrated by a case in which a fraud is practised upon the acceptor of a bill drawn in blank with reference to the amount.

A., owing a debt of 50*l.* to B., writes to him enclosing a blank paper with a stamp sufficient to cover a bill for 100*l.*, saying, "I do not know the exact amount of my debt, but fill up the enclosed for the amount and I will honour it at three months." B., in fraud of A., draws the bill for 75*l.*, indorses it and it comes into the hands of a *bona fide* holder for value. Here is a clear absence of authority and a fraud against A., yet he is liable, and for

(2) He received no money for it.

London and South Western Bank v. Wentworth, Exch.

the reason we have given. In the present case, although Smith was guilty of a fraud against the defendant collateral to the bill itself, the inserting of Head's name was, as respects the defendant, wholly immaterial, and was no part of the transaction by which the defendant parted with the blank acceptance. To him the result would have been the same in every respect, whether Smith had procured the wealthiest banker or the veriest pauper to actually sign his name as drawer, or had himself inserted as drawer his own name, that of a stranger, a fictitious name or that of Head, for in any case the defendant would be ultimately liable. Looking next to the effect upon the plaintiffs, with reference to the circumstances under which they took the bill, can it be said that the fact that Head's name appeared as drawer made any difference? They gave value for it, had no notice of fraud, and the forgery was no part of the transaction whereby they acquired the bill; they made all the enquiries as to the acceptor from his own banker that could be demanded from the most prudent persons. To require more of them, and say that they ought to have unravelled all the history of the bill, its drawing and indorsement, would be to create a new burden and cast a new duty upon indorsees of bills of exchange for which there is no precedent, and which would go far to hamper their negotiability and destroy their usefulness. Moreover, it would graft an exception upon a system of law which has worked well and is of great public use, for the benefit of one who has brought about the difficulty by his own irregular act.

It may be said that this course of reasoning would apply to the case of a bill drawn and accepted in due course and indorsed by a forgery of the drawer's name, in which case the acceptor would not be liable even to a *bona fide* holder for value, but the two cases are not *in pari materia*. In the case last put the drawing and accepting of the bill are in proper order, and the acceptor is entitled to say, "I accepted on the faith of the bill being drawn by a person of credit, and I am ready to pay to his order, but not to the holder of a forged indorsement." In such a case, the whole matter, *quoad* the ac-

ceptor, is real, and depends upon a real authority. In the present case, the defendant is in default from the beginning by giving a blank acceptance, and therefore, as is admitted in the cases of a drawing by a stranger or in a fictitious name, the ordinary rule as to authority cannot be adhered to, and something like a fiction must be resorted to in favour of a *bona fide* indorsee for value; or, as we should prefer to say, the law merchant in such a case holds that, although the acceptor did not authorise the drawer's name to be used, he enabled the person to whom he gave the bill to use it, and so to give the bill currency, and this as against the acceptor is sufficient to render him liable. Further, where an indorsement is forged there is a material distinction between the case of a bill drawn by a real person and one like that now under consideration, which materially affects the rights of the parties. Where the bill is drawn by a real person, not only have those who claim under a forged indorsement no title to the bill, but the title is in some one else who is entitled to have the bill returned to him and to sue upon it; and to his action a plea of payment to the man who claims under the forgery would be no defence. In the present case there is no real drawer, and the defendant could have paid the plaintiff without the risk of having to pay it a second time to another.

Let us now see to what extent the principles which are involved in the decision of this question have been considered and settled. Where a man signs his name to a blank stamped piece of paper, and delivers it to another to be negotiated, this gives him authority to fill it up to the amount which the stamp will cover, treating the signature as that of the acceptor, and if the bill thus completed is indorsed to a holder for value without notice, he is entitled to recover upon it against him who has so signed his name, although the person to whom the blank paper is originally given may have defrauded the man who gave it to him. This is clearly established by a long series of cases, amongst which are the following: *Russel v. Langstaffe* (1780) (3),

(3) 2 Dougl. 514.

London and South Western Bank v. Wentworth, Exon.

Peacock v. Rhodes (1781) (4), *Collis v. Emett* (1790) (5) and *Schultz v. Astley* (1836) (6).

The ground upon which these decisions have been rested is well explained by Mr. Justice Maule, in *Montague v. Perkins* (7), and in the judgment of the Court in *Foster v. Mackinnon* (8), where, after stating the general proposition that a man is not bound by his signature to an instrument if it be obtained by a fraudulent representation, it is said: "This principle when applied to negotiable instruments must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover."

In *Cooper v. Meyer* (1830) (9), bills having been drawn in a fictitious name, and accepted by the defendant and indorsed in the same handwriting as that of the supposed drawer, the defendant was held liable to the plaintiff who was a holder for value. Lord Tenterden in giving judgment says, "The acceptor ought to know the handwriting of the drawer, and is, therefore, precluded from disputing it; but it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so, but if there is in reality no such person, I think the fair construction of the acceptor's undertaking is that he will pay to the signature of the same person that signed for the drawer."

In the above case the bill was accepted

after it was drawn, and Lord Tenterden appears to have thought that in such a case if the drawer be a real person the acceptor, though bound by the drawing, may dispute the indorsement. The same view was taken by this Court in *Beeman v. Duck* (1843) (10), and is in accordance with what was laid down with reference to such bills in *Smith v. Chester* (1787) (11) and *Robinson v. Yarrow* (1817) (12). Not long after *Cooper v. Meyer* (9), however, came the case of *Schultz v. Astley* (1836) (6). The defendant had given to a money lender, among others, two slips of stamped paper, on which were written acceptances signed by himself, and for which he received nothing; a man named Clissold afterwards wrote his name on one of these, and it was then filled up as a bill of exchange. The second paper was filled up as a bill of exchange by a person who subscribed himself in the character of drawer and indorser as Thomas Wilson, his real name being Thomas Wilson Richardson. The two bills having been indorsed to the plaintiff for value, he sued the defendant upon them, and the Court held that the defendant was liable, and in giving judgment said (13): "As to the bill drawn by Clissold, the objection is, that admitting a party may be bound by his acceptance written on a blank piece of stamped paper, to the extent of such sum as the stamp will cover, yet that this giving of a blank acceptance authorises only the party to whom it is given to draw the bill; or at all events does not authorise Clissold, a stranger, to sign his name on the same blank piece of paper as drawer, the bill itself being subsequently written upon the paper by some other person. No authority has been cited to us for any such restriction of the general doctrine above admitted; nor can we see any distinction in principle, where the bill has passed into the hands of third persons, between holding the acceptor liable to a given amount, when the bill is afterwards drawn in the

(4) 2 Dougl. 633.

(5) 1 H. Black. 313.

(6) 2 Bing. N.C. 544; 5 Law J. Rep. C.P. 130.

(7) 22 Law J. Rep. C.P. 187.

(8) 38 Law J. Rep. C.P. 310; Law Rep. 4 C.P. 704.

(9) 10 B. & C. 468.

(10) 11 Mees. & W. 251; 12 Law J. Rep. Exch. 198.

(11) 1 Term Rep. 654.

(12) 7 Taunt. 455.

(13) 2 Bing. N.C. at p. 552; 5 Law J. Rep. C.P. 130.

London and South Western Bank v. Wentworth, Exen.

name of the party who has obtained the acceptance, and when it is drawn by a stranger who becomes the drawer at the instance of the party to whom the acceptance is given. The blank acceptance is an acceptance of the bill which is afterwards put upon it; and it seems to follow from the doctrine of Lord Mansfield in *Russel v. Langstaffe* (3) that it does not lie in the mouth of the acceptor to say that the drawing or indorsing of the bill is irregular. The acceptor was a stranger to the party to whom he handed over his blank acceptance, and as all that he desired was to raise the money, it could make no difference to him, either as to the extent of his liability, or in any other respect, whether the bill was drawn in the name of one person or another. And if the defendant is estopped from denying the right of the drawer to draw the bill, whoever he may be, he is bound by the indorsement made by such drawer, after such indorsement is proved to have been made by such drawer. "As to the bill which purports to have been drawn by Wilson, the proof was that it was drawn and indorsed by a real person, who signed the name Thomas Wilson, although his real name was Thomas Wilson Richardson. There were no circumstances proved to shew an intention to pass himself off for a different person of the name of Thomas Wilson, or an intention to defraud any person of that name, or any other person; and we therefore think there is no ground for treating the signature as a forgery, or holding the bill void on that account."

We have cited the remarks of the Court as to both of the bills, although those as to the second bill may appear to be not in accordance with the view we have taken, but it is to be observed that the observations as to forgery were unnecessary to the decision of the case, and the question which has arisen in the present case was not before the Court. The principles which are laid down with reference to the first bill, if applied to the facts before us, would go far to decide the point of law in the plaintiffs' favour.

In many of the cases and text-books in which the liability of the acceptor of a bill of exchange under circumstances similar

to those which occurred in the present case has been discussed, it has been rested upon the ground of estoppel; and with reference to this, Lord Justice Bramwell has recently said with great force in the case of *Bazendale v. Bennett* (14), "Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done or failed to say or do." This language might be not improperly applied to the present case, but, for our own part, we should prefer not to use the word estoppel, which seems to imply that a person by his conduct is excluded from shewing what are the true facts, but rather to say that the question is whether, when all the facts are admitted, the acceptor is not liable upon the well-known principle that where one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the person to commit the fraud. Looking at the case from this point of view, the law as laid down in *Young v. Grote* (15), where the Court held that the drawer of a cheque who so carelessly fills it up as to enable the holder of it to add figures making it payable for a larger amount, is liable to the banker who honours it, is in favour of the plaintiff, and although many observations have been made since that case with reference to the grounds upon which it was decided, which are mostly collected in the judgment of the Common Pleas Division in *Arnold v. The Cheque Bank* (16), the principle we have alluded to has always been upheld. In *The Bank of Ireland v. Evans' Trustees* (17), Baron Parke, speaking of *Young v. Grote* (15), said: "In that case it was held to have been the fault of the drawer of the cheque that he

(14) 47 Law J. Rep. Q.B. 624; Law Rep. 3 Q.B. D. 625.

(15) 4 Bing. 253; 5 Law J. Rep. (o.s.) C.P. 165.

(16) 45 Law J. Rep. C.P. 562; Law Rep. 1 C.P. D. 587.

(17) 5 H.L. Cas. 389, at p. 410.

London and South Western Bank v. Wentworth, Excn.

mised the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment."

Our attention was called during the argument for the defendant to two recent cases decided by the Court of Appeal—*Hogarth v. Latham* (18) and *Bazendale v. Bennett* (14), but neither of these have any real bearing upon the present case. In the first the plaintiff received only a bill accepted by the defendant, but without any drawer's name. At this time he had no notice of any irregularity, but afterwards, when he filled in the name of his firm as drawers of the bill, the jury found he had notice that there was something wrong, and the bills had in fact been accepted without authority. In *Bazendale v. Bennett* (14) the bill sued on bore the defendant's signature, and purported to have been drawn and indorsed by Cartwright, and also indorsed by Cameron, from whom the plaintiff received it; but before it had been so drawn or indorsed, and whilst it was a mere blank paper with a bill stamp and the defendant's signature upon it, it was stolen from the defendant's drawer, and therefore never had been given to Cartwright, or anyone from whom he received it, to be negotiated or in any way treated as a bill of exchange.

In conclusion, it may be added that no assistance can be gained in the present case by reference to the law of France relating to bills of exchange, or to the codes of other continental nations, which are mostly founded upon that of France, and this for a reason which appears to us to give weight to the arguments adduced in favour of the plaintiffs. By the Ordinance of 1673, which is referred to by Pothier in his *Traité du Contrat de Change*, part I., ch. 3, s. 1, it was made essential to a bill of exchange that it should mention the drawer, acceptor and payee; and the law remains in substance the same,

(18) 47 Law J. Rep. Q.B. 339; Law Rep. 3 Q.B. D. 643.

as will be seen by referring to the *Code de Commerce*, Art. 110, so that a blank acceptance is inadmissible. The distinction between the English and the French system is well described by Mr. Chalmers in the Preface to his valuable *Digest of the Law of Bills of Exchange*, where he says, the French law "remains in substance what it was two hundred years ago. English law has been developed piecemeal by judicial decision founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt due in one place was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England, bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavours to stamp it out."

That this is a correct account of the spirit in which the English law has dealt with the negotiability of bills of exchange is further evidenced by the mode in which effect is given to it in favour of *bona fide* indorsees for value by modern legislation. Thus the earlier Acts, 16 Car. 2. c. 7, and 9 Anne, c. 14, wholly avoided certain securities given for a gaming consideration, but the 5 & 6 Will. 4. c. 41. s. 1, after reciting the hardship and injustice which arises where such securities are indorsed for a valuable consideration without notice, repeals the earlier provisions, and provides merely that such securities shall only be taken to have been given for an illegal consideration, leaving the rights of *bona fide* holders for value without notice of the original illegality intact.

In the result, therefore, it appears to us that there is no authority binding upon us which requires that we should give judgment for the defendant, and that the spirit of such authorities as can be found

London and South Western Bank v. Wentworth, Exch.

is in favour of the plaintiffs, and accords with what, in our view, are the legal merits.

The order nisi for a new trial will therefore be discharged with costs.

Rule discharged.

Solicitors—Vallance & Vallance, for plaintiffs;
C. A. Hilliard, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879. } WILLIAMS v. STERN.*
Dec. 19. }

Bill of Sale—Default in Payment—Giving Time.

By a bill of sale, dated the 9th of July, 1878, the plaintiff assigned to the defendant certain furniture and goods in his house, subject to the proviso that if the plaintiff should pay to the defendant a sum of 42l. by twenty-five consecutive weekly payments on every Monday before noon the assignment should be void. It was also agreed that the plaintiff might at any time after the execution of the bill of sale take possession of the property therein comprised, and retain possession thereof until all the moneys payable should be fully paid; and further, that if default should be made by the plaintiff in payment of any of the instalments on the days on which such should become due, the whole amount which at the time of such default should be unpaid, should at once become due, and the defendant was empowered thereon to sell the property and to receive the moneys arising from such sale. The previous instalments having been paid by the plaintiff, he failed to pay the fourteenth instalment, due on the 14th of October; he saw the defendant on the 16th of October, and asked for time. The defendant replied that he "would not look to a week." On the plaintiff's returning home on the 17th of October he found that the goods had been seized and sold.

* *Coram* Bramwell, L.J.; Brett, L.J.; Cotton, L.J.

In an action for conversion and for an improper sale, the jury found for the plaintiff on the ground that the defendant had induced him to believe that he would not seize the goods:—

Held (by the Court of Appeal affirming the judgment of the Queen's Bench Division), that there must be a new trial, for that the defendant was entitled by the provisions of the bill of sale to seize on default, that there had been a default and that he had not in any way induced the plaintiff to alter his position.

Albert v. The Grosvenor Investment Company (37 Law J. Rep. Q.B. 24) questioned.

Appeal by the plaintiff from a decision of the Queen's Bench Division making absolute a rule for a new trial.

Action in the Court of passage at Liverpool, for damages for wrongful seizure and conversion of the plaintiff's goods, and for an improper sale.

It appeared at the trial that the defendant had lent 30l. to the plaintiff, and that to secure the repayment of that sum with 12l. interest, the plaintiff had assigned certain furniture to the defendant by a bill of sale, dated the 9th of July, 1878, subject to the proviso that the assignment should be void if the plaintiff should pay to the defendant the said sum of 42l. by twenty-five consecutive weekly payments of 1l. 5s. each on every Monday before noon, the first payment to be made on the 15th of July, and the balance of 10l. 15s. on the 6th of January, 1879; and it was further agreed that, notwithstanding this proviso for redemption, "it shall be lawful for the defendant at any time after the execution thereof to take possession of the said property, and to retain such possession (either in or upon the said shop, dwelling-house and premises, or in any other place to which the mortgagees may think fit to remove it) until all moneys payable under these presents . . . shall be fully paid. And further, that if default be made by the mortgagor in payment of any instalments of the sum of 42l. or in payment of any instalment which shall become payable in respect of any further advance or advances on the days on which such instalments re-

Williams v. Stern (App.), Q.B.

spectively shall become payable, the whole amount which at the time of such default shall be secured by these presents and shall be remaining unpaid, shall at once become due and payable, and thereupon it shall be lawful for the mortgagee to sell the said property . . . and receive the moneys arising therefrom."

The plaintiff paid thirteen weekly instalments, but the fourteenth instalment, which was due on the 14th of October, was not paid, because the plaintiff was summoned as a jurymen. He saw the defendant on the 16th and asked for time to pay, and the defendant then said that "he would not look to a week." On the plaintiff's returning home on the 17th he found that his goods had been seized and sold.

The Judge, in summing up, told the jury to consider whether the defendant acted in such a way as to induce the plaintiff to believe that he would hold his hand, and whether the seizure was wrongful.

The jury found that the defendant represented to the plaintiff that he would hold over, and found a verdict for the plaintiff for 25*l.* 15*s.* The Judge gave judgment for that amount, reserving leave to the defendant to move the Queen's Bench Division whether there was any evidence of conduct on the part of the defendant disentiitling him to put in force the powers of the bill of sale.

A rule *nisi* was accordingly obtained in the Queen's Bench Division for a new trial on this ground, and it was afterwards made absolute.

The plaintiff appealed.

Raikes, for the plaintiff, cited *Albert v. The Grosvenor Investment Company* (1).

French, for the defendant.

BRANWELL, L.J.—This appeal must be dismissed. I am of opinion that there was no evidence to go to the jury to shew that the plaintiff had not a right to seize and sell. I am of opinion that under this bill of sale there was a default, for there

was a non-payment, and that is a default. Then it is said that the defendant gave the plaintiff time; but, accepting the plaintiff's version, and assuming that the defendant said "that he wouldn't look to a week for payment," still that would not protect the plaintiff; it was not an engagement, and there was no consideration for it; it did not mislead the plaintiff and he did not alter his position in consequence of it. I think that any other construction would be unjust, as it would lead to this, that under this bill of sale the defendant would be prevented from seizing the goods, even though they were in danger, and though a distress was actually impending. With regard to the case of *Albert v. The Grosvenor Investment Company* (1), which has been cited, I must own that I have considerable doubt, and, indeed, I cannot accede to the decision in it. There is no doubt a difference between that case and the present, for there a seizure could only be made on default, whereas here the mortgagee could seize at any time; but still I cannot accede to it. There must be a new trial, because there was no evidence to go to the jury that the benefits which accrued under this bill of sale to the defendant from the non-payment by the plaintiff have been got rid of.

BRETT, L.J.—I agree as to the law which has been laid down. By this bill of sale the defendant had a right to take possession at any time, whether default had been made or not; but he could not sell unless there was a default in payment, that is, until non-payment, so that a default of payment on any Monday at noon would be a non-payment within this deed. It is then said that there was a waiver by the defendant of the payment due by the plaintiff on a certain Monday before noon, that is, that there was a promise by the defendant that he would not sell if payment were made before the end of the week. This promise was a naked promise, there was no consideration for it, it was not binding on the defendant, it could not be a binding waiver, and this the plaintiff was bound to know. Then it is urged that there was misleading conduct or misconduct on the part of

(1) 37 *Law J. Rep.* Q.B. 24; *Law Rep.* 3 Q.B. 128.

Williams v. Stern (App.), Q.B.

the defendant by which the plaintiff was induced to alter his position. I do not think so. Some difficulty arises from the decision in *Albert v. The Grosvenor Investment Company* (1), and I think that decision does in fact alter the meaning of "default," so that I cannot acquiesce in what was there said. I think that there must be a new trial, inasmuch as there was no evidence to go to a jury that the sale was wrongful as a sale, apart from the way in which the sale was carried on.

COTTON, L.J.—I am of the same opinion. The only question is, whether the defendant had a right to sell. The words in the bill of sale are "if default be made." Now, in my opinion, nothing took place which bound the defendant not to sell, for there was no consideration for the supposed contract of forbearance. Then is there anything in equity which would make the sale wrongful? I think not. There was no representation of fact which prevented the plaintiff from doing something which he would otherwise have done, and by which he was misled. There is no evidence that the plaintiff abstained from doing anything which he would or could otherwise have done. *Qua* sale there was no evidence that there was anything wrongful, and there was no evidence given as to the way in which the sale was conducted, so that there must be a new trial.

Appeal dismissed.

Solicitors—Yorke & Brewer, agents for R. H. W. Bartlett, Liverpool, for plaintiff; Chenery, Aldridge & Cray, agents for M. Norton, Liverpool, for defendant.

[IN THE COURT OF APPEAL.]

1880. }
May 13. } HOCH v. BOOR.*

Practice—Appeal—Compulsory Order of Reference—Judicature Act, 1873, ss. 39–57—Jurisdiction to refer Issues involving Charges of Fraud.

An appeal from a compulsory order of reference, made under s. 57 of the Judicature Act, 1873, by a Judge, sitting at nisi prius or assizes, must be brought direct to the Court of Appeal.

A Judge has jurisdiction, under s. 57, to refer compulsorily issues which involve questions of fraud, affecting the character and reputation of the parties, though, as a general rule, such issues ought not to be referred.

Appeal from an order of Grove, J., sitting at Nisi Prius.

The plaintiff's claim was for damages for wrongful dismissal of the plaintiff from the defendant's service as manager.

The statement of defence contained a paragraph justifying the dismissal on the ground of the plaintiff's misconduct, negligence and incompetence during his service. And the defendant counter-claimed for damages alleged to have been sustained by reason of such misconduct, negligence and incompetence.

An order for particulars having been obtained by the plaintiff, the defendant delivered very lengthy particulars of alleged "misconduct, disobedience, negligence and incompetence, and dates and items of loss thereby." A great number of items were set forth under different heads. There were particulars of the plaintiff's alleged misconduct in having from time to time made purchases of goods for the defendant, who was a merchant, against his express orders; of the plaintiff having supplied goods to customers abroad not equal to sample, and of his having wilfully destroyed the samples remaining at home; and there were a very great number of dates and items taken from the defendant's office books with respect to instances in which, as was alleged, on purchases by customers

* *Coram* Brett, L.J.; Cotton, L.J.; and Theisiger, L.J.

Hoch v. Boor (App.), C.P.

abroad, the plaintiff had erroneously invoiced wheat to the customers at incorrect weights, and thereby overcharged them for the wheat actually delivered, and the particulars mentioned these customers as having objected to be "defrauded in weight." The plaintiff was to be paid for his services as manager partly by receiving twenty per cent. on profits actually made in the business.

At the trial, before Grove, J., and a jury, after the opening of counsel, the Judge made the following order:—

"It is ordered that the issues in this action be referred to an official referee, who is to make his report to the Court. By the Court."

The plaintiff appealed from this order.

W. Digby Seymour and *Smalman Smith*, for the plaintiff. The particulars furnished by the defendants shew that the defence raises serious issues involving charges affecting the plaintiff's character and competence. He is entitled to have those issues submitted to a jury. Where fraud is alleged, as it is here, there is no jurisdiction to refer compulsorily under section 57—*Leigh v. Brooks* (1).

There was also a preliminary question of law as to what sort of negligence would justify the dismissal, and on that ground the case ought not to have been referred—*Clow v. Harper* (2).

They also referred to *Longman v. East* (3), *Pontifex v. Severn* (3), and *Mellin v. Monico* (3).

Willis and *Morton Smith*, for the defendant.—An appeal should have been made to the Divisional Court in the first instance. The order appealed from is on the same footing as an order made at Chambers. There is jurisdiction to refer compulsorily under section 57, even where questions of fraud are involved, though no doubt in such cases the Judge's discretion ought to be sparingly exercised. But here it would be impossible to try the issues raised by the defence and

counterclaim before a jury. The particulars are with respect to transactions relating to shipments of goods abroad, extending over months, and a most minute examination of a great number of documents is necessary.

W. Digby Seymour replied.

BRETT, L.J.—The question in this case is, whether we can set aside an order made by Mr. Justice Grove, referring the issues in the action to an official referee.

A preliminary objection has been taken that the appeal is not to this Court, but that it ought to have been taken to the Divisional Court. The order was not made by Mr. Justice Grove, sitting at Chambers and acting as a Judge in the place of the Court in a matter which might be heard at Chambers, or before the full Court, but it was made independently of the Court by a Judge sitting at Nisi Prius. Section 39 of the Judicature Act of 1873 provides that, in all cases within the section (and this case is), any Judge sitting in Court shall be deemed to constitute a Court. Therefore the order made by Mr. Justice Grove is made by him as constituting a Divisional Court. It is an order, therefore, of a Divisional Court. I am of opinion that the appeal is directly to this Court, and that the preliminary objection fails. The form in which the order is drawn up strengthens the view which I take from a consideration of the Act and of the difference which exists between a Judge sitting in Chambers and sitting in his capacity of Judge of Assize. The order is that the report of the official referee is to be made "to the Court," that is, to Mr. Justice Grove, in that capacity.

As to the merits of this appeal [his Lordship here stated the effect of the pleadings and particulars], the charge against the plaintiff that he had overcharged customers abroad by putting wrong weights in the invoices for the purpose of making a greater profit on which to receive twenty per cent. is a charge of fraud. The charge of wilfully destroying samples is now explained to be a charge of negligence only, so that we have one charge of fraud to deal with. As a general rule I adopt what was said in *Leigh v. Brooks* (1) by The Master of

(1) 46 Law J. Rep. Chanc. 344; Law Rep. 5 Ch. D. 592.

(2) 47 Law J. Rep. Exch. 303; Law Rep. 3 Ex. D. 198.

(3) 47 Law J. Rep. C.P. 211; Law Rep. 2 C.P. D. 142.

Hoch v. Boor (App.), C.P.

the Rolls and Lord Justice James. I interpret their meaning to be that, in almost all cases where a charge of fraud is made and a man's character is at stake, the matter ought not to be withdrawn from a jury. But that rule is not an absolute one. There is nothing in section 57 to except issues which involve a charge of fraud. There must be some cases in which the rule ought not to be applied. Here the charge of fraud involves an unusual and necessarily prolonged examination of documents, because the only way to shew that the plaintiff fraudulently put wrong weights in the invoices is by accumulating instances to shew that he did it systematically. That course involves an examination of a great number of books and documents relating to purchases and shipments of goods abroad, extending over months.

I therefore think that Mr. Justice Grove had jurisdiction to make the order appealed from, and I am not prepared to say that he did not exercise his discretion correctly.

COTTON, L.J.—The order appealed from is made under section 57 of the Judicature Act, 1873. And the first question is, whether the appeal ought not to have been taken to the Divisional Court. Section 39 of the Judicature Act of 1873 provides that any Judge of the High Court may exercise in Court or in Chambers all or any part of the jurisdiction vested in the High Court by the Act in all cases and proceedings which before the passing of the Act might have been heard in Court or in Chambers by a single Judge of a Court whose jurisdiction is transferred to the High Court; and the section ends, "In all such cases any Judge sitting in Court shall be deemed to constitute a Court." I am of opinion, therefore, that the order of Mr. Justice Grove was the order of a Court, and that the appeal is properly brought here. The questions of substance which arise are whether or not there was jurisdiction to refer, and if there was, whether or not the discretion of the Judge has been so wrongly exercised that we ought to interfere. In my opinion there is no preliminary question of law to be tried. The only

questions are of fact, whether or not the plaintiff misconducted himself and disobeyed orders. I think there was such a prolonged examination of accounts requisite for the decision of the issues as to bring the case within the section. It is objected that fraud is alleged and character involved. I should state my opinion that even although there may be jurisdiction to refer some issues because they involve a prolonged examination of accounts, it does not follow that all ought to be referred, but only those which cannot be tried separately. If there is a charge of fraud which can be separated, that issue ought not to be referred, but should be tried out in open Court. But there may be issues raising questions of fraud which entirely depend upon a prolonged examination of accounts; issues which it is impossible for a jury to try satisfactorily, and it is then a proper course to refer them. Therefore I think that, though as a general rule issues involving fraud ought to be tried in Court, there are cases in which they ought to be referred. Here there is a doubt in my mind whether upon the issues there is any question of fraud entirely unconnected with the other issues. I think the whole matter depends upon an examination of accounts and documents. I am therefore of opinion that there was jurisdiction to make the order, and that we ought not to interfere with it.

THESIGER, L.J.—I can well understand that the plaintiff prefers, where his character for honesty and competence is in question, that the matter should go before a jury. I think it is a justification for this appeal that *prima facie* issues involving fraud ought not to be referred. But this rule is not without exception. The Legislature has imposed a restriction as to the character of the questions that may be referred compulsorily; they must involve a "prolonged examination of accounts," &c., but with this exception the action may be founded on any ground whatever, and the issues may be referred. I must add that, in a matter within the jurisdiction of a Judge to refer, and therefore fit for the exercise of a judicial discretion, the Court will require a very

Hock v. Boor (App.), C.P.

clear case of manifest error before interfering with his exercise of that discretion; but a strong case ought to be made out for a reference when a charge of fraud is made. I am not sure that I should myself have made the order to refer. Practically, no doubt an honest man accused of dishonesty might prefer to have the charge, if it involved a prolonged and minute examination of accounts, investigated by an official referee. However, here there must necessarily be a considerable examination of documents as regards most of the heads of the particulars. I am of opinion that there was jurisdiction to refer, and that we ought not to interfere with the discretion exercised by Mr. Justice Grove. I agree in thinking the appeal lies to this Court.

Appeal dismissed.

Solicitors—J. Neal, for plaintiff; Tilson & Bryne Jones, for defendant.

*Nelson v. Gt. Nelson Ry. 50 L.J. 232.
Duke of Norfolk v. Ashurst 50 L.J. 235.*

[IN THE COURT OF APPEAL.]

1880. { *HILL'S EXECUTORS v. THE MANAGERS OF THE METROPOLITAN DISTRICT ASYLUM.**
May 25. {

Practice—Appeal—Evidence—Shorthand Notes—Time within which Application for Costs of Shorthand Notes used on Appeal should be made—Order LVIII. rule 11.

Where shorthand notes of the evidence and proceedings in the Court below are used on appeal, an application to be allowed, on taxation, the costs of the notes as costs of the appeal, must be made before the judgment of the Court of Appeal is entered.

Per BAGGALLAY, L.J., and BRETT, L.J. (BRAMWELL, L.J., dubitante)—The Court of Appeal has power to allow the costs of all shorthand notes properly used in the appeal, whether taken for the purposes of the appeal or not.

Application on behalf of the plaintiffs that, on taxation of their costs, the cost of shorthand notes used in the Court of Appeal should be allowed.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

The action was to recover damages, and for an injunction in respect of an alleged nuisance resulting from the erection and maintenance by the defendants of a small-pox hospital near to the plaintiffs' premises.

At the trial the jury gave a verdict for the plaintiffs, and Pollock, B., on further consideration, gave judgment for the plaintiffs.

The defendants moved for and obtained in the Queen's Bench Division a rule nisi, which was afterwards made absolute, for a new trial.

The plaintiffs appealed from the judgment of the Queen's Bench Division, and the defendants appealed from the judgment of Pollock, B.

The Court of Appeal dismissed the plaintiffs' appeal on condition of the defendants paying them the costs of the trial, and dismissed the defendants' appeal (reported *ante*, Q.B. 228). The defendants failed to pay the costs of the trial, and the plaintiffs' appeal was therefore allowed with costs.

Shorthand writers attended and took notes of the evidence and proceedings at the trial, and a transcript of the notes and copies were used on the motion for a new trial in the Queen's Bench Division, and also on the hearing in the Court of Appeal.

Shorthand notes of the arguments of counsel and judgments were also taken on the hearing of the motion for a new trial in the Queen's Bench Division, and a transcript and copies were used on the appeal.

Finlay, for the plaintiffs, now applied for a direction that, on taxation, the cost of all the notes, transcripts and copies used in the Court of Appeal should be allowed.

Anderson, for the defendants.—These costs cannot be taxed without a special order of the Court. The application is too late. It should have been made at the hearing of the appeal, or at any rate before judgment was entered—*Ashworth v. Outram* (1). It is more convenient that the application should be made be-

(1) 46 Law J. Rep. Chanc. 687; Law Rep. 9 Ch. D. 483.

Hill's Executors v. Managers of Metropolitan District Asylum (App.), Q.B.

fore judgment entered, when the matter is fresh in the minds of the Court. The application with respect to the cost of the notes taken at the trial should have been made to the Queen's Bench Division. This Court cannot allow the cost of notes not taken for the purposes of the appeal. At the most only the notes of the judgment in the Queen's Bench Division ought to be allowed.

Finlay in reply.—*Ashworth v. Outram* (1) only points out the more proper mode of application; no hard-and-fast rule is laid down as to the time it is to be made. In *Ex parte Sawyer* (2) the order was made after taxation.

[*Brett*, L.J.—That case tells against you; this Court cannot review the taxation.]

The present application is properly made here, the Queen's Bench Division having reserved the question of costs. We are entitled to the costs of all the notes properly used on the hearing of the appeal, whether they were taken for the purposes of the appeal or not.

BRAMWELL, L.J.—I am of opinion that this application must be refused. It appears to be the practice in the Court of Appeal at Lincoln's Inn not to make an order such as is asked for here unless the application is made, if not precisely when the decree is made, at all events before the decree is finally drawn up. I think it desirable that the same rule should be observed here. The costs of the shorthand notes should be asked for when our judgment is given. There is good reason for that. It is much better that these costs should be asked for when our judgment is given and all the circumstances are fresh in the minds of the Court, or at all events before the final judgment is drawn up. Those are the grounds upon which I think the application ought to be refused. I doubt very much whether we should have power to allow as costs of appeal the cost of shorthand notes not taken for the purpose of being used in the Court of Appeal. I doubt, therefore, very much whether the cost of the shorthand notes of the evidence at the trial, or

the transcript of those notes, could be allowed here. But I do not decide that this application ought to be refused on that ground, but upon the first ground that I have mentioned, namely, that the application is made too late.

BAGGALLAY, L.J.—I agree in thinking that this application should be refused on the ground that it ought to have been made at the time of the hearing of the appeal. I was not a member of the Court when the appeal was heard, though, having regard to the fact that the shorthand notes taken at the trial and at the motion before the Divisional Court were used in the Court of Appeal, I think that the application, if then made, should have been acceded to. I think it is clear that it could have been granted under the second part of rule 11 of Order LVIII. It seems to me that the rule gives a very wide discretion as to the materials the Court may deem it expedient to have before them on the hearing of an appeal in order to ascertain what evidence was made use of in the Court below, and in my opinion both sets of shorthand notes are within the rules.

BRETT, L.J.—In this case shorthand notes of the proceedings at the trial were taken and a transcript made of them, and that transcript and copies of it were used on the motion for a new trial before the Divisional Court, and in this Court on appeal. We are asked to make an order allowing the cost of the transcript and notes as costs properly incurred for the purposes of the appeal. Two objections are made to the application: first, that as the notes, transcript and copies were taken and used for the purpose of the hearing in the Divisional Court, and not solely for the purposes of this Court, we ought not and could not at any time have made the order asked for. With great deference I think that, if properly used in the Court of Appeal, the fact that they had been taken for and used in the Divisional Court would not oust the jurisdiction of this Court to allow the costs of them as costs of the appeal. If applied for in proper time, I think, therefore, the order should have been made. But then comes

Hill's Executors v. Managers of Metropolitan District Asylum (App.), Q.B.

the second objection, that the application is made too late. I think the decided cases shew that these costs could not be taxed as costs of appeal without a specific order of this Court, and it has also been held that the Court would not make such an order after its judgment had been entered and passed. Where in a case in the Chancery Division the Court of Appeal made the decree which the Court appealed from ought to have made, and the decree was taken and drawn up in the form of minutes of decree, it was held that an application like the one in the present case could be made at any time before the final decree was made. Here the appeal was from a Divisional Court on the Common Law side of the High Court of Justice, and our judgment does not generally assume the form of minutes of decree. It is short, and in such a form and in such terms as to be entered in the books as a judgment at once. In order to make the practice uniform, I am of opinion that we must treat our judgment formally entered in the books as a decree made upon minutes on the Chancery side of the Court, and we must hold that the application cannot be made after the judgment is once so entered, that is, almost immediately. It follows that practically the application must be made at the time of the judgment given or order made by this Court. That makes the practice in all cases identical. The only reason in my mind for refusing to accede to the application is that it has been made after the judgment of the Court of Appeal has been entered in the proper book.

Application refused.

Solicitors—Bischoff, Bompas, Bischoff & Co., for plaintiffs; Few & Co., for defendants.

[IN THE EXCHEQUER DIVISION.]

1880. { THE ATTORNEY-GENERAL v. THE
March 9. { LONDON AND NORTH WESTERN
RAILWAY COMPANY.

Railway Passenger Duty—Extra Charge to Passengers to cover the Duty—Extra Charge for Sleeping Accommodation—5 & 6 Vict. c. 79. ss. 2 and 4.

Under 5 & 6 Vict. c. 79. s. 2, which imposes a duty of five per cent. upon all sums received or charged for the hire, fare or conveyance of passengers conveyed upon a railway, the Crown claimed from a railway company, empowered to demand maximum rates of charge for the conveyance of passengers, including every expense incidental to such conveyance except Government duty, duty upon a sum of five per cent. which, to cover the Government duty, the company charged to their passengers in addition to the rate of fare, whether maximum or not:—Held, that the Crown was entitled to duty upon the five per cent. added to cover the duty. Per KELLY, C.B.—Quære, whether the charge made by the company was lawful; but if the charge was unlawful, the Crown was nevertheless entitled to the duty. Per HAWKINS, J.—It was unnecessary to decide whether, if the charge was shown to be unlawful, the Crown would nevertheless be entitled to the duty; but, semble, that it would.

The Crown claimed also duty under the same enactment upon a sum charged by the company, in addition to the ordinary first-class fare, to passengers using sleeping carriages, who were provided with a couch, sheet, &c., a lavatory, &c., were left undisturbed upon arriving at their journey's end, and were waited upon in the morning by a servant to call them and bring them hot water:—

Held, that the Crown was entitled to duty upon the sum charged for such extra accommodation.

Information for railway passenger duty under 5 & 6 Vict. c. 79. ss. 2 and 4 (1).

(1) 5 & 6 Vict. c. 79. s. 2, enacts that " . . . there shall be . . . paid . . . for and in respect of the passengers conveyed upon any railway . . . the . . . duties . . . set forth in the . . . schedule, . . . " which schedule contains (*inter alia*), " the duties in respect of passengers conveyed for hire by carriages travelling upon

Attorney-General v. London and North Western Rail. Co., Exch.

The material facts were as follows:—

The defendants, a railway company incorporated by Act of Parliament, conveyed passengers for hire from London to divers parts of Great Britain.

The Act, 9 & 10 Vict. c. cciv., by which the defendants were incorporated, enacted, by section 62, that the company might lawfully demand and receive, in respect of the use of the railways and of carriages and engines employed thereon respectively, any rates, tolls and charges not exceeding the following (that was to say): For every passenger conveyed in or by any express train, 2*d.* per mile; for every passenger conveyed by any other trains in a first-class carriage, 1½*d.* per mile; in a second-class carriage, 1*d.* per mile; in a third-class carriage, ¾*d.* per mile.

The same Act enacted, by section 63, that the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the railway and of carriages, and for locomotive power and every other expense incidental to such conveyance as aforesaid, except Government duty, should not exceed the following sums (that was to say): For every passenger conveyed in or by express train, 2½*d.* per mile; for every passenger conveyed by any other train in a first-class

carriage, 2*d.* per mile; in a second-class carriage, 1½*d.* per mile; in a third-class carriage, 1*d.* per mile.

The maximum rate of fare permitted to be charged was not in all cases charged by the defendants in the case of passengers conveyed by first or second-class carriages, but was charged in nearly every instance in the case of passengers conveyed by third-class carriages.

The defendants, in addition to the said rate of fare, whether maximum or otherwise, charged the passengers a further sum of five per cent. thereon to cover the Government duty. The Crown claimed from the defendants duty on the additional sum so charged by them. The defendants disputed their liability thereto.

The defendants further disputed their liability to pay duty on certain sums charged by them in the following circumstances.

The defendants by certain of their night trains ran not only first, second and third-class carriages, but also certain special carriages called "sleeping carriages," available only to first-class passengers on payment of a sum in addition to the first-class fare. The defendants provided for each person using such sleeping carriages a couch six and a-half to seven feet long, a clean sheet, a rug or blanket and a clean pillow-case, a lavatory with water laid on, and soap and towels, a water bottle and glass and a looking-glass, and also a water closet, &c. When the persons using such sleeping carriages entered them in order to retire to rest, they were not again disturbed during the night. When the sleeping carriage arrived at its destination, it was put into a siding specially reserved for it, where the persons using it could remain until the morning, and a special servant was employed to wait upon them there, to call them when they wished, and to bring them hot water when they were called. The defendants contended that the extra sums charged for the use of the sleeping carriages were not liable to duty, on the ground that such extra sums were charges for what practically amounted to hotel accommodation, and were not sums received or charged for the hire, fare or conveyance of passengers.

railways, that is to say, for and in respect of all passengers conveyed for hire upon or along any railway, a duty at and after the rate of 6*l.* for 100*l.* upon all sums received or charged for the hire, fare or conveyance of all such passengers."

Section 4 enacts that the proprietors "of every railway . . . and every other person who shall . . . convey or cause to be . . . conveyed any passengers for hire in or upon any railway . . . shall . . . keep . . . a . . . true account of all . . . sums of money which shall be received or charged daily by or for such "proprietors "or other person for the hire, fare or conveyance of all such passengers as aforesaid, whether the same shall be received for the conveyance of passengers on the railway of such proprietor, company or other person only, or on such last-mentioned railway and any other railway, or any such other railway only, and for or in respect of all which sums of money the duties charged by this Act shall in manner hereinafter directed be paid by the said "proprietor, company "or other person so receiving or charging the same as aforesaid, without any deduction or abatement thereout on any account or pretence whatever. . . ."

Attorney-General v. London and North Western Rail. Co., Exrn.

Sir H. Giffard (Solicitor-General) and W. W. Karslake, for the Crown.

J. S. Dugdale, for the defendants.

KELLY, C.B.—Every argument which I think could be presented on the part of the defendants has been presented by Mr. Dugdale; but I have not the slightest doubt that upon the true construction of this Act of Parliament the Crown is entitled to the judgment of the Court upon both the questions raised.

The first question is, whether the Crown is entitled to duty upon the additional sum of five per cent. charged by the defendants to the passenger to cover the Government duty. Without entering into the question whether it is lawful as between the company and the public to charge this five per cent. to the passenger, I am of opinion that if the company do add this five per cent., the Crown is entitled to duty upon it. The provision of 5 & 6 Vict. c. 79, is that the Crown shall be entitled to this duty at the rate of five per cent. "upon all sums received or charged for the hire, fare or conveyance of passengers" conveyed for hire upon a railway. A person desiring to travel by the defendants' railway has, before he is permitted to travel upon it, to pay a given sum, and whether that sum does or does not include a sum of five per cent. added by the defendants to cover the Government duty, duty is payable upon the entire sum which the passenger thus has to pay as a condition of the transit. All that the passenger gets for the sum which he pays is the transit, and upon the sum which he pays for the transit, whether the sum includes such extra five per cent. or not, the Crown is, by virtue of the express terms of the Act of Parliament, entitled to duty. Without expressing any judicial opinion on the question whether the defendants have a right to charge to the public travelling by their railway the five per cent. which they have to pay as duty to the Government, I may say that, according to my present impression, the defendants appear to me, on the true construction of their Act, to have no such right. The exception of Government duty in the section of the defendants' Act as to the maximum rate of

charge, appears to me to mean, not that the defendants may, to cover the Government duty, add to that maximum, but that the Government duty is not one of the expenses which the defendants may legitimately take into account in fixing their fares. However, whether that be so or not, I am of opinion that the defendants having charged this extra five per cent., must pay duty upon it.

With regard to the second question, that might raise a point of some nicety, if there were in the accommodation which has been provided by the defendants something clearly different from any accommodation usually provided by a railway company—say the providing of a dinner on the way, or something as unnecessary to and unconnected with the journey. But when we look to the description of what the defendants provide, we find that is not at all the case. The couch, six and a-half to seven feet long, is only the adaptation of a railway carriage to lying down instead of sitting up, and such an adaptation by one means or another in first-class carriages is very common. A pillow is only another word for a cushion; a looking-glass is very common in an ordinary railway carriage. Some of the other things which the defendants have provided are, no doubt, more unlike what is usually provided; but, when all is said, the additional accommodation which the defendants provide in one of their sleeping carriages, though making the carriage a more convenient carriage, especially for anyone having to pass a night on the railway, leaves it simply a railway carriage better fitted up than usual.

I think the Crown is entitled to the judgment of the Court upon both questions.

HAWKINS, J.—I am of the same opinion. The Crown is entitled to a duty at the rate of five per cent. upon all sums received or charged for the hire, fare or conveyance of passengers upon railways. Upon the first question, I think that, however the lump sum actually charged to the passenger for his conveyance is in the mind of the railway company made up, the whole of the sum which they require the passenger to pay as a condi-

Attorney-General v. London and North Western Rail. Co., Exch.

tion of his being carried on his journey is properly and strictly to be called a sum received or charged for the conveyance of such passenger: and I think (though it is not necessary so to decide) it is immaterial whether the defendants are strictly entitled to charge the sum which they do charge. I think that if a railway company charged fares in excess of those mentioned by their Act of Parliament, the duty would be chargeable upon the whole of the sums which they actually charged and received, the words of the Railway Passengers Duty Act not being all sums which the railway company have *rightfully* received or charged, but "all sums received or charged." As regards the second question for our decision, I confess that on the first blush there seemed to me to be a good deal in the defendants' contention. I thoroughly concede that accommodation provided in a sleeping saloon or an ordinary day saloon might be such as would be by no means incidental to the mere transit of passengers. Suppose, for instance, an ordinary drawing-room saloon, as it is called, and a library were fitted up, and newspapers were provided and coffee served to all persons on the journey; it would be absurd to say that those were things incidentally connected with the carriage, so as to make a charge for that a charge for conveyance. If the company said that those who went into that particular carriage must pay a sum of 1s. 6d. or 2s. for the privilege of using the books or newspapers or consuming the coffee supplied to those who travelled in that particular carriage, I could understand thoroughly that duty would not be charged on those extra sums, because they could not be fairly said to be sums which the company received for the hire, fare or conveyance of passengers. But that is not the case here. If the defendants were entitled to make separate charges for parts of the accommodation which they have provided, and to have such separate charges regarded as not liable to duty, they have not, in point of fact, thus made separate charges. What they have done is to charge one sum as for the ordinary first-class fare, and, secondly, an additional sum in gross for

the right conferred on the passenger to travel in a much more luxurious carriage. And looking to the statement of the accommodation afforded, the extra luxury provided appears to me to consist of things which are only additional luxuries incidental to the conveyance. A luxurious sleeping compartment is as much incidental, as it strikes me, to the conveyance as "first-class" itself. The mere conveyance may be by the bare boards afforded by a truck; more luxurious accommodation is afforded by a third-class carriage; still more luxurious accommodation by a second-class carriage; still more luxurious by a first-class; and yet more luxurious still in the sleeping carriage. I see no reason to distinguish this last accommodation, and to say that this is not incidental to the travelling, any more than I should think of saying that the extra accommodation of a first-class carriage with cushions and curtains is not incidental to the conveyance because some persons may travel second-class and some may travel third-class. I confess that if there really was an extra expense entailed upon the company in providing accommodation which did not belong or was not incidental to the actual conveyance of a passenger (say shunting the carriage and allowing the passenger to keep his bed for three or four hours after he arrives, and calling him in the morning, and providing him with hot water, as if he were at an hotel), I should be far from saying that the railway company might not, if they considered it expedient, make a separate charge for that which would be purely hotel accommodation. But it seems to me that the company have not provided and made a charge for hotel accommodation. They have, in fact, said to the passenger, "If you will pay us for the conveyance the increased demand, we will give you conveniences which we are not bound to, and will, among other things, gratuitously afford to you the assistance and service of a person to call you, and bring you hot water." It is just what they do in an ordinary way. At an ordinary station the passenger has the convenience of a waiting-room and a refreshment-room. Those things are thrown into the charge

Attorney-General v. London and North Western Rail. Co., Exrs.

for conveyance of the passenger, and it would be idle to contend that those things could be separated from the charge for conveyance, so as to exempt any portion of the ordinary fare from duty, because a small portion might be said to represent the value of that accommodation. I think that the company are liable to pay five per cent. duty in respect of the extra charge for this sleeping accommodation, upon the simple ground that the charge so made is charged for the conveyance and that which is incidental to the conveyance of a passenger.

Judgment for the Crown accordingly.

Solicitors—The Solicitor of Inland Revenue, for the Crown; R. F. Roberts, for defendants.

[IN THE COURT OF APPEAL.]

1879.	} SCARAMANGA v. STAMP AND ANOTHER.*
Dec. 15, 16.	
1880.	
April 20.	

Shipping—Deviation—Perils of the Seas—Deviation to save Life and Property.

A deviation made by a vessel for the purpose of saving property is not justifiable, and the shipowner is liable to the charterer for loss or damage to cargo occasioned thereby. A deviation made solely for the purpose of saving life is justifiable.

Appeal from a judgment of Lindley, J. (reported 48 Law J. Rep. C.P. 478.)

The facts of the case are fully stated in the judgment of Cockburn, C.J. (*post.*)

Herschell and Benjamin (Cohen with them), for the defendants.—The question in this case is whether or not the owners of the steamship *Olympias* are liable to their charterer for a loss of cargo, caused by the ship having deviated from her course for the purpose of saving life and

property, and with that object having towed the steamship *Arion* into the Texel.

It will, perhaps, be admitted, that a deviation to save life only is justifiable. It is proposed, first, to argue the proposition here that, according to English law, a deviation for the purpose of saving property only is also justifiable. It is conceded that, according to the American authorities, a deviation for the purpose of saving goods merely is not justifiable—*Bond v. The Brig Cora* (1), but there has been no decision to that effect in the English Courts. In *Davis v. Garrett* (2), which is the only reported case in which an action has been brought by cargo owner against ship for loss caused by deviation, the deviation was clearly wrongful, and that case therefore has no application. Public policy demands that shipowners should be protected from loss and liability in consequence of giving succour to a ship and cargo in danger. It is for the common interest and advantage of all who engage in maritime adventures that they should do so. The ship who saves to-day may herself require saving to-morrow.

[COCKBURN, C.J.—Can this Court mould the law in the way you suggest, there being no positive authority on the subject? Is it not a matter for legislation?]

An exception from the circumstances under which shipowners are liable for deviation is already implied, as part of the contract between owner of goods and shipowner, in the case of a deviation for the purpose of saving life solely, which, according to the judgment of Lindley, J., is justifiable; the question is how far that exception is to be carried. The same considerations of public policy apply to a deviation in order to save goods as to one in order to save life. Secondly, a deviation for the purpose of saving life and goods is justifiable. Public policy is against taking away inducements to save life.

[BRAMWELL, L.J.—There is a distinction recognised by law between saving life and saving goods; it is justifiable to

* *Coram* Cockburn, C.J.; Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 2 Wash. C. C. 80.

(2) 6 Bing. 716.

Saramanga v. Stamp (App.), C.P.

destroy goods in order to save life—*Moussé's Case* (3).]

There are many *dicta* of English Judges which support the general proposition that succouring a ship in distress is not a deviation—*The Beaver* (4), judgment of Sir William Scott, at p. 294; *Lawrence v. Sydebotham* (5), per Lord Ellenborough, C.J., and per Lawrence, J., at p. 54; *The Waterloo* (6); *The Jane* (7); *The Deveron* (8); *The Orbona* (9). It is nowhere stated in the above authorities that lives must be in danger in order to justify deviation. The true distinction would seem to lie between saving goods in a derelict ship and succouring a ship with lives on board. In the one case, the deviation being for gain purely, is not justified; in the other, being from motives of humanity, it is. When a ship is in distress, and lives are on board, the saving ship cannot be restricted to saving life merely. If it is conceded that a deviation for the purpose of saving goods merely cannot be justified, still where the ship goes out of her course, in the first instance to save life, she is justified in saving goods also, and the true question for a jury then is, whether a reasonable course was adopted in order to save life, not whether the succouring ship did that, and no more, which was absolutely necessary for saving life.

[BRETT, L.J.—In 1 *Arnold on Marine Insurance*, pt. 1, c. 10, p. 502, 5th edit., a deviation is said to be justified if made to save life only, but the justification is said not to extend to a deviation for the purpose of saving property.]

The proposition is better stated in 1 *Phillips on Marine Insurance*, c. 12, s. 11, para. 1,027, 1,028, pp. 589, 590, 5th edit., where a deviation to save property “merely” is stated not to be justified. If that proposition is admitted, it does not cover the present case, where the motive was to save lives in the first place, and goods in the second. If the plaintiff’s

contention is right—that in order to justify a deviation no more than was absolutely necessary to save life must be shewn to have been done—it would follow that a ship bound to Calcutta, who succoured a ship bound to Dover, must take out her crew and carry them to Calcutta. That result is unreasonable. The burden of proof is on the plaintiff, to shew that the defendants are liable for a loss of cargo which occurred otherwise than from perils of the sea.

C. P. Butt, for the defendants.—It is not conclusively settled by authority that a deviation from a ship’s course, even to save life only, is justified. But, assuming that it is justified, the rule cannot be extended to a deviation for the purpose of saving property. The Court will not introduce into their contracts between shipowner and owner of cargo a power for the shipowner to undertake an entirely new voyage for profit. Public policy cannot require that he should do so. The benefit of salvage offers inducement enough for masters to succour ships in distress. No doubt expressions may be found in the reported cases which favour the defendants’ contention, but there is no express decision as to the effects of a deviation to save both life and property. In *Papayanni v. Hocquard* (10) and *Car-michael v. Brodie* (11), the Judicial Committee of the Privy Council expressly declined to decide the question; and it is also treated as doubtful in 3 *Dent’s Com.* pt. 5. lect. 48, pp. 312, 313. In 2 *Parsons on Marine Insurance*, c. 1, s. 5, p. 35, it is said that “a delay for the purpose of towing a vessel is certainly a deviation, unless there are persons on board the vessel towed who can be saved in no other way.” And the writer refers to *Crocker v. Jackson* (12), which states the result of the American authorities. That proposition covers this case, because the sea was smooth, and the crew of the *Arion* could well have been taken off the ship, and, so far as saving life was concerned, there was no necessity to tow at all.

(3) 12 Rep. 63.

(4) 3 C. Rob. 292.

(5) 6 East, 46, at p. 52.

(6) 2 Dod. 433, at p. 437.

(7) 2 Hag. Adm. 338, at p. 345.

(8) 1 Willm. Rob. 180, at p. 182.

(9) 1 Spinks, 161, at p. 166.

(10) Law Rep. 1 P.C. 250.

(11) Law Rep. 1 P.C. 461.

(12) Sprague, R. 141.

Scaramanga v. Stamp (App.), C.P.

Herschell, in reply.—The law implies that some deviation from the ship's course may be justified, as when she deviates to avoid capture. Justification ought equally to be implied where the object is to save lives and property. The decision in *Crocker v. Jackson* (12) does not apply to the present case.

Our. adv. vult.

The following judgments were (on April 20) delivered by

COCKBURN, C.J.—This case comes before us on appeal from a judgment of Mr. Justice Lindley after a trial at Nisi Prius. The facts are not in dispute, and lie in a very narrow compass. The steamship *Olympias*, of which the defendants are owners, having been chartered by the plaintiff to carry a cargo of wheat from Cronstadt to Gibraltar, and having started on her voyage, when nine days out sighted another steamship, the *Arion*, in distress, and on nearing her, found that the machinery of the *Arion* had broken down and that the vessel was in a helpless condition. The weather was fine and the sea smooth, and there would have been no difficulty in taking off and so saving the crew; but the master of the *Arion*, being desirous of saving his ship, as well as the lives of his crew, agreed to pay 1,000*l.* to the master of the *Olympias* to tow the ship into the Texel.

Having taken the *Arion* in tow, the *Olympias*, when off the Dutch coast, on the way to the Texel, got ashore on the Terschelling Sands, and, with her cargo, was ultimately lost.

Under these circumstances the plaintiff claims the value of his goods, alleging that the goods were not lost by perils of the seas, so as to be within the exception in the charter-party, but were lost through the wrongful deviation of the defendants' vessel. The defendants pleaded that the deviation was justified, because it was for the purpose of saving the *Arion* and her cargo and the lives of her captain and crew, the ship being in such a damaged condition that she could not be navigated.

That there was here a twofold deviation, which, unless the circumstances

were such as to justify it, would entitle the plaintiff to recover, cannot be disputed—in the first place, in the departure of the *Olympias* from her proper course in going to the Texel; secondly, in her taking the *Arion* in tow, which, in the three American cases of *Herman v. The Western Marine and Fire Insurance Company* (13), *The Natches Insurance Company v. Stanton* (14), and *Stewart v. The Tennessee Marine and Fire Insurance Company* (15), has been held to be equivalent to a deviation, and rightly so, seeing that the effect of taking another vessel in tow is necessarily to retard the progress of the towing vessel, and thereby to prolong the risk of the voyage. It is unnecessary to consider how far, if the loss had not been the consequence of the deviation, the mere fact of the deviation would render the shipowner liable to the goods owner for loss that ensued after it, as distinguished from its effects in a case of insurance, as there can be no doubt that the loss not only occurred during the deviation, but was occasioned by it, there being the express admission of the master to that effect; and the case, therefore, comes within the ruling in *Davis v. Garrett* (2), the authority of which, so far as relates to a loss of goods occurring during the course of a deviation, has never been questioned.

It becomes, therefore, necessary to consider how far the grounds on which the defendants seek to justify the deviation can avail them in defence of the action. As regards that part of the plea which seeks to justify the deviation on the ground of its having been for the purpose of saving the lives of the crew of the *Arion*, it is obvious that the defence fails on the finding of the jury, who have found, and beyond all question rightly, that the deviation was not reasonably necessary in order to save the lives of those on board. On the other hand, the jury have found that the deviation was reasonably necessary for the purpose of saving the *Arion* and her

(13) 18 Lo. R. 516.

(14) 2 Smed. & M. 340.

(15) 1 Humph. 242.

Soaramanga v. Stamp (App.), C.P.

cargo. The question for decision, therefore, is whether, when deviation has taken place with the object not of saving life, but of saving property alone, the shipowner will be exempt from liability to a goods owner whose goods have been lost through the deviation. Mr. Justice Lindley, before whom the cause was heard at Nisi Prius, gave judgment in favour of the goods owner, the plaintiff, and the case comes before us on appeal from his decision. I am of opinion that his decision was right, and ought not to be disturbed.

It is a remarkable fact that, while the commerce and the mercantile marine of Great Britain have been for so many years the largest in the world, the question as to how far a deviation for the purpose of saving life or property is justifiable as against a goods owner or insurer, has never come before the tribunals of this country, so as to be authoritatively determined; while in the United States both questions have on several occasions come before the Courts, and the law may now be taken to be there settled by judicial decision, as well as by the consensus of jurists. In this country the question, with one exception, has only presented itself incidentally to that of salvage, and cannot be said, even in that form, to have been brought to the test of judicial decision. The exception in question is to be found in the case of *Lawrence v. Sydebotham* (5), in which the question of deviation to assist a vessel in distress was incidentally touched upon, but was not the point for decision. In that case Mr. Justice Lawrence says, "As to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress. But that" (he continues) "was not the case here; the prize was in no distress." This observation, made to meet the argument of counsel, was altogether *obiter dictum*, the question in the cause having no reference to deviation at all, but being whether, under a policy authorising the taking of prizes in a voyage, the shortening sail in order to remain by and protect a captured prize

was within the terms of the policy. The learned Judge, it is to be observed, in no way explains what he means by the term "deviation," or the degree of assistance which is to be understood as to be given for what he terms "the common advantage." That the question of deviation was not before the Court is apparent from the language of Lord Ellenborough, who, after stating what the point really was, says (p. 32) (5), "This does not affect the question how far slackening sail from motives of humanity to succour another ship in distress is allowable; nor is it necessary to touch upon it. Perhaps, when such a case does arise, it may be found for the general benefit of all insurers (and, amongst others, consequently for the benefit of those who may raise such an objection) to allow such succour to be given without imputing deviation to the succouring ship. It is not, however, necessary now to give any opinion on that point."

The other cases in which the question had incidentally arisen are all cases of salvage. In the case of *The Beaver* (4) there were conflicting claims, it being insisted on behalf of a king's ship that the ship saved had been a derelict, and had been saved entirely through the assistance of the king's ship. All that Sir William Scott says is, "With respect to the king's ship, I cannot admit the inflated representation which has been made of their services. It is the duty of every king's ship, and indeed of every other ship, to give assistance as well against the elements as against the enemy." How far the duty extended, or how far it would protect a shipowner from the consequences of a deviation, the learned Judge does not say, nor does it appear to have been present to his mind.

In the later case of *The Waterloo* (6), in which salvage was claimed by the owners and crew of a ship chartered by the East India Company for salvage services rendered to one of the company's own ships, and in which the claim was resisted on the ground that by the terms of the charter-party and the instructions under which the ship sailed, no salvage could be demanded, Sir William Scott, it

Scaramanga v. Stamp (App.), C.P.

is true, says, "As to the instructions, they extend no further than to enjoin the duty of assisting other ships belonging to the company, but they do not express that this duty, which it is very proper to enjoin, shall receive no remuneration, whatever be the actual merit, whatever be the suffering incurred in performing it. It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it; but that does not discharge from liability to payment where assistance is substantially given." Here again the learned Judge is dealing with the subject of duty only so far as it affected the claim to salvage; with its effect in respect of deviation, he had nothing to do. Yet it appears to have occurred to him that the deviation might not be without serious consequences in respect of the ship's insurance, for in fixing the amount to be paid for salvage, after dwelling on the merits of the claim, he adds, "Nor can I altogether lose sight of the dangers the ship thus incurred of vitiating her insurance, though that may be a questionable point."

In the case of *The Jane* (7), where the master of a whaler had gone with a boat's crew at the risk of their lives to the assistance of a vessel dismasted, and with the sea making a breach over her, and the crew of which had taken to the rigging as their last resource, it being urged on behalf of the owners that they had incurred the risk of forfeiting their insurance, the Court (Sir Charles Robinson) is said to have "entertained some doubt as to the positive forfeiture of the insurance in all cases by deviation to assist vessels in distress," evidently looking upon the question as an unsettled and uncertain one.

In the later case of *The Orbona* (9), Dr. Lushington appears, indeed, to have taken a more decided view. Referring to the claim for additional salvage, on the ground of the fatal effect which the deviation might have had on the insurance, he says, "It is said that the insurance of the *Poictiers* was void. That is not true in law, for it is not the law that, if one vessel goes out of her way to assist another in distress, the

insurance is void." In support of which he refers to what was said by the Judges in *Lawrence v. Sydebotham* (5), but which, as I have already shewn, affords no sufficient authority for the position in question.

In two more recent cases the Judicial Committee of the Privy Council appear, however, to have taken a more doubtful view of the subject than seems to have been entertained by Dr. Lushington in the case just referred to. In delivering the judgment of the Judicial Committee in *Papayanni v. Hocquard* (10), the risk run of vitiating the insurance having been urged as a reason for increasing the amount to be allowed for salvage, Dr. Lushington says, "With reference to the uncertainty in which the subject is involved, their Lordships have been invited to solve the question. Their Lordships beg to decline that invitation. We are of opinion" (he continues) "that this question ought to be raised, not incidentally before this, but directly before another, tribunal, as the great question at issue, and there receive the most careful deliberation until at last it comes to a final solution and is set at rest." He adds, however, that, in considering the amount of salvage to be given, "The Judge can never forget that there was possibly a risk incurred in respect of the vacating of policies, and in regard to actions which might be brought by owners of cargo."

In like manner, in the subsequent case of *Carmichael v. Brodie* (11), the Judicial Committee held that the claim of the owner should be considered with reference to "the doubt whether the insurance might not be vitiated, and whether the owners of the ship might not become responsible to the owners of the cargo for the acts of their servants in deviating from their course to render the assistance, and weakening the crew," thus treating the question of law, as to the effect of a deviation for the purpose of rendering assistance, as unsettled and uncertain.

The case before us presents itself, therefore, so far as our Courts are concerned, as one of the first impression, on

Scaramanga v. Stamp (App.), C.P.

which we have to declare, or perhaps I may say, practically to make, the law.

I am glad to think that in doing so we have the advantage of the assistance afforded to us by the decisions of the American Courts, and in the opinion of American jurists whom accident has caused to anticipate us on this question. And although the decisions of the American Courts are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part.

It is, however, unnecessary to go through the American decisions in any detail. The effect of them is to be found in the well-known text writers, but is nowhere better stated than in the judgment of Mr. Justice Sprague, in the case of *Orocker v. Jackson* (12). The result of these authorities immediately bearing on the question which we have here to decide may be briefly stated.

Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of "perils of the seas;" and, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation.

If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorised deviation.

But where the preservation of life can only be effected through the concurrent saving of property, and the *bona fide* purpose of saving life forms part of the motive which leads to the deviation, the

privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating.

In these propositions I entirely concur, as well as in the reasoning by which this view of the law is supported by Mr. Justice Lindley in his very able judgment. The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences which may result to a ship or cargo from the rendering of the needed aid. It would be against the common good, and shocking to the sentiments of mankind, that the shipowner should be deterred from endeavouring to save life by the fear lest any disaster to ship or cargo, consequent on so doing, should fall on himself. Yet it would be unjust to expect that he should be called upon to satisfy the call of humanity at his own entire risk. Moreover, the uniform practice of the mariners of every nation—except such as are in the habit of making the unfortunate their prey—of succouring others who are in danger, is so universal and well known, that there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner as subject to this exception to the general rule of not deviating from the appointed course. Goods owners and insurers must be taken, at all events in the absence of any stipulation to the contrary, as acquiescing in the universal practice of the maritime world, prompted as it is by the inherent instinct of human nature, and founded on the common interest of all who are exposed to the perils of the seas. What would be the effect of such a stipulation as I have just referred to, if it existed, it is unnecessary for the purpose of the present case to consider.

Scaramanga v. Stamp (App.), C.P.

Deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil which, though its fulfilment may have been attended with danger to life or property, remains unrewarded. There would be much force, no doubt, in the argument, that it is to the common interest of merchants and insurers, as well as of shipowners, that ships and cargo when in danger of perishing should be saved, and consequently that, as matter of policy, the same latitude should be allowed in respect of the saving of property as in respect of the saving of life, were it not that the law had provided another and a very adequate motive for the saving of property, by securing to the salvor a liberal proportion of the property saved—a proportion in which not only the value of the property saved, but also the danger run by the salvor to life or property, is taken into account, and in calculating which, if it be once settled that the insurance will not be protected, nor the shipowner free from liability in respect of loss of cargo, the risk thus run will, no doubt, be included as an element. It would obviously be most unjust if the shipowner could thus take the chance of highly remunerative gain at the risk and possible loss of the merchant or the insurer, neither of whom derive any benefit from the preservation of the property saved. This is strikingly exemplified in the present case, in which, not content with what would have been awarded to him by the proper Court on account of salvage, the master made his own terms, and would have been paid a very large sum had the attempt to bring the *Arion* into port proved successful. It is obviously one thing to accord a privilege to one who acts from a sense of duty without expectation of reward, and another to extend it to one who neither acts from a sense of moral duty nor in obedience to what may be thought to be the policy of the law, but solely with a view to his own individual profit.

In the result, I am of opinion that though the deviation of the *Olympias*, so far as relates to her proceeding to the *Arion* in the first instance, was justified, the taking the latter in tow and departing from the

proper course in order to take the ship to the Texel, this not being necessary in order to save the lives of the captain and crew, was an unauthorised deviation, and the loss of the plaintiff's cargo having been the direct consequence of the deviation, or, to use the language of Chief Justice Tindal in *Davis v. Garrett* (2), "The loss having actually happened whilst the wrongful act was in operation and force, and being attributable to the wrongful act," the defendants cannot avail themselves of the exception in the charter-party, and the plaintiff is therefore entitled to judgment. The appeal must, therefore, be disallowed.

I am authorised by my colleagues, Lord Justice Brett and Lord Justice Cotton, to say that they concur in the judgment I have just delivered.

BRAMWELL, L.J.—I am of opinion that the judgment must be affirmed. The defendants have undertaken to the plaintiff to carry his goods from port to port without deviation, unless for good cause justifying such deviation. The defendants have deviated, and so broken their contract, unless they can shew such cause. Now the cause that will justify non-compliance with an undertaking may be expressed or implied in the contract itself, or added to it by usage or by some positive law. The cause alleged in this case is that the deviation was a reasonable one, to save a ship and her cargo from loss and destruction. It is certain that no law orders such a deviation. It is certain there is no usage which adds to the contract a power to deviate for such cause. On the contrary, every opinion is against it, and it is certain that ships which desire to have such a power, or one somewhat like it, expressly stipulate for it, as, for example, for the right to tow vessels. As it is not expressed in the contract between the plaintiff and the defendants, the only remaining question is, Can it be implied? Now, for my own part, I think it most objectionable to add to the contracts of parties that which they could have added themselves had they been minded. It is to suppose they would have made the contract we make for them, had they only thought of it—a

Scaramanga v. Stamp (App.), C.P.

supposition very likely to be wrong. Still in some cases it is and must be done. It is said it must be in this case on the ground of public policy. That is to say, as I understand, that it is for the good of mankind in general, and so of Englishmen, that ships should, without liability to freighters, have power to deviate to save other ships and cargoes. Now I am by no means sure that that is so. I am by no means certain that more might not be lost than gained by such a power and its exercise. I am certain of this, that the best way to manage the matter is to leave parties to make their own bargains about it. Let the shipowner charge less freight where he reserves to himself the power, and more where he does not. I am also certain of this, that even if the good of mankind and of this country in particular would be augmented by such a power, and by implying it in a contract unless expressly excluded, we cannot imply it on the ground of public policy.

If public policy required such power should exist, a charter-party which expressly denied such power would be illegal and all its provisions void. Can that be maintained for a minute? Public policy requires the enforcement of certain rules, as that contracts shall not be illegal or immoral, that they shall not be in restraint of trade or of personal freedom, that they shall not invite to the commission of crime, as an undertaking with a man to pay money to his executors if he commits suicide. But public policy would no more imply such a matter as this, and make its exclusion from a charter illegal, than it would make an agricultural lease unlawful, because some of the covenants were inconsistent with the most profitable use of the land.

I am of opinion, then, that the defendants have broken their contract without any sufficient excuse or justification, and that this action is maintainable.

It will be said that this is a very narrow ground on which to decide the case. It may be. But it is the only ground, and it is not my fault that that is narrow. After all, the question is, Had the defendants sufficient justification for breaking

their promise? I say no, and that the plaintiff must recover.

The question whether a deviation to save life is justifiable is untouched by this opinion. That question depends on different considerations and different authorities.

Judgment affirmed.

Solicitors—Waltons, Bubb & Walton, for plaintiff; Crump & Son, for defendants.

Jessie's Maidenhair 51 & 52 210. Moore v Kenniard
[IN THE COMMON PLEAS DIVISION.] 52 & 53

1880. { In re WALLINGFORD (BOROUGH)
June 9. { ELECTION PETITION. WELLS
(petitioner); v. WREN (respondent).

Parliament—Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), ss. 2 and 26—Election Petition—Interrogatories.

The Court has no power to order interrogatories to be delivered to a respondent to a Parliamentary election petition, under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), for though section 2 gives the Court the same powers, with reference to such petition, as it would have if such petition were an ordinary cause, yet this is "subject to the provisions of the Act," and section 26 enacts, that until rules have been made (and none have been made as to interrogatories), "the principles, practice and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions," are to be observed in the case of election petitions under the Act.

In this case, in which a petition had been duly presented according to the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), complaining of the undue election of the respondent for the borough of Wallingford, an application was made to Lindley, J., at Chambers, for an order that the petitioner might be at liberty to deliver to the respondent, or his agents, interrogatories in writing,

In re Wallingford Election Petition, C.P.

and that the respondent should, within five days, answer the questions in writing, by affidavit, to be sworn and filed in the ordinary way. That learned Judge dismissed the application with costs, and he indorsed on the summons the following reason for refusing to make the order: "I think that on the true construction of sections 2 and 26 of the Act of 1868, I have no power to make this order, although the election Judges can, by making a rule under section 25, authorise interrogatories to be delivered. As yet, however, there is no such rule."

Pollard now moved, by way of appeal, for an order to deliver interrogatories, in the terms of the summons at Chambers. The 2nd section of the Parliamentary Elections Act, 1868, after defining the expression, "the Court," to mean the Court of Common Pleas, states, "such Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, with reference to an election petition and the proceedings thereon, as it would have if such petition were an ordinary cause within their jurisdiction;" and section 29 enacts, "On the trial of an election petition under the Act the Judge shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a Judge of one of the Superior Courts, and as a Judge of Assize and Nisi Prius, and the Court held by him shall be a Court of Record." In *The Stalybridge Election Petition* (1) an application was made for an order to examine by commission a witness alleged to be dangerously ill. An objection was there made by counsel for the respondent similar to the objection here, that the Judge had no power to grant such a commission in the matter of an election petition, but Hannen, J., thought that, under section 2 of the Parliamentary Elections Act, 1868, he had power to issue a commission, as he considered that the taking evidence was a proceeding on the petition. His decision was not appealed against, but it was expressly followed by Blackburn, J., in *The Coventry Petition Case* (2), where

that learned Judge considered that this 2nd section gave him jurisdiction to make an order in the said election petition for the discovery of certain telegraphic messages.

[LORD COLERIDGE, C.J.—An election petition committee could, by means of the Speaker's warrant, have got the production of all necessary documents.]

But Blackburn, J., went further, and required the other side to make an affidavit as to the documents they had in their possession. Again, in *The Stafford Election Petition Case* (3), application was made for particulars of certain sums in the accounts filed by the agent of the sitting member, and in answer to such application it was objected that no such order could have been made under the old practice, and that the 2nd section of the Parliamentary Elections Act, 1868, did not incorporate the Common Law Procedure Acts into the procedure on election petitions; and further, that the particulars applied for could only be obtained by interrogatories. Blackburn, J., however, is reported to have said that he thought the 2nd section gave the Judges power to make orders with respect to election petitions in conformity with the Common Law Procedure Acts; and further, to have said that the particulars sought for there could only be obtained by interrogatories. He made in that case an order for the inspection of the vouchers.

[LORD COLERIDGE, C.J. — Section 2 states that it is "subject to the provisions of this Act," that the Court is to have the powers there mentioned; and section 26 (4) contains a provision that the practice of committees of the House of Commons is to be observed until rules have been made, and so far as they do not extend. It does not appear that this 26th section was referred to in either of those cases.]

That is true. However, very recently,

(3) 20 Law Times, N.S. 237.

(4) The following is section 26: "Until rules of Court have been made in pursuance of this Act, and so far as such rules do not extend, the principles, practice and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions, shall be observed, so far as may be, by the Court and Judge, in the case of election petitions under this Act."

(1) 19 Law Times, N.S. 703.

(2) 19 Law Times, N.S. 742.

In re Wallingford Election Petition, C.P.

in *The Bewdley Election Petition Case*, Lush J., at Chambers, has made an order for interrogatories precisely similar to what is now asked for, and that order has been acted on and obeyed.

[LORD COLERIDGE, C.J.—Do you know whether this section 26 was brought before my brother Lush?] No; the case is not reported.

[*A. L. Smith (amicus curie)* stated that in *The Bewdley Election Petition Case* he obtained the order from Lush, J., on the authority of section 2 of the Act, and that section 26 was certainly not referred to or brought to the attention of that learned Judge.]

The 2nd section clearly gives the Court the power it would have in an ordinary cause, with respect to "proceedings on an election petition," and surely the exhibiting interrogatories is merely a mode of procedure.

[GROVE, J.—It is very different from the production of documents.]

A note to *The Ipswich Case* (5) would seem to shew that the committee had no power to examine as to what documents a person had in his possession, and if so, this 26th section would not apply.

[LORD COLERIDGE, C.J.—That is not so. In the note in *Barron & Austin*, it appears that the motion was to the House of Commons, to order the attendance of Sir Thomas Cochrane, to examine him as to documents which he might produce before the committee. It was not an application to the committee at all.]

Rules have been made under section 25, and by rule 44 of the rules made in Michaelmas Term, 1868, "All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a Judge, who shall have the same control over the proceedings under the *Parliamentary Elections Act*, 1868, as a Judge at Chambers in the ordinary proceedings of the Superior Courts, and such questions and matters shall be heard and disposed of by one of the Judges upon the rota, if practicable, and if not, then by any Judge at Chambers."

[LORD COLERIDGE, C.J.—Do you suppose it was intended by that rule to give

power to a Judge to interrogate a person whether he had committed an offence so serious as a corrupt practice at a Parliamentary election?]

It must surely be assumed that the rules so made under section 25 have done away with the effect of section 26.

[GROVE, J.—Rule 44 does not give jurisdiction.]

If the Court think that section 26 has narrowed the meaning of the large words in section 2, it would be difficult to contend further in support of this application.

Moulton, for the respondent, was not called upon.

LORD COLERIDGE, C.J.—I think that my brother Lindley was correct in refusing to make the order for interrogatories. We have now for the first time to decide this question, which turns on the construction to be put on one or two sections of the *Parliamentary Elections Act*, 1868. The second section of that Act gives the same authority to the Court of Common Pleas with reference to the proceedings in election petitions as it would have in ordinary actions; but such authority is given "subject to the provisions of this Act." If those words were left out of the section, there is no doubt that this Court would have power to order the delivery of interrogatories to the respondent; but the section says it is to be subject to the provisions of the Act, and amongst those provisions there is the 26th section, which does not appear to have been called to the attention of the Judges who decided the cases which have been cited before us. Now section 25 provides for the making of rules; it says the Judges for the trial of election petitions may "from time to time make and may from time to time revoke and alter general rules and orders (in this Act referred to as the rules of Court) for the effectual execution of this Act and of the intention and object thereof, and the regulation of the practice, procedure and costs of election petitions and the trial thereof, and the certifying and reporting thereon." Rules so made are to be deemed within the powers conferred by the Act, and to have the same

In re Wallingford Election Petition, C.P.

force as if enacted. Then section 26 says, "that until rules of Court have been made in pursuance of this Act," the Judges cannot by rules enlarge the jurisdiction beyond what is given to them by the Act, but can make rules only for "the execution of the Act;" and so far as such rules do not extend, "the principles, practice and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed, so far as may be, by the Court and Judge in the case of election petitions under this Act."

With regard to section 29, which says the Judge is to have the same powers, jurisdiction and authority as a Judge of Assize and Nisi Prius, it means, I believe, that he is to have power to commit for a contempt of Court, and to order witnesses to answer questions, or to order a commission to issue to examine witnesses. Then there is only rule 44, which it is necessary to refer to, and that merely means to give a Judge on the rota the power of a Judge at Chambers, and is a rule clearly within the powers of the Judges to make.

Now it has been argued that a Judge who, so far as I can see in this Act, is not the same as the Court, can do what the Court it is said can do by virtue of the second section, namely, exercise the powers it could exercise in an ordinary cause, one of those powers being to order interrogatories to be delivered to one of the parties. Unless there is some section in the Act of which I am not aware, giving a Judge all the powers of the Court, I should doubt whether he would have such power. But, supposing he has, the 26th section says that until rules have been made, and so far as they do not extend, the principles, practice and rules on which committees of the House of Commons have acted are to be observed; that means, as I understand, what in common sense it would mean, that, so far as the Act does not go and the rules under it do not go, the old practice of the House of Commons committees is to govern. It is admitted that the exhibiting of interrogatories to members of Parliament is a practice that was unheard of in the proceedings of such committees; and on

that short ground I should be content to place my judgment in this case. But I am prepared to go further. It seems to me to be inconsistent with the principles on which committees of the House of Commons have proceeded to admit the exhibiting of interrogatories to the sitting member. The information sought to be obtained by interrogatories might have been acquired in another way. The sitting member might be called, and if he refused to answer, the election committee might, and so might now the Election Judges, draw their own conclusion. I think, therefore, that both on principle and on the authority of the Act itself, no such jurisdiction is shewn to exist as has been contended for, and consequently that the order of my brother Lindley refusing the application was correct.

GROVE, J.—I am of the same opinion. With regard to section 2 of the Parliamentary Elections Act, 1868, I do not know that a Judge can exercise the powers of the Court; and as far as I am at present advised, I think that the jurisdiction and powers given by that section apply to the Court only. As to the second and principal point, I think that the 26th section makes the matter clear. [The learned Judge here read that section.] Now it is admitted that administering interrogatories to the sitting member was a thing which could not have been done by the committees of the House of Commons. With regard to the cases which have been cited, there is only one of them which conflicts with our decision, and that is the case of the Bewdley election petition, in which Mr. Justice Lush has lately made an order for interrogatories; but it is admitted that his attention was not called to the 26th section, and I cannot quite understand how it was that the order was made. It may be that he read only the 2nd section, and never knew that there was any provision in the Act to which the restriction, "subject to the provisions of the Act," could apply, and so this point was in fact never before him. An argument was addressed to us on rule 44. That rule does not appear to enlarge the jurisdiction of the Judge, and it would be strange if it

In re Wallingford Election Petition, C.P.

did. It does not mean that the Judge shall have any new power, but that what may properly arise and be within his jurisdiction shall be disposed of by the Judge on the rota as a Judge at Chambers. I think that my brother Lindley was right, and I must say also that if it had been a matter of discretion about allowing interrogatories in a case of this kind, I should have hesitated before I should have allowed them, as they may tend to affect not merely a privilege in which two parties are concerned, but a matter in which the public have an interest.

Application refused.

Solicitors—C. C. Ellis, Munday & Co., agents for Hedges, Son & Marshall, for petitioner; Wyatt, Hoskins & Co., for respondent.

[IN THE COMMON PLEAS DIVISION.]

1880. } *In re TEWKESBURY (BOROUGH)*
June 9. } ELECTION PETITION.

Parliament—Election Petition—Change of Place of Trial.

The power to change the place of trial of an election petition under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), can be exercised only by the Court and not by an Election Judge.

Semble, the Court will not exercise such power unless there are special circumstances more than mere inconvenience why the trial should not be had in the borough or county (as the case may be) to the election for which the petition relates.

A. L. Smith moved for an order that the trial of this election petition should take place at Gloucester instead of at Tewkesbury. Mr. Justice Lush made an order to so change the place of trial, but after the opinion of Mr. Justice Hawkins in the Evesham election petition case he has doubted if a Judge has power under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), to make such an order. It has, therefore, been thought

advisable to make this application to the Court.

The Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), in section 11, sub-section 11, enacts that "the trial of an election petition in the case of a petition relating to a borough election shall take place in the borough, and in the case of a petition relating to a county election in the county: provided always that if it shall appear to the Court that special circumstances exist which render it desirable that the petition should be tried elsewhere than in the borough or county, it shall be lawful for the Court to appoint such other place for the trial as shall appear most convenient."

[LORD COLERIDGE, C.J.—What are the special circumstances in this case?]

There is an affidavit of the mayor, shewing the difficulty there would be in providing a place at Tewkesbury suitable for the trial, and also for the accommodation of the Judges and their attendants, and of the witnesses and other persons whose attendance would be required. Both parties, the respondent as well as the petitioner, consent to this application.

LORD COLERIDGE, C.J.—It is clear that an order of this kind must be made by the Court and not by a Judge only. I am very unwilling, except on strong grounds, to differ from what a Judge, in the exercise of his discretion, has ordered, and as my brother Lush has expressed his opinion that this order should be made, the present application may be granted; but I think it right to say that so long as I am a member of this Court, I for one shall require circumstances really special, and something more than mere inconvenience, to be shewn before I allow a departure from what the statute intended, namely, that the trial of the election petition should be held in the place where the election to which it relates occurred.

GROVE, J.—I agree with what my Lord has said, and I doubt whether the Act did not mean that the special circumstances should point to more than mere inconvenience of locality. I think that it intended rather that they should point to some strong feeling existing in the place such as might produce a riot or

In re Tewkesbury Election Petition, C.P.

something of that sort, which would make it desirable to change the place of trial.

Order granted.

Solicitors—Duignan & Smiles, for petitioner; Sharpe, Parkers & Co., agents for C. E. Sheppard, Gloucester, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1880. { HEREFORD (CITY) ELECTION PETITION. FREECE AND OTHERS
May 31. { (petitioners) v. PULLEY AND REID (respondents).

Parliament — Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 6. sub-ss. 4 & 5—Recognisance—Security for Costs—Number of Sureties.

*Section 6, sub-section 5 of Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), states that the security for costs to the amount of 1,000*l.* which is to be given at the time of presenting an election petition under that Act, "shall be given either by recognisance to be entered into by any number of sureties not exceeding four, or by a deposit of money," &c. It is a sufficient compliance with this enactment that the recognisance be entered into by one surety only.*

This was an application on behalf of the respondents that the petition which had been presented under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), against the return of the respondents as members of Parliament for the city of Hereford, be set aside and removed from the records of this Court on the ground that the provisions of 31 & 32 Vict. c. 125. s. 6. sub-ss. 4 & 5, had not been complied with, and that the recognisance entered into by Robert Byrie for 1,000*l.* was not a recognisance in accordance with the provisions of the said statute. The application had been made by summons before Manisty, J., at Chambers, and had been referred by him to the Court.

The following are sub-sections 4 and 5 of the said 6th section of the statute, namely:—

Sub-section 4: "At the time of the presentation of the petition or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner—

"(a) To any person summoned as a witness on his behalf, or

"(b) To the member whose election or return is complained of (who is hereinafter referred to as the respondent), shall be given on behalf of the petitioner."

Sub-section 5: "The security shall be to an amount of 1,000*l.*; it shall be given either by recognisance to be entered into by any number of sureties not exceeding four, or by a deposit of money in manner prescribed, or partly in one way and partly in the other."

In the present case the security given on behalf of the petitioners was a recognisance entered into by one surety only, namely, Mr. Robert Byrie, for 1,000*l.* No objection, however, was made under section 8 to the sufficiency of such security.

Webster and A. T. Lawrence, for the respondents, in support of the application. The Act evidently intended that where the security was given by recognisance there should be more than one surety, a number of sureties not exceeding four; and the recognisance in this case having been entered into by one person only, it is not in accordance with the Act. Sections 8 and 9 relate to objections to the recognisance. Under section 9, no objection to a recognisance can be cured unless it be within section 8—*Pease v. Norwood* (1), and the whole of section 8 points to there being more than one surety. In the previous statutes relating to the trial of election petitions, namely, 9 Geo. 4. c. 22, 7 & 8 Vict. c. 103, more than one surety was required. The 11 & 12 Vict. c. 98. s. 3, enacted, it is true, that a recognisance should be entered into "by one, two, three or four persons as sureties," but that statute was repealed by 31 & 32 Vict. c. 125, and the language is changed to "a recognisance to be entered into by any number of sureties not

(1) 38 Law J. Rep. C.P. 161.

Hereford Election Petition, C.P.

exceeding four"—one is not a number of sureties.

[LORD COLERIDGE, C.J.—Is not one a number? It is usual to speak of No. 1.]

One must not take a word by itself but read the whole sentence.

[GROVE, J.—If the Legislature had intended to alter what had been required by 11 & 12 Vict. c. 98. s. 3, it would have said "recognisance to be entered into by any number of sureties, not less than two."

LORD COLERIDGE, C.J.—If one surety is of such a character as to be sufficient security for 1,000*l.*, what more security is obtained by having two sureties for that amount; what can be the object of having them?]

A surety might afterwards become bankrupt, but if there were two the respondent might still have a security for his costs. The sufficiency of the security is dealt with by section 8; but such a case as this is not within that section. The objection by that section may be "on the ground that the sureties or any of them are insufficient, or that a surety is dead." If the Act contemplated only one surety, that section should not have said "*a* surety," but "*the* surety" was dead. Rules have been made pursuant to the Act, and of these, rule 18 states, "There may be one recognisance acknowledged by all the sureties or separate recognisances by one or more as may be convenient;" and rule 22 says, "An objection to the recognisance must state the ground or grounds thereof as that the sureties or any and which of them is insufficient," &c. All these shew that more than one surety is contemplated.

[LORD COLERIDGE, C.J.—By 13 Vict. c. 21. s. 4, words importing the singular are "to include the plural and the plural the singular," unless the contrary be expressly provided.]

H. Matthews and *Anstie* appeared for the petitioners, but were not called upon.

LORD COLERIDGE, C.J.—I think this case is abundantly clear. The object of the enactment in question is to secure to the sitting member, when successful, the payment of his costs to the extent of 1,000*l.* That may be by a recognisance entered into by any number of sureties not exceed-

ing four. It is not necessary for me to go into the old Acts relating to the trial of election petitions, although they throw, I think, some light on the matter, nor will I rely on the 13 Vict. c. 21, to which I have referred, but I will place my decision on the plain words of the Act itself. [His Lordship here read sub-section 5 of section 6.] I cannot see how "one" is not a number, and that the number may not consist therefore of one, two, three or four sureties. It is not suggested that the surety in this case is a person of insufficient means to be security for 1,000*l.*, but only that there should be two instead of one surety. That, in my opinion, is no valid objection to the recognisance.

GROVE, J.—I am of the same opinion. The object of the enactment is not to express the minimum but the maximum number of sureties to which it is limited. Any number not exceeding four; that is to say, any number less than four. The 11 & 12 Vict. c. 98. s. 3, required the recognisance to be entered into by one, two, three or four persons as sureties. That Act has been repealed, but if it had been intended to have altered it as regards the number of sureties so that there should not be only one surety, the Legislature would have done so by adopting the words of the older Acts, whereas the words here used in this sub-section 5 are similar to those in 11 & 12 Vict. c. 98, and the rules also bear the same construction. Rule 18 does not say that two shall be the minimum, but that there may be recognisances by one or more sureties, as may be convenient. The fact is that what the statute intended to put a limit to was the number 4, so that there should never be more than that number. The words of the statute and of the rules all shew that the object is to get a security for costs for 1,000*l.*, and that it should not be so subdivided by having less responsible persons than would be given by a limited number of sureties.

Application refused.

Solicitors—A. Cheese, for petitioner; Matthews & Greetham, agents for James & Bodenham and J. Lambe, Hereford, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1880. }
 June 30. } DITCHAM v. WORRELL.

Infant—Promise to Marry—Infants Relief Act (37 & 38 Vict. c. 62)—Evidence—Fresh Promise or Ratification after Age.

When both the plaintiff and defendant were under age, the defendant made an express promise to marry the plaintiff, which she accepted, but no time for the marriage was then fixed. For some years afterwards, and after the defendant had come of age, the parties remained on the footing of engaged lovers, and at last (the defendant being then of age) the day of their marriage was fixed, the plaintiff naming the day at the request of the defendant to do so. Ultimately the defendant refused to marry. In an action for breach of promise of marriage,—Held, by DENMAN, J., and LINDLEY, J., that, assuming the case of *Coxhead v. Mullis* (47 Law J. Rep. C.P. 761; Law Rep. 3 C.P. D. 439) to be rightly decided, and that a contract to marry is within the *Infants Relief Act* (37 & 38 Vict. c. 62), and therefore not capable of being ratified by an infant after he comes of age, there was here evidence from which a jury ought to find a fresh promise to marry made after the defendant had come of age, as distinguished from a mere ratification of the promise to marry which had been made during the defendant's infancy. Held, by LORD COLERIDGE, C.J., that as a contract to marry is within the *Infants Relief Act*, what took place after the defendant came of age was only evidence of a ratification of the subsisting contract to marry, and was not evidence of a fresh contract.

Action for breach of promise to marry.

The following appeared in evidence at the trial before Lord Coleridge, C.J., at the last Hilary Sittings in Middlesex. In January, 1875, when both the plaintiff and defendant were under age (the plaintiff being then about eighteen and the defendant twenty), they promised to marry each other, but no time was fixed for the wedding. The engagement was shortly afterwards made known to their respective parents with whom each were living at the time, and it received

their approval. In December, 1875, the defendant came of age, and the engagement continued until 1879, the parties in the meanwhile corresponding together and remaining on the footing of engaged lovers. In January, 1879, the defendant's father made arrangements by which he (the defendant) was enabled to marry, and the defendant then asked the plaintiff in the presence of her father to fix the day for the wedding, and she thereupon named the 8th of June. Afterwards a house was taken, and other preparations were made for the marriage until May, 1879, when, in consequence of the serious illness of the plaintiff's mother, the plaintiff desired to have the marriage postponed for a month. The defendant, though reluctantly, consented to this, but he shortly afterwards quarrelled with the plaintiff, and ultimately he broke off the engagement and refused to marry her.

It was contended on the part of the defendant that there was no evidence of a fresh promise by the defendant after he came of age, but only of a ratification of the promise previously made, and which was, therefore, invalid by the *Infants Relief Act*, 1874 (37 & 38 Vict. c. 62) (1) as decided by *Coxhead v. Mullis* (2), and that the case was therefore distinguishable from *Northcote v. Doughty* (3).

The learned Judge was of that opinion, and he accordingly left to the jury only the question of damages. These they assessed at 400*l.*, and the plaintiff was to have judgment for that amount if the Court should be of opinion that there was evidence, from which the jury ought rea-

(1) The *Infants Relief Act* (37 & 38 Vict. c. 62) by section 1 enacts that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void." Section 2 enacts that "no action shall be brought whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall be or shall not be any new consideration for such promise or ratification after full age."

(2) 47 Law J. Rep. C.P. 761; Law Rep. 3 C.P. D. 439.

(3) Law Rep. 4 C.P. D. 385.

Ditcham v. Worrall, C.P.

sonably to have found a fresh promise to marry.

Henry Matthews and Stokes, for the plaintiff, now moved accordingly for judgment for the plaintiff.—It must be taken to be decided by *Coxhead v. Mullis* (2) that the Infants Relief Act, 1874, applies to the contract of marriage, but the case of *Northcote v. Doughty* (3) shews that such evidence as there was in this case would warrant a jury in finding a fresh promise to marry made by the defendant after he came of age. That case was distinguished by the Court from the previous one of *Coxhead v. Mullis* (2) on the ground that there was there evidence of direct words of promise after coming of age, whilst in *Coxhead v. Mullis* (2) there was only evidence of conduct from which a promise might be inferred. In the present case, after the defendant had come of age, he asked the plaintiff to fix the day of marriage, which she did, and it became then a promise to marry on that day, which was clearly a fresh and different promise from that which had been made during his minority, when no time for the wedding had been fixed. It was a fresh promise and not a ratification of the old promise. In *Mawson v. Blane* (4), Parke, B., said, "I take the meaning of 'ratification' to be different from a promise. It is an admission that he is liable, and bound to pay that debt on a contract which he made when an infant; therefore, in order to bring the case within Lord Tenterden's Act, there must be an admission in writing that he was liable to pay on that contract which he made when he was a minor." The case of *De Torr v. The Attorney-General* (5) shews that even evidence of the conduct of the parties is not to be rejected as evidence of a promise to marry, because it is consistent with its being evidence of a ratification of a promise made during infancy.

Digby Seymour and Bucknill, for the defendant.—Nothing which amounts to a ratification can be binding, the promises subsequent to the majority of the defen-

dant would be mere affirmation. In *Rawley v. Rawley* (6) the Master of the Rolls uses the word "confirmation" as synonymous with "ratification." What took place in the present action was a mere confirmation or ratification of the original promise, and cannot support the action. The language of section 2 of the Infants Relief Act (1) is similar to that of section 5 of Lord Tenterden's Act (9 Geo. 4. c. 14), and in a considered judgment bearing upon the latter statute, Rolfe, B., says, "We are of opinion (apart from Lord Tenterden's Act) that any act or declaration which recognises the existence of the promise as binding is a ratification of it, as in the case of agency anything which recognises as binding an act done by an agent, or by a party who has acted as agent, is an adoption of it"—*Harris v. Wall* (7).

Henry Matthews, in reply.

Cour. adv. vult.

There being a difference in opinion amongst the members of the Court, the following judgments were now (June 30) delivered:—

LINDLEY, J.—Before the defendant came of age he and the plaintiff agreed to marry each other, but no time for their marriage was then fixed. The promise thus made by the defendant was not binding on him whilst he was under age; nor since 37 & 38 Vict. c. 62 was it capable of being ratified by him after he came of age. This was decided in *Coxhead v. Mullis* (2), which, unless it should be reversed, must be taken as binding on us. After the defendant came of age his agreement with the plaintiff continued for some two years, and at last the day for their marriage was fixed. Ultimately, however, the defendant refused to marry the plaintiff, and she thereupon brought this action against him. The question is whether she can sustain it. If she can, the verdict is to be entered for her for 400*l.* damages; if she cannot, the verdict is to be entered for the defendant.

(6) 45 Law J. Rep. Q.B. 675; Law Rep. 1 Q.B.D. 460.

(7) 1 Exch. Rep. 122; 16 Law J. Rep. Exch. 270.

(4) 23 Law J. Rep. Exch. 343.

(5) Law Rep. Sc. App. Cas. 686.

VOL. 49.—Q.B., C.P., & EXCH.

Ditcham v. Worrall, C.P.

The question for our decision depends upon the true legal effect of what took place after the defendant came of age, regard being had to the fact of his engagement before that time. But for the fact of the defendant's previous engagement, his conduct after he came of age and the fixing of the day for the marriage between himself and the plaintiff would not only be evidence of, but would, in my opinion, satisfactorily prove a promise by the defendant after he came of age to marry the plaintiff on the day fixed. Nor is there, I believe, any difference of opinion on this point. But it is said that the conduct of the defendant and the fixing of the day for the marriage, are all referable to the promise made by him when under age, and amount to no more than a ratification by him of such promise. In order to determine which of these two views is in point of law the more correct, it is necessary to determine the real meaning of a ratification as distinguished from an independent fresh promise. A ratification necessarily has reference to the past, and, as applied to promises made by the person ratifying, a ratification is simply an intentional recognition of some previous promise made by him, and an adoption and confirmation of such promise with the intention of rendering it binding—*Harris v. Wall* (7) and *Rowe v. Hopwood* (8). In other words, a ratification of a voidable promise is a recognition of it, and an election not to avoid it, but to be bound by it. There may or may not be any new consideration for a ratification, but there must be a consideration for a new and independent promise. If, therefore, in any particular case there is no consideration for the alleged ratification, it may be binding as a ratification, but not as a fresh promise. Again, a so-called ratification which introduces new terms and stipulations is, at least as to these, a new promise, and is binding as such, if there is a consideration to support it, but not otherwise. Where there is a consideration and no new term introduced, the intentions of the parties, if clearly expressed, will afford a test whereby to

determine whether there has been a new promise or only a ratification of a former promise. But where the intention of the parties respecting this particular point is obscure, their words or conduct ought to be so interpreted as to render valid the transaction in which they were engaged, if it is clear that this result, at all events, was intended by them, and if there is no law rendering such interpretation inadmissible. In this particular case the consideration for the ratification or new promise was the willingness of the plaintiff to marry; that willingness was expressed when the original promise was made, and was again expressed when she fixed the day for the wedding, and continued throughout until the engagement was broken off. The plaintiff's willingness to marry on the day ultimately fixed for the wedding is a sufficient consideration to support a fresh promise by the defendant to marry her on that day. With respect to the intentions of the parties, all that is plain is that they considered themselves under an engagement to marry, and ultimately intended to marry on the day fixed. Their minds were never addressed to the question of ratification as distinguished from a fresh promise, and their intentions as expressed by themselves throw no light whatever on the question whether what occurred was actually intended to be a ratification of a previous promise or to be a fresh and independent promise. To hold this case to be one of ratification would be to render the engagement of the parties invalid and not binding, contrary to their manifest intention; while to hold that there was a fresh promise to marry will be to give effect to that intention. Unless, therefore, the statute forbids such an inference from their conduct, it appears to me that the jury might have found and ought to have found that there was a promise by the defendant, after he came of age, to marry the plaintiff on the day ultimately fixed for the marriage, and not a mere ratification of a promise made previously to marry at a day to be thereafter fixed. This method of reasoning is, in my opinion, warranted by the decision of the House of Lords in *De Torr v. The Attorney-General* (5), in which a valid

(8) 38 Law J. Rep. Q.B. 1; Law Rep. 4 Q.B. 1.

Ditcham v. Worrall, C.P.

Scotch marriage was inferred from habit and repute, although there had been an invalid solemnisation of marriage, which accounted for the living together of the parties, and to which, in fact, all their subsequent conduct was referable. In order to give effect to the manifest intention of the parties, the Court in that case held that a subsequent promise to marry ought to be inferred from their conduct. In my opinion, the present is a much clearer case, by reason of the fixing of the day for the wedding; for, although this is, no doubt, to be accounted for by the original engagement, it is a clear and distinct renewal of the original promise with an important addition, and not a mere recognition of such promise and election to abide by it. It remains, however, to consider whether the statute excludes the view which, but for it, ought, in my opinion, to be taken of this case. The statute was passed to protect persons from the consequences of entering into engagements when under twenty-one, and of ratifying them after attaining twenty-one. As regards debts contracted before twenty-one, the statute goes further, and invalidates any promise made after twenty-one to pay them. The statute, however, does not go so far as regards promises after twenty-one to perform other obligations made before that age, and it has already been held that a new and independent promise to marry made after twenty-one is not invalid by reason of its being preceded by a promise to marry made before twenty-one—*Northcote v. Doughty* (3). Still it must be borne in mind that, as regards ratification, the statute applies to and invalidates every ratification by a person who has attained his majority of a promise made by him while under age, whether there be a consideration for such ratification or not. In every case which arises under the Act care must, therefore, be taken not to deprive persons of the protection intended to be afforded them by it. Where the intention of the parties is obscure, where the so-called new promise is made soon after attaining twenty-one, where it is the consequence of an influence against which it is necessary to guard, in all such cases a jury

ought to be warned not lightly to infer a fresh promise as distinguished from a ratification. But the present case is free from all embarrassing conditions of this kind, and the facts of this case were such that, notwithstanding the statute, a jury might properly, and, I think, ought to, have found that there was a fresh promise as distinguished from a ratification. I am, therefore, of opinion that the verdict and judgment ought to be entered for the plaintiff.

DENMAN, J.—In this action for breach of promise of marriage it was proved that the defendant during his minority made an express promise of marriage to the plaintiff, which was accepted by her. The parties behaved as an engaged couple from that time, and continued to do so for three years after the defendant had attained his majority. On a particular occasion, about three years after the defendant came of age, the plaintiff and defendant met, and the defendant requested the plaintiff, in the presence of her father, to name the day for their marriage, and the plaintiff named a day, and it was then arranged that the marriage should take place on that day. Under these circumstances two questions have been raised: first, whether there was any evidence which ought to have been left to the jury of a promise to marry made after the defendant had come of age; secondly, whether upon the evidence given the jury ought to have found for the plaintiff or the defendant, the Court being, as I understand, substituted for the jury, by consent of the parties, in case it should be of opinion that there was evidence fit to be submitted to a jury. Upon both these questions I am of opinion that the plaintiff is entitled to succeed. It was decided by this Court in *Coxhead v. Mullis* (2), that section 2 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62) (1), applies to actions for breach of promise of marriage. By that decision I am bound. That case further decided that where there has been an express promise of marriage during the infancy of a defendant, and the only evidence subsequently is evidence of mere conduct on the part of the engaged couple, consist-

Ditcham v. Worrall, C.P.

ing of their treating one another as an engaged couple and keeping company as such, without any evidence of words capable of being construed as a fresh promise, such conduct must be referred to the promise made during the infancy of the defendant, and held to be mere evidence of ratification within the meaning of the above clause. But it has also been held in *Northcote v. Doughty* (3), by which I am also bound, that where there is evidence not only that after the defendant's coming of age the defendant and the plaintiff behaved as before, but that the defendant used language capable of being considered as a fresh promise, it is for the jury to find whether the words so used amount merely to evidence of a ratification of the promise made during infancy, or whether they prove a fresh promise. In the present case I think that the words proved to have been used on the occasion on which the defendant asked the plaintiff to fix the day for their marriage are words amply capable of amounting to a fresh promise to marry, and that on that ground the case ought not to have been withdrawn from the jury. I think it would be impossible to hold otherwise without straining the Act so as to include a case which it is impossible to suppose that the Act was intended to include. I may, perhaps, be unduly influenced in coming to this opinion by a doubt, which I cannot overcome, whether the Act was intended to apply to the case of promises to marry at all, and whether the case of *Coxhead v. Mullis* (2) was rightly decided; but I think that in any case the statute was not intended and ought not to be construed to go so far as to warrant a nonsuit in the present case. Even assuming *Coxhead v. Mullis* (2) to have been rightly decided, I cannot think that an action supported by such evidence as that which was given in this case must necessarily be held to be "an action brought whereby to charge a person upon a ratification made after full age of a promise or contract made during infancy." At the very least, I think it was a question for the jury whether, under all the circumstances of the case, the language used was merely evidence of a ratification of the promise made during in-

fancy or evidence of a fresh promise made after full age. The question, then, being, in my opinion, one for the jury, I am to say, by consent of the parties, whether the jury ought to have found for the plaintiff or the defendant. On the whole, I am of opinion that the plaintiff was entitled to succeed.

Three years had elapsed since the defendant had come of age. No time for the marriage had ever been fixed. There was evidence that it had been spoken of as an event that might not come off for many years. The parties met. The defendant asked the plaintiff to name the day for their marriage. The plaintiff named a particular day. She might then have declined to fix any day. She might have told the defendant that she preferred to be free, and that he himself was free because the only promise given by him had been during infancy. Instead of doing this she names a day in the presence of relations, and thereupon arrangements are made for the marriage on the day named. I consider that this all put together amounts to cogent evidence of a mutual promise to marry one another on the day named made by the parties after the defendant had attained his full age, and that it is not mere evidence of ratification of the promise made three years previously, during the infancy of the defendant, to marry at some indefinite future period. For these reasons I am of opinion that the plaintiff is entitled to judgment for 400*l.*, the damages assessed by the jury, and costs.

LOED COLERIDGE, C.J.—In this case I am unable to agree with the judgments of my learned brothers, and although I cannot say that on the face of their difference I feel confident of my own opinion, yet as I entertain it, I must express it.

Two points arise in this case, one directly, the other indirectly, the latter far the most important of the two, and therefore to be first considered. In the case of *Coxhead v. Mullis* (2), my brother Lopes and I held that 37 & 38 Vict. c. 62, the Infants Relief Act (1), applied to the contract of marriage. That case has never been overruled; but in the

Ditcham v. Worrall, C.P.

later case of *Northcote v. Doughty* (3), and again in his judgment in the present case, my brother Denman does not conceal his opinion that it was not well decided. It is true that my brother Lindley accepts the case, and, in a sense, so does my brother Denman; but if it is not law, the sooner it is overruled the better, and, as the only judgment actually pronounced in it is mine, I ought, if on consideration I think it wrong, to say so, and to give every facility for having it reviewed in the Court of Appeal. If it is not law, there is a short and summary end to the case before us, because I do not question that, but for 37 & 38 Vict. c. 62, the verdict in this case ought to be entered for the plaintiff. Is it law then, or, to put it in other words, are contracts of marriage within 37 & 38 Vict. c. 62? I do not pretend that the question is easy nor that the answer to it is clear. The preamble is general, and applies in terms to contracts of infants without restriction, and to ratifications by persons of full age of contracts made by them during infancy also without restriction. It speaks also of necessities, distinguishing contracts as to them from other contracts; and it then proceeds to enact in the first section that certain contracts, certainly not contracts of marriage, made by infants shall be absolutely void. The enacting part is followed by a proviso not, perhaps, very happily or clearly worded, but recognising unquestionably the existence of contracts voidable as distinguished from contracts absolutely void—an important recognition, as it seems to me, when the language of section 2 has to be dealt with. If contracts of debt only are made void, but the existence of other voidable contracts is recognised, it is surely not unreasonable to think that a contract of marriage may be one among the latter class dealt with in the Act, as it certainly was before the Act a contract voidable by the infant. Then comes the second section, which, like the first, is in two parts. By the first it is enacted that no fresh promise made after age shall be ground of action in the case of a contract of debt made during infancy; by the second no ratification made after full age of any con-

tract or promise made during infancy shall be a ground of action. I own that, considering the distinction between contracts void and voidable to be recognised in the Act, that debts are void, that other contracts are voidable, it seems to me reasonable to hold that the second part of the 2nd section deals with the contracts recognised in the proviso to the first, and that it enacts that no ratification by an infant after full age of a voidable contract, and *inter alia* of a contract of marriage made by him during infancy, shall be a ground of action. It seems to me clear that contracts other than debts are dealt with in this section, for, if not, the second part of it is inoperative. Promise to do a thing already promised to be done must, at least in the great majority of cases, include ratification, though ratification does not include promise, and if the first half stood alone it would, I think, be impossible to hold that though a fresh promise to pay a debt would not be a ground of action a ratification of an old promise would. Besides making every allowance for the difficulties of legislation, I cannot believe that no more is meant by the clause as to ratification than if the words "or ratification" had been inserted after the words "any promise" where these words first occur in the section. If so, it follows inevitably that contracts other than contracts of debt are within the section, and if other contracts, then, as the words are unlimited, contracts of marriage.

It has been said, and the observation is correct, that the words of this section are very nearly those of 9 Geo. 4. c. 14. s. 5, and that the words of section 5 have been held to apply to contracts of marriage. I am unable to say how far this latter assertion is correct; but if it be, my answer is that at least there is no decision that they do not; that if the words *are* the same the interpretation of them should be the same; but, further, that 9 Geo. 4. c. 14 is a statute dealing primarily with limitation of action, and the statute before us is a statute dealing primarily with the protection of infants from improvident contracts during infancy; and that, whereas the latter statute suggests this defence,

Ditcham v. Worral, C.P.

the earlier statute to an ordinary reader certainly does not.

Supposing these contracts to be within the words of the Act, it does not add much force to the argument to shew that they are within its mischief and its spirit. The verbal argument, however, if it needs confirmation, may have it from this consideration. It is not, indeed, every infant of either sex who needs protection, nor at every time. There are infants, as every one knows, abundantly able to take care of themselves. "*Malitia supplet etatem*" is a maxim applicable by no means only to the criminal law. The infant who bought a horse from one dealer and sold it to two others, being paid by both his purchasers, without ever paying his vendor, is not a solitary specimen of his class. But Parliament has chosen, on the whole for good and sound reasons, to protect infants by legislation from the consequences of their contracts, and there is nothing so mischievous, so fatal in its consequences, so capable at least of destroying the happiness and blasting the usefulness of a whole life, as a foolish and hasty marriage promised by a girl or boy and enforced upon a man or woman. If Parliament did mean to enact that the marriage contracts of girls and boys should not be made binding upon them as men and women by means only of acknowledgment or ratification, Parliament intended to enact what, in my judgment, is wise and right. I think Parliament did so intend, and I desire to give full effect to its intention. I have been thus full in discussing the true meaning of this statute because I think it materially affects the second question to be determined, namely, whether what happened in this case was a ratification or a promise. Holding these contracts to be within the Act, and desiring to give full effect to its provisions, I must be satisfied that what was said and done here was a fresh promise before I can consent to a verdict for the plaintiff. I say "was a fresh promise" because that is, I conceive, the point to be established. Evidence of a promise, in the sense in which those words are commonly used, will not do; and I think that in this argument a fallacy lurks in their common use. They have survived

from a bygone state of things when they meant something very different from the meaning which it is now sought to affix to them. In former days, when neither plaintiff nor defendant could be witnesses (a state of the case which survived as regards this action longer than as regards any other), it was very seldom that the actual promise could be directly proved at all. It had to be inferred, from conduct, from letters, from the giving of presents, from preparations for the marriage, from a hundred facts or documents consistent only, or only reasonably consistent, with a foregone promise. These things were most properly put to juries as "evidence of a promise," not of a promise made and re-made every time a letter was given, or a kiss was given, or a present was made, or a settlement was agreed upon, or a wedding day was fixed, but of a promise made as such promises are made in real life, once for all—evidence of a promise which explained these things naturally, of a promise which the jury were to find as a fact and of the existence of which they were to be satisfied. Now (unless I misapprehend the judgments of my learned brothers), when the actual promise can be proved, nay, when it has been actually proved in terms, it is for the jury to say in each case whether evidence of phrases, or acts, or conduct which in old days would have been evidence of the promise are or are not evidence of another and fresh promise, because the phrases, or the act, or the conduct implies a promise or refers to a promise, and is consistent only with the existence of a state of mind which recognises the promise as binding at the time when the phrase, or the act, or the conduct is used or is done. Far better, in my opinion, to overrule *Coxhead v. Mullis* (2) plainly, or, if *Coxhead v. Mullis* (2) be well decided, to repeal the Act itself, than to give authority to a doctrine which will make the Act in cases of this sort practically a dead letter, and make for the parties to these actions a contract in law which I venture to say neither of them at the time of the supposed making of it ever dreamed they were making in point of fact. A very great man has said, "After all, things are what they are, and not other things." If

Ditcham v. Worrall, C.P.

there is a promise in terms, *cadit questio*; if there is not, I refuse to hold that in a practical matter two people did what (as it is a contract, and, therefore, a question of intention) I am certain they did not do.

As to the facts of this case, I am quite content to take them as stated by my learned brothers. There was a definite contract between the parties when both were under age; they remained for years upon the footing of engaged lovers; at last it was agreed they should be married at a particular time, and on a definite occasion the parties met, and the day being named by the plaintiff, the day so named was fixed as the wedding day. Now, was this a fresh promise to marry made by them to one another (for this, I apprehend, is essential to found the action), or was it evidence of a recognition and a ratification of the promise which they had both actually made several years before to marry one another? It certainly was not a promise in terms; so far, at least, is conceded, or at any rate cannot be disputed. Was it in law a promise or a ratification? In order to ground an action the promise must be mutual; there must be an agreement, an *aggregatio mentium* of the same terms at the same time, the promise of each being the consideration for the promise of the other, so that here there must have been an actual present fresh promise to marry one another on the day when, having promised years ago, the woman is asked to fix the day on which the promise is to be fulfilled, and fixes it accordingly.

Pothier, again, says that for a binding contract there must be consent of contracting parties, capacity to contract, a *thing certain* to form the subject of the contract, and that the contract must be legal. So that the *thing certain* here was, I must presume, not the day, which was uncertain before, which it was important to render certain, and which was rendered certain by the contract, but the marriage itself, which had been already certain as far as promise could make it so for many years past. Take some parallel case. A man makes a binding contract for the purchase of a picture for 100 guineas, no time being agreed for its being sent home;

he has no space for it for some months; at last he obtains space; he calls on the vendor and desires the picture to be sent home on the 5th of June: held, I suppose, a fresh purchase or sale of the picture on the day when he calls to name the day. The same law, I presume, of a horse left for a reasonable time in a vendor's stable while arrangements are being made for its reception by the purchaser, and a day afterwards named for its delivery on the completion of such arrangements; and so in a hundred other instances. These are, it may be said, *eadem per eadem*. So they are, and he who accepts one conclusion may see no difficulty in accepting the other. But the consequences are, to my mind, startling, and such as, until compelled by authority, I am unable to accept. I will not appeal to the common sense of mankind and ask whether any man or woman who fixes the wedding day do, in fact, think that they are then promising over again and afresh to marry one another, because I have a most unfeigned respect for the sense of my learned brothers, and their sense and mine have come on this matter of fact to wholly opposite conclusions. I can but fall back on the saying already quoted, "Things are what they are, and not other things," and affirm that, in my judgment (I am speaking, remember, of a case in which there is an actual subsisting and acknowledged contract to marry), a promise to marry is one thing, and fixing the day when the promise is to be performed is another thing, and not the same. On the other hand, what happened in this case appears to me exactly to fulfil the definition of a ratification. *Ratihabitio est consensus qui negotium perfectum consequitur*. Here the *negotium*—the contract—was long since *perfectum*. It had been completed years before; it was consented to, acknowledged and ratified in the strongest way when the day for its execution was ascertained. I am, therefore, of opinion that in this case there should be a non-suit or judgment for the defendant. I cannot, under the circumstances, regret that I am in a minority. The real facts and the facts proved in Court are no doubt not always the same; but judging, as only I can judge, by what was proved in Court, the

Ditcham v. Worrall, C.P.

conduct of the plaintiff was as good as that of the defendant was as bad as it could be, and if the law will give them to her she appears morally well entitled to the damages which the jury have awarded.

Judgment for plaintiff.

Solicitors—Radford & Franklin, for plaintiff;
G. E. Carpenter, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. }
April 19. }

WARD v. SINFIELD.

Evidence—Witness—Proof of previous Conviction admissible, though immaterial to Issue—17 & 18 Vict. c. 125. s. 25.

A party to a cause who gives evidence in support of his case may be cross-examined as to whether he has been ever convicted of a felony or misdemeanor, and if he denies or refuses to answer it, the opposite party may prove such conviction under section 25 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), although the fact of such conviction be altogether irrelevant to the matter in issue in the cause.

Action to recover 23*l.* 13*s.*, for goods sold, money lent and work and labour done.

The defendant, by his statement of defence, admitted most of the sums claimed, but pleaded a set-off and counter-claim for goods sold, and for rent of a furnished room, rented by the plaintiff of the defendant, exceeding in the aggregate the amount of the plaintiff's claim. The plaintiff, in his reply to the defendant's set-off and counter-claim, stated that he had paid the defendant for the goods sold, and denied that he was indebted to the defendant for rent, alleging that from time to time he had paid rent as it accrued, either to the defendant or his wife.

At the trial before Lopes, J., last Easter Sittings, in Middlesex, the de-

fendant, who gave evidence in support of his counter-claim, was cross-examined as to whether he had ever been convicted of an embezzlement, and on his denying that he had, the plaintiff proposed to prove that he had been so convicted, and for that purpose he tendered a certificate of such conviction, which, with proof of the identity of the person, is made sufficient evidence of the same by section 25 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). This was objected to on the part of the defendant, on the ground that it was not relevant to the issue in question. The learned Judge, however, received it, and in the result the jury found for the plaintiff, both on the claim and on the counter-claim.

Cooper Wyld now moved for a new trial, on the ground that such evidence was not admissible, and had, therefore, been wrongly received. Before the Common Law Procedure Act, 1854, if a witness, when questioned as to some previous offence, denied the imputation, his denial was conclusive, and could not be controverted—*Day's Common Law Procedure Acts*, 4th edit. p. 268. Now the 25th section of that Act has enacted this: "A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction." In the note on this section in *Day's Common Law Procedure Acts*, 4th edit. p. 278, it is said, "This section does not interfere with the previous right to cross-examine a witness as to the commission of offences, either for the purpose of discrediting him, or of contradicting him, if the question is so connected with the point in issue that the witness may be contradicted by the evidence if he denies the facts. Four rules on this subject may be considered as established in practice." The note then gives these rules, and amongst them rule 3, as follows: "Evidence cannot be adduced to contradict the witness if he deny the imputation, unless the fact sought to be established be material to the issue." The 28 & 29 Vict. c. 18. s. 6,

Ward v. Sinfield, C.P.

embodies and is in substance identical with the 25th section of the Common Law Procedure Act, 1854.

GROVE, J.—I am of opinion that there should be no rule. If I had any doubt in the matter, the point is one which is so important that I should have thought it right to have granted a rule, in order that the matter might be argued. But I cannot get over the express words of the statute, which, to my mind, leave the case free from any doubt. The question whether the witness had been convicted of an embezzlement could have been put to him before the Common Law Procedure Act, 1854; but if he had denied this he could not formerly have been contradicted by any evidence which was immaterial to the issue in the cause. Then section 25 of that Act says, "A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor." That was not new; he might before the Act have been so questioned. Then it goes on to say, "And upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction." The section might end there, so far as the present case is concerned, for the rest of the section is only as to the mode of proving the conviction, and stopping there, I can give no meaning to it, unless it be read as enacting that if the witness denies the fact of conviction the opposite party may prove it, whether it be relevant or not to the matter in issue in the cause. If not so read, the enactment would make no alteration in the law, except as to the mode of proving the conviction, which occurs only in the latter part of the section.

I think the rule in this case must be refused.

LOPES, J.—I am of the same opinion. The words of the statute are, I think, very clear, and if they have not the meaning which they carry on their face they have no meaning at all. I had some hesitation at the trial about admitting the evidence, because in practice I have never known such a case to occur; for, in the first place, a witness if he has been

convicted usually admits the fact; and, secondly, if he does not, the counsel who is cross-examining him is not prepared with the evidence necessary to prove it. It seems to me that the construction we are now putting on the enactment is a reasonable one, for if a witness who has been convicted denies such a matter, which must be so clearly within his own knowledge, as well as obviously untrue, the jury ought to know it, in order that they may understand the kind of witness they have before them.

Rule refused.

Solicitors—J. Mason, for plaintiff; W. Wood, for defendant.

[IN THE EXCHEQUER DIVISION.]

1880. }
May 25. }

FLETCHER v. HUDSON.

Local Board—Member acting after Disqualification—Action for Penalty—Plaintiff—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 253, and sched. 2, rule 70.

An action for a penalty incurred by acting as a member of a local board under the Public Health Act, 1875, after disqualification, brought under schedule 2, rule 70 (which provides that "any person who, being disabled from acting by any provision of this Act, acts as such member, shall be liable to a penalty of 50l., which may be recovered by any person, with full costs of suit, by action of debt"), was stayed by order of a Judge, on the ground that the plaintiff was a person having no special title to sue within section 253 (which enacts that "proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be taken by any person other than a party aggrieved, or the local authority, without the consent of the Attorney-General"):—Held, that although the plaintiff might have no special title to sue within section 253, he nevertheless could sue, and that the order was, therefore, wrong.

Motion to set aside an order made by Bowen, J., at Chambers, staying, as being contrary to the Public Health Act, 1875,

4 U

Fletcher v. Hudson, Excn.

s. 253 (1), the proceedings in an action brought under schedule 2, rule 70, of that Act, for a penalty alleged to have been incurred by the defendant by acting as a member of the Local Board of the District of Grasmere, in the county of Westmoreland, notwithstanding his being disqualified under schedule 2, rule 64, by being concerned in a contract with the board. The plaintiff was not otherwise a party aggrieved than as being rector of the parish of Grasmere and a ratepayer, and the proceedings were taken without the consent of the Attorney-General.

Cock, for the plaintiff.—First, it is immaterial whether the plaintiff is “a party aggrieved” within the meaning of section 253. The words of section 253, “Except as in this Act is expressly provided,” are satisfied by the words of schedule 2, rule 70, providing that the penalty imposed by that rule “may be recovered by any person.” In *Rochefort v. Atherley* (2) this point was not taken. Secondly, the plaintiff is “a party aggrieved.” [The arguments on this head are omitted, as the Court pronounced no opinion upon it.]

Orompton, for the defendant.—Schedule 2, rule 70, does not take the case out of section 253.

Cock was not heard in reply.

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), enacts:—

Section 253: “Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General. . . .”

Section 317: “The schedules to this Act shall be read and have effect as part of this Act. . . .”

Schedule 2, rule 64: “Any member who . . . accepts or holds any office or place of profit under the local board of which he is a member, or in any manner is concerned in any bargain or contract entered into by such board, . . . shall, except in the cases next hereinafter provided, cease to be such member. . . .”

Schedule 2, rule 70: “Any person who, not being duly qualified to act as member of the local board, . . . or being disabled from acting by any provision of this Act, acts as such member, shall be liable to a penalty of 50*l.*, which may be recovered by any person, with full costs of suit, by action of debt. . . .”

(2) Law Rep. 1 Ex D. 511.

HUDDESTON, B.—I am of opinion that this appeal must be allowed, and the order of Mr. Justice Bowen set aside. Section 253 says, “Except as in this Act is expressly provided.” Schedule 2, rule 70, which by virtue of section 317 is part of the Act, provides that the penalty imposed by that rule “may be recovered by any person, with full costs of suit, by action of debt.” I think that that is an express provision within the meaning of the words in section 253, “Except as in this Act is expressly provided,” and consequently that whether the plaintiff is or is not “a party aggrieved,” he is entitled to sue.

STEPHEN, J., concurred.

Order set aside.

Solicitors—Iliffe, Russell, Iliffe & Cardale, agents for Laycock & Co., Huddersfield, for plaintiff; J. & E. Scott, agents for G. Gatey, Ambleside, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. }
March 13. } ELPHICK v. BARNES.

Sale—Conditional Sale—Sale of Horse on Trial—Death of Horse before Trial.

The plaintiff sold a horse to the defendant upon a condition that the horse should be tried by the defendant for eight days and returned by him at the end of that time if he did not think it suitable for his purposes. The horse died within such eight days without fault of either party:—Held by DENMAN, J., that there was no absolute sale at the time of the horse's death, and, therefore, that the plaintiff could not recover the price.

Action for the price of a horse and a cow which the plaintiff had sold to the defendant. The amount of the purchase-money for the cow was paid into Court, and the question was only as to the defendant's liability for the price of the horse.

The action was tried before Denman, J., at the last Spring Assizes at Lewes, when the jury found in effect that the

Elphick v. Barnes, C.P.

sale of the horse was not a sale out and out, but only conditional on the defendant finding the horse on a trial for eight days suitable for his purposes. The horse died within such eight days without fault of either party, and the question was whether, under those circumstances, the plaintiff could maintain his action for the price of the horse. This was argued before Denman, J., on further consideration by

Grantham and Houghton, for the plaintiff, and

Day and Gore, for the defendant.

Cur. adv. vult.

The following judgment was (on March 13) delivered by

DENMAN, J.—The plaintiff in this case sued the defendant for 65*l.*, the price of a horse and cow sold and delivered. The defendant admitted that he agreed to purchase a horse and a cow, but alleged that they were not sold or purchased together at 65*l.*, but under two separate and distinct contracts. There was conflicting evidence as to this part of the defence; but upon the argument before me (there having been no finding of the jury upon this point) it was agreed that I should decide the question; and I found for the defendant that there were two separate and distinct contracts, the horse being sold for forty, and the cow for twenty-five, pounds. The latter amount was paid into Court, and no question remains for decision, except that arising upon the defendant's answer to the plaintiff's demand, so far as the price of the horse was concerned. This answer, as set out in the statement of defence, was as follows: "The price of the said horse was 40*l.*, and the plaintiff warranted it sound and well, and it was sold to the defendant on the terms that, if it did not answer the said warranty or *suit the defendant*, the defendant should be at liberty to reject the same. The said horse was neither sound nor well at the time of the sale to the defendant, but suffering from an internal inflammation, and in consequence of such unsoundness and illness it died before a reasonable

time in which to return the same had elapsed. The defendant, on discovery of the unsoundness, repudiated the contract and gave notice thereof to the plaintiff." The jury found that there was no warranty of soundness and that the horse was, in fact, sound at the time when the bargain was made. But the defendant's counsel at the trial relied, not only on the warranty, but upon evidence that the plaintiff, at the time of the bargain being made, had agreed that the defendant might take away the horse and work him, and if he did not suit the defendant by working in every kind of vehicle for which the defendant required him, the defendant might return him within eight days, and that, *if the horse was satisfactory*, the defendant should pay for him at that time, namely, at the end of the eight days. The bargain having taken place on Thursday, the 31st of July, the horse died on Sunday, the 3rd of August, in the defendant's stable, to which it had been removed on the 31st of July. Under these circumstances the defendant's counsel contended that the defendant was not liable, because the bargain was a conditional one, and the sale not having become absolute before the death of the horse, an action for goods sold and delivered would not lie. It was objected for the plaintiff that no such case ought to be left to the jury, because it was not raised by the statement of defence. But I was of opinion that this defence was one included in the statement of defence; that the pleadings might properly be amended, if necessary, but that it was not necessary to amend them, and that no injustice would be done by leaving the question to the jury. I, therefore, left it to the jury, as follows: "Was the bargain on the 31st of July one for a sale out and out, or only for a sale conditional on the defendant finding the horse all right at the end of the eight days?" The jury found in answer to that question, "that the bargain was conditional on the horse being *right*, and with a trial for eight days." Being doubtful what the jury meant by "*right*," I asked them the question, to which they replied, "Suitable for the defendant's purposes, not contemplating the case of

Elphick v. Barnes, C.P.

death." They afterwards added, in answer to a further question, "But for the complaint which came on after the bargain, we see no reason to suppose that the horse would not have been suitable for the defendant's purposes; by *trial* we mean a trial as regards suitability, not as regards health." Taking all these findings together, I think they amount to a finding that the plaintiff sold the horse to the defendant upon a condition that the horse should be taken away by the defendant and tried by him for eight days and returned at the end of the eight days if the defendant did not think it suitable for his purposes. The horse having died without fault of either party, the question is whether the plaintiff can maintain his action for goods sold and delivered. I am of opinion that he cannot.

The case of *Ellis v. Mortimer* (1), shows that the defendant had the whole time allowed for the trial, in which to decide whether to return the horse or not. I think it clear that no action for goods sold and delivered would have lain at any time before the eight days had expired in case the horse had lived. But before the eight days had expired the horse died. If the defendant were to be fixed with the price of the horse he would be compelled to pay for something different from what he had bargained for, namely, a horse of which he should have had eight days' trial. The finding that the horse might, or probably would, have suited the defendant's purposes does not appear to me to be sufficient reason for fixing the defendant as the absolute owner of the horse. The option was his at the moment of the horse's death, and down to a later period, if the horse had lived. The case of *Rugg v. Minnett* (2), which was relied upon for the plaintiff, does not appear to me to apply, because that was not a case in which the buyer of the goods which were destroyed had any option as to whether he should become the purchaser or not, but at the time of the destruction of the goods, he had, by virtue of the bargain, and of what had passed, become the absolute owner of the

goods, in respect of which he was liable. Nor, in my opinion, does the dictum of Mr. Justice Coleridge in *Moss v. Sweet* (3), which was relied upon for the plaintiff, help the plaintiff's contention in this case. That was a case in which the defendant having taken delivery of goods "on sale or return," and having kept the goods, it was held that the sale was completed if the goods had not been returned within a reasonable time, and that the common count for goods sold and delivered would suffice. Mr. Justice Coleridge in that case says, "The goods in question passed on condition that unless returned—that is, at the option of the buyer—within a reasonable time, they were to be taken as sold to him. That condition was at an end after the lapse of a reasonable time without a return of the goods; and the sale was then complete." He does not say that it was complete *before* that time. He does go on to say, "The same consequence would follow where goods are destroyed or injured, so that a return within the meaning of the contract becomes impossible." This was relied upon as referring to an accidental destruction such as by death or fire. I think it clear that this was not the meaning, but that the learned Judge referred to destruction of, or injury to, the goods being the act of the defendant, in which case, of course, the defendant would have been liable as much as if he had kept them an unreasonable time. The case of *Head v. Tattersall* (4) is nearer to the present case. That was an action for money received, to recover back the price of a horse which had been sold at Tattersall's with a warranty and a condition that the plaintiff was to be at liberty to return the horse if it did not answer the description, up to the following Wednesday. The horse was injured on its way home and depreciated in value, but without any fault of the plaintiff's servant who was taking it home. The horse, being found not to correspond with the warranty, was returned within the time; and it was held

(3) 16 Q.B. Rep. 495; 20 Law J. Rep. Q.B. 167.

(4) 41 Law J. Rep. Exch. 4; Law Rep. 7 Exch. 7.

(1) 1 N. R. 257.

(2) 11 East, 210.

Elphick v. Barnes, C.P.

that the plaintiff had a right to return it and recover back the price, notwithstanding that he was unable to return it in the same condition. It was attempted to distinguish that case from the present, on the ground that there was a right to return the horse on a specific ground, on which it was, in fact, returned.

But I can see no difference in principle between such a case and the case in which the purchaser has an option to return the horse on any ground still remaining to him at the time when the event occurs which renders it impossible for him to exercise that option and so to have the whole benefit of his bargain. In such a case, I think the sale to him cannot be considered to be absolute at the time of the accident occurring. The maxim of *res perit domino* applies, I think, in such a case much more reasonably as against the unpaid contingent vendor, than as against the possible vendee still having an option to return at the end of a period not yet expired. I think the law relating to such a case is accurately stated by Mr. Benjamin in page 483 of the 2nd edition of his work on *Sales*, where he lays it down as follows, speaking of "sales on trial" or "sales on approval," in which case he says, "There is no sale until the approval is given either expressly or by implication resulting from keeping the goods beyond the time allowed for trial." Here, I think, there was no sale at the time of the horse's death, which happened without the fault of either party, and, therefore, that the action for goods sold and delivered must fail; and I give judgment for the defendant, except so far as relates to the costs of and occasioned by the allegations of warranty and unsoundness, which costs I order to be paid by the defendant, such costs to be set off against the defendant's costs on taxation.

Judgment for defendant.

Solicitors—Venn & Woodcock, agents for T. A. Goodman, Brighton, for plaintiff; Palmer, Bull & Fry, agents for Lamb & Evett, Brighton, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } STEVENSON, JAMES AND CO. v.
May 7, 25. } M'LEAN.

Contract of Sale—Revocation of Offer—Notice of Revocation.

Negotiations having been going on for sale by the defendant to the plaintiffs of a quantity of iron, the defendant wrote saying that he "would sell now for 40s. net cash, open till Monday." On the Monday morning the plaintiffs telegraphed enquiring whether the defendant would accept 40s. for delivery over two months. The defendant did not reply, and about midday the plaintiffs succeeded in selling on the defendant's original terms, and telegraphed that they had done so. The defendant had himself in the course of the morning sold the iron to other persons, but his telegram announcing this reached the plaintiffs after the latter had dispatched their telegram to defendant. On action brought for non-delivery of the iron to the plaintiffs,—Held, by LUSH, J., on further consideration, that the defendant's offer being a continuing one throughout Monday, the plaintiffs were authorised by it to sell at any time during the day until notice of its revocation reached them. The revocation having no effect until it was communicated, the plaintiffs were here entitled to require delivery of the iron.

Cooke v. Oxley (3 Term Rep. 653) discussed.

Byrne & Co. v. Leon van Tienhoven & Co. (49 Law J. Rep. C.P. 316) followed.

This was an action tried at Leeds, when a verdict was taken for the plaintiffs subject to the determination of the questions of law argued before the learned Judge at Westminster on the 7th of May, by

Waddy and Hugh Shield, for the plaintiffs, and

Cave and Wormald, for the defendant.

The facts appear fully in the judgment which was delivered, after time taken to consider, by

LUSH, J. (on May 25) — This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at 40s. per ton net cash. The trial took place

Stevenson & Co. v. McLean, Q.B.

before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for 1,900*l.*, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of damages. The question of law was argued before me on the 7th of May instant. The plaintiffs are makers of iron and iron merchants at Middlesboro. The defendant being possessed of warrants for iron which he had originally bought of the plaintiffs, wrote on the 24th of September to the plaintiffs from London, where he carries on his business, "I see that No. 3 has been sold for immediate delivery at 39*s.*, which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3,800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool, "Your letter has followed me here. The pig-iron trade is at present very excited, and it is difficult to decide whether prices will be maintained or fall as suddenly as they have advanced. Sales are being made freely, for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesboro I shall probably be able to write you something definite on Monday." This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms:—

"Referring to R. A. McLean's letter to you *re* warrants, I have seen him again to-day and he considers 39*s.* too low for same. At 40*s.* he says he would consider an offer. However, I shall be obliged by your kindly writing me, if possible, your best offer for all or part of the warrants he has to dispose of."

On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram: "Cannot make an offer to-day, warrants rather easier. Several sellers think might get 39*s.* 6*d.* If you could wire firm offer, subject reply Tuesday noon."

In answer to this Fossick wrote on the same day, "Your telegram duly to hand *re* warrants. I have seen Mr. McLean, but he is not inclined to make a firm offer. I do not think he is likely to sell at 39*s.* 6*d.*, but will probably prefer to wait. Please let me know immediately you get any likely offer."

On the same day the defendant, who had then received the Liverpool letter of the 26th, wrote himself to the plaintiffs as follows:—

"Mr. Fossick's clerk shewed me a telegram from him yesterday mentioning 39*s.* for No. 3 as present price, 40*s.* for forward delivery. I instructed the clerk to wire you that I would now sell for 40*s.* nett cash, open till Monday."

No such telegram was sent by Fossick's clerk.

The plaintiffs were thus on the 28th (Sunday) in possession of both letters, the one from Fossick stating that the defendant was not inclined to make a firm offer, and the other from the defendant himself to the effect that he would sell for 40*s.* nett cash, and would hold it open all Monday. This, it was admitted, must have been the meaning of "open till Monday."

On the Monday morning at 9.42 the plaintiffs telegraphed to the defendant, "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give."

This telegram was received at the office at Moorgate at 10.1 A.M., and was delivered at the defendant's office in the Old Jewry shortly afterwards. No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants through Fossick for 40*s.* nett cash, and at 1.25 sent off a telegram to the plaintiffs, "Have sold all my warrants here for forty nett to-day." This telegram reached Middlesboro at 1.46, and was delivered in due course.

Before its arrival at Middlesboro, however, and at 1.34 the plaintiffs telegraphed to defendant, "Have secured your price for payment next Monday, write you fully by post."

By the usage of the iron market at Middlesboro, contracts made on a Monday for cash are payable on the following Monday.

Stevenson & Co. v. McLean, Q.B.

At 2.6 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed, "Have your telegram following our advice to you of sale per your instructions which we cannot revoke, but rely upon you carrying out."

The defendant replied, "Your two telegrams received; but your sale was too late—your sale was not per my instructions." And to this the plaintiffs rejoined, "Have sold your warrants on terms stated in your letter of twenty-seventh."

The iron was sold by plaintiffs to one Walker for 41s. 6d., and the contract note was signed before one o'clock on Monday.

The price of iron rapidly rose, and the plaintiffs had to buy in fulfilment of their contract at a considerable advance on 40s.

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent or that of buyer and seller. The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant: first, it was contended that the telegram sent by the plaintiffs on the Monday was a rejection of the defendant's offer, and a new proposal on the plaintiff's part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only as an enquiry, expecting an answer for his guidance, and this I think is the sense in which the defendant ought to have regarded it. It is apparent throughout the correspondence that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict, at the early hour when the telegram was sent, how the prices would range during the day. It was reasonable that under these circumstances they should desire to know before busi-

ness began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one.

Then again the form of the telegram is one of enquiry. It is not, "I offer forty for delivery over two months," which would have likened the case to *Hyde v. Wrench* (1), where one party offered his estate for 1,000l. and the other answered by offering 950l. Lord Langdale, in that case, held that after the 950l. had been refused, the party offering it could not by then agreeing to the original proposal claim the estate, for the negotiation was at an end by the refusal of his counterproposal. The words are, "Please wire whether you would accept forty for delivery over two months, or if not, the longest limit you would give." There is nothing specific by way of offer or rejection but a mere enquiry which should have been answered and not treated as a rejection of the offer; this ground of objection, therefore, fails.

The remaining objection is one founded on a well-known passage in Pothier which has been supposed to have been sanctioned by the Court of Queen's Bench in *Cooke v. Oxley* (2), that in order to constitute a contract there must be the assent or concurrence of the two minds at the moment when the offer is accepted, and that if when an offer is made and time is given for the other party to determine whether he will accept it or reject it, the proposer changes his mind before the time arrives, although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of *Cooke v. Oxley* (2) does not appear to me to warrant the inference which has been drawn from it,

(1) 3 Beav. 334.

(2) 3 Term Rep. 653.

Stevenson & Co. v. McLean, Q.B.

or the supposition that the Judges ever intended to lay down such a doctrine.

The declaration stated a proposal by the defendant to sell to the plaintiffs 266 hogsheads of sugar at a specific price, that the plaintiffs desired time to agree to or dissent from the proposal till four in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver if the plaintiff would agree to purchase and give notice thereof before four o'clock. The Court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till four o'clock, and that the alleged promise to wait was *nudum pactum*.

All that the judgment affirms is that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities which have been supposed to conflict with *Cooke v. Oxley* (2). It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end. See *Routledge v. Grant* (3). But in the absence of an intermediate revocation a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it—*Adams v. Lindsell* (4). "Common sense tells us," said Lord Cottenham, in *Dunlop v. Higgins* (5) "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted there is an end of the proposal. *Cooke v. Oxley* (2), if decided the other way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in *Cooke v. Oxley* (2), the doctrine of Pothier before adverted to, which is undoubtedly contrary to the spirit of English law, has never been affirmed in any Courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party has not, until recently, been laid down, no case having apparently arisen to call for a decision upon the point. In America it was decided some years ago that an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted—*Taylor v. The Merchants Fire Insurance Company* (6), and in *Byrne & Co. v. Leon Van Tienhoven & Co.* (7) my brother Lindley in an elaborate judgment adopted this view and held that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all.

It follows that as no notice of withdrawal of his offer to sell at 40s. nett cash was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and their acceptance of it made the contract which was initiated by the proposal complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for 1,900*l.*, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed or if the amount be not reduced the judgment will stand for 1,900*l.* The cost of the arbitration to be in the arbitrator's discretion.

Judgment for plaintiffs.

Solicitors—Ullithorne, Currey & Villiers, agents for Dodds & Co., Stockton-on-Tees, for plaintiffs; Harries, Wilkinson & Raikes, for defendant.

(3) 4 Bing. 653.

(4) 1 B. & Ald. 681.

(5) 1 H.L. Cas. 381.

(6) 9 How. Sup. Court Rep. U.S. 390.

(7) 49 Law J. Rep. 316.

[IN THE COURT OF APPEAL.]

1880.
June 16. }

WARD v. PILLEY.*

Practice—Reference—Matters of Account—Jurisdiction to refer Issues compulsorily—Judicature Act, 1873 (36 & 37 Vict. c. 66) s. 57. Order XXXVI. rule 5.

Where there is a question of account which can be referred compulsorily under section 57 of the Judicature Act, 1873, the Court has power to order all the other issues in the action to be also referred.

Rule 5 of Order XXXVI. does not apply to cases within section 57 of the Judicature Act, 1873; so that a summons to refer the issues in an action compulsorily under that section, need not be taken out within four days from service of notice of trial.

In an action on a builder's bill consisting of many items, each of which, it appeared probable from the pleadings, would be separately disputed, it was,—

Held (reversing the decision of the Queen's Bench Division), that the matter was one "requiring a prolonged examination of accounts," within section 57 of the Judicature Act, 1873, and might, therefore, be compulsorily referred to an official referee.

Appeal from an order of the Queen's Bench Division (Lush, J., and Field, J.).

The action was to recover the amount of a builder's bill. There were a great number of items in the bill which were set forth in particulars filling about twenty-eight sheets.

The defence denied the defendant's liability, and alleged that the charges were not fair and proper ones.

There was also a counter-claim for money lent by the defendant to the plaintiff, and for damages for breach of the plaintiff's agreement to advance money to the defendant in order to enable him to meet a bill of exchange accepted by the defendant at the plaintiff's request. Notice of trial having been given on the 24th of February, the defendant took out a summons on the 28th of May to shew cause why all the issues in the action should not be referred to an official referee.

A master made an order referring all

* *Coram Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.*

VOL. 49.—Q.B., C.P. & EXCH.

the issues accordingly, and Lindley, J., in chambers, affirmed this order.

On appeal, the Queen's Bench Division rescinded the order, being of opinion that the questions of account arising in the action were not such as to require a "prolonged examination of accounts" within the meaning of section 57 of the Judicature Act, 1873, and, therefore, that the Court had no jurisdiction to make the order. The Court, however, intimated that the questions of account were such as ought to be referred, and that they would have referred them compulsorily if they had had jurisdiction.

The defendant appealed.

Harmsworth, for the defendant.—There was jurisdiction to refer all the issues in this action compulsorily under section 57; the accounts being such as to require a "prolonged examination" within the section. In *In re Leigh* (1), Hall, V.C., referred the issues in the action, which was for goods sold and delivered, to an official referee, although the particulars contained only twenty-four items.

Here the issues of account and the issues raised on the counter-claim were so inseparably mixed up that the whole of the issues ought to have been referred.

H. Bozall, for the plaintiff. Order XXXVI. rule 5 provides that "in any case within the 57th section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a Judge for an order to that effect, within four days from the time of the service of the notice of trial." So that, if the case is within section 57, the defendant's summons was too late—*Lascelles v. Butt* (2).

These are not accounts requiring a "prolonged examination," and there was consequently no jurisdiction to refer—*Green's Trustees v. Barrett* (3). Whatever the construction of section 57 may be, this is not a case which ought to be referred in view of the issues between the parties apart from the issues raising

(1) 46 Law J. Rep. Chanc. 60; Law Rep. 3 Ch. D. 292.

(2) Law Rep. 2 Ch. D. 588.

(3) Weekly Notes, 1875, p. 204.

Ward v. Pilley (App.), Q.B.

questions of account. Part of the defence is that the defendant did not employ the plaintiff on the terms that he was to be paid on a *quantum meruit*, but that the employment was under a contract to complete the work for a specific sum. And in answer to the counter-claim the plaintiff sets up that the bill of exchange accepted by the defendant for the plaintiff had been altered.

BRAMWELL, L.J.—It has been the practice in chambers to refer, in mercy to the parties, cases in which the action cannot be tried by a jury, although the parties have raised all sorts of issues besides the matters of account involved. If there was jurisdiction to refer, I think that this case ought to have been referred. In the questions which have been raised, the truth, in my opinion, would be better got at before the official referee than a jury. The only consequence of referring one part of the case to the referee and the other to a jury, is that two trials would be had instead of one, and a double expense incurred.

I have come to the conclusion that we have jurisdiction to refer here. I think the Queen's Bench Division had jurisdiction, and a discretion which they might have exercised. They did not exercise it because they thought that they had not jurisdiction, and, therefore, that they had no choice but to overrule the decision of Mr. Justice Lindley. With great respect to the opinion of Mr. Justice Lush and Mr. Justice Field, and with some doubt arising from the language of the section, I cannot agree with their view.

The section gives power to refer compulsorily "in any case or matter requiring any prolonged examination of documents or accounts." It is difficult to give any precise and logical definition of what is a matter "requiring a prolonged examination of accounts." But I am of opinion that the Legislature intended to enable the Court to do that which might be done under the Common Law Procedure Act, 1854. It was meant that the same questions of account which could be referred to a master under that Act should be referred now under section 57 of the Judicature Act, 1873.

I cannot think, looking at the language of the section, that the Legislature could have intended not to include such compulsory powers of reference as are given by section 3 of the Common Law Procedure Act, 1854. If that is so, whenever there is jurisdiction to refer, it seems to me that the Judge has power to order any other question of fact in the action to be referred with the question of account. I think it is most reasonable that he should have that power; because otherwise two trials might be had, and increased expense incurred. It should be understood that on these applications to refer matters partly, but not wholly, of account, the whole of the questions at issue may be referred, as the whole matter in dispute could be referred compulsorily under the Common Law Procedure Acts, where there was a question of account. I am of opinion that there was jurisdiction to refer in this case and that the appeal should be allowed.

BAGGALLAY, L.J.—I am of the same opinion. The question turns on the construction of section 57 alone. That section gives power to refer in two classes of cases: first, where the parties consent; and, secondly, without their consent "in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, be made before a jury." The discretion to be exercised is a judicial one, and is capable of being reviewed by the Court of Appeal, though of course we should differ with great hesitation from the opinion of a Judge, who exercises the discretion, having all the materials before him. I am satisfied that this case is within the words of the section. The appeal has come before us on the ground that the Court refused to hear the application as having no jurisdiction to entertain it. It is admitted that the Queen's Bench Division would have made the order to refer if they had thought they had jurisdiction. Both the Master and Mr. Justice Lindley thought the case one which ought to be referred. I am of opinion that the appeal should be allowed.

Ward v. Pilley (App.), Q.B.

BRETT, L.J.—In this case the order made by the Master and affirmed by Mr. Justice Lindley was not to refer the action, but all the issues in the action to the official referee. That is, all the issues in the action were referred to be tried by the official referee, and he was to report his findings to the Court. The question is, whether under section 57 the Master or the Court had jurisdiction to make such an order. First, it was objected that, assuming the case to be within section 57, yet the application to refer was too late by reason of Order XXXVI. rule 5. That rule, in my opinion, does not apply to cases within section 57; that is, to references to an official referee only. Rule 5 deals with the trial of actions, but it has been held that actions cannot be tried by an official referee, but only the issues in an action—see *Longman v. East* (4). The rule, therefore, does not apply to cases where, under section 57, issues are referred. It is said that the case of *Luscelles v. Butt* (2) is an authority to the contrary; but that case was decided before it had been finally determined that actions cannot be sent for trial before an official referee. In the then state of the authorities, therefore, the decision was right, but it has become obsolete and inapplicable since the construction put upon section 57 by *Longman v. East* (4).

The next question is, whether there is jurisdiction to refer under section 57. The action is brought upon a builder's bill. Certainly that is matter of account. The account contains many items, and in order to determine the case it must be examined. But that is not enough; there is no jurisdiction to refer any of the issues to an official referee unless the examination which the accounts require will be a prolonged one.

Now this account consists of many items, some or all of which may be disputed. Probably every one of them will be disputed, because one of the issues raised by the pleadings is that the charges are not fair and proper ones. It is necessary, therefore, to consider every item, but that fact is not enough to give jurisdiction; the Court

must make a preliminary enquiry whether the examination is likely to be a prolonged one. If it appears to a Judge that the account requires examination, but that in fact, although all the items are disputed, the question can be determined by an examination of one item, the Judge ought, in my opinion, to say that he has no jurisdiction to refer compulsorily. But if he finds that every item is disputed and will require a separate examination, he may reasonably say that a prolonged examination of the account is necessary, and that he has jurisdiction to send it to an official referee. It might have been argued that, as an examination of the items of one account only was requisite, that could not be an "examination of accounts" within section 57; but I think the decisions under the Common Law Procedure Act, 1854, as to what constitutes matter of account, shew what is the proper construction of this section 57. The Judicature Act, 1873, was drawn with the knowledge of those decisions; where an examination of disputed items in one account is necessary, that involves an "examination of accounts" within section 57. I am of opinion, therefore, with some hesitation, that the Master and Mr. Justice Lindley and the Queen's Bench Division had jurisdiction to refer. If so, the Queen's Bench Division had a discretion which they did not exercise, though they intimated an opinion that they would have agreed with the view of Mr. Justice Lindley and of the Master if they had felt themselves at liberty to exercise a discretion.

Next, I am of opinion that when once you bring the case within section 57, all the issues in the action may be sent for trial to an official referee, just as under the Common Law Procedure Act, 1854, when the case was once brought within section 3, the whole matter in dispute could be referred. Here, as a matter of discretion, Mr. Justice Lindley and the Master both thought all the issues ought to be referred, and the Queen's Bench Division did not exercise their discretion. It is not necessary for us to say whether all the issues should have been sent to the official referee. We ought not to in-

(4) 47 Law J. Rep. C.P. 211; Law Rep. 3 C.P. D. 142.

Ward v. Pilley (App.), Q.B.

terfere, except in extreme cases, with the exercise of discretion by Judges below. There is no reason here to interfere with the discretion exercised by Mr. Justice Lindley and the Master.

Judgment for the defendant. Appeal allowed.

Solicitors—Boxall & Boxall, for plaintiff; Henry Morris, for defendant.

[IN THE COURT OF APPEAL.]

Sanderson (Appeal from the Queen's Bench Division.)
Morgan of 1880.
Berwick's } ANDERSON v. OPPENHEIMER.*
 April 16, 17.

Landlord and Tenant—Lease—Covenant for Quiet Enjoyment—Water Supply—House Let out in Flats—Damage by Water.

The defendant demised the ground floor of his house to the plaintiff under a lease containing a covenant that the lessee might "peaceably hold and enjoy the said demised premises during the said term without any interruption by the lessor, or any person lawfully claiming through or in trust for him." The remainder of the house was let out in floors to different tenants. Before and during the demise to the plaintiff the water supply was effected by means of a main service pipe connected with a cistern placed at the top of the house, branch pipes being inserted into the main pipe for the supply of water to each floor. The tenants paid a proportion of the water rate for the supply to their respective premises. The branch pipe on the first floor suddenly burst, and the water therefrom poured down into the plaintiff's premises and injured his goods. In an action for damages the jury found that the branch pipe when fixed (which was before the demise) was a reasonably fit and proper one for the purpose for which it was fixed and intended,

* *Cram* Brett, L.J.; Cotton, L.J.; Thesiger, L.J.

and that there was no negligence or want of skill in the fixing and maintaining the pipe where and as it was:—Held (affirming the judgment of FIELD, J.), that the plaintiff had no cause of action founded upon the covenant for quiet enjoyment, because the covenant was prospective, and there had been no act of omission or commission during the demise to the plaintiff, causing an interruption of his enjoyment. Held also, that the apparatus for the water supply, being for the common benefit of the plaintiff and the other tenants, the plaintiff had no cause of action founded upon the principle laid down in *Fletcher v. Rylands*, 34 Law J. Rep. Exch. 177; 3 Hurl. & C. 774; 35 Law J. Rep. Exch. 154; *Rylands v. Fletcher* (H.L.) 37 Law J. Rep. Exch. 161; in Ex. Ch. Law Rep. 1 Exch. 265; in H.L. Law Rep. 3 H.L. 330.

Appeal from a judgment of Field, J., on further consideration, after trial with a jury.

The facts are fully stated in the judgment of Field, J., reported *ante*, Q.B. 456.

Morgan Lloyd and *W. R. Phillips* appeared for the plaintiff.

J. Brown and *A. R. Jelf*, for the defendant.

The arguments sufficiently appear from the judgment of the Court of Appeal (*post*).

The following authorities were cited:—

Andrews v. Paradise (1); *Shaw v. Stenton* (2); *Calvert v. Sebright* (3); *Hall v. The City of London Brewery Company* (4); *Fletcher v. Rylands* (5); *Nichols v. Marsland* (6).

BRETT, L.J.—I am of opinion that the judgment of Mr. Justice Field was right.

(1) 8 Mod. 240.

(2) 2 Hurl. & N. 858; 27 Law J. Rep. Exch. 263.

(3) 15 Bear. 156.

(4) 31 Law J. Rep. Q.B. 257.

(5) 34 Law J. Rep. Exch. 177; 35 Law J. Rep. Exch. 154.

(6) 46 Law J. Rep. Exch. 174; Law Rep. 2 Ex. D. 1.

Anderson v. Oppenheimer (App.), Q.B.

It is said, in the first place, that the defendant has committed a breach of his covenant for quiet enjoyment. I apprehend that the covenant is prospective. The defendant covenants that, from the time of granting the lease, the plaintiff's enjoyment shall not be interfered with by any act of the defendant, or of anyone for whose act he is responsible. But here the act, and the only act, according to Mr. Lloyd's own argument, done by the defendant, or anyone for whose act he is responsible, was done before the granting of the lease. The jury have found that it was not done negligently. There was no breach of any duty whatever, no act of either commission or omission, and no negligence after the lease. What happened was the result of the forces of nature alone. The covenant being only prospective, it follows that there has been no breach of it.

The cases which have been cited to us are cases where, under an authority given by the lessor before the granting of the lease, an act has been done after the lease by the person so authorised; that is, an act of commission has been done by some one authorised by the prior grant of the lessor to do it, which has affected the tenant's enjoyment of the premises demised to him.

In such a case, although the authority has been given before the lease, and the act has been done after it, it has been done by reason of the continuing authority given by the lessor; it is, therefore, within that authority, an act for which the lessor is responsible. No decision can be found to support the view contended for by the appellant here. In my judgment, therefore, both upon principle and upon the want of authority in his favour, there is no foundation for his contention.

It is further suggested that the plaintiff has a cause of action, irrespective of the covenant for quiet enjoyment, and founded upon the principle of *Fletcher v. Rylands* (5). That might have been so if the water supply had been for the premises of the other tenants without reference to the plaintiff's premises. But this was one apparatus used for the common benefit of the plaintiff and the other

tenants. There was no storing up of water for the defendant's own benefit merely. I am of opinion, therefore, that the plaintiff has no cause of action on that ground.

COTTON, L.J.—The action is brought for the breach of a covenant for the quiet enjoyment by the plaintiff of premises let to him by the defendant. The covenant is that the defendant "may peaceably hold and enjoy the demised premises during the said term without any interruption by the lessor or any person lawfully claiming through or in trust for him." I will assume for the purposes of this case that there was a substantial interruption of the plaintiff's enjoyment, and the question then is, whether it has been done by the defendant or those lawfully claiming through him. It must be so done in order to be within the words of the covenant. In my opinion, those words only refer to acts done after the granting of the lease. Here it is conceded that no act was done by the defendant or those lawfully claiming through him after the lease was granted. There was no act of commission or omission, and I agree that an act of omission may be equal to an act of commission so as to be a breach of the covenant. But the jury have found that there was no negligence on the part of anyone in the fixing and maintaining the pipe; there was nothing, therefore, to make what occurred, although an interruption of the plaintiff's enjoyment, come within the covenant.

It is suggested that the case comes within *Fletcher v. Rylands* (5); that the defendant, having the water in the cistern at the top of the house for his own purposes, is liable if, without negligence, it escapes and injures the plaintiff. That point is not raised by the pleadings, but it has been argued, and I will deal with it. I agree with the judgment of Lord Justice Brett, that, the water having been stored in the cistern for the benefit of the plaintiff as well as of the other tenants, the case does not come within *Fletcher v. Rylands* (5), although the point of escape was not on the plaintiff's premises.

Anderson v. Oppenheimer (App.), Q.B.

THE SINGER, L.J.—I am of the same opinion. If the water apparatus had been entirely unconnected with the plaintiff's premises the matter would have had a different complexion. It might have been said that the defendant, having stored up water for his own purposes, is liable within the principle of *Fletcher v. Rylands* (5) if it escapes and does damage to the plaintiff. He might also, perhaps, have been liable under the covenant. But here the case is different: the plaintiff takes the premises subject to this, that there is a water apparatus for the supply of the whole house, with a main pipe from the cistern, and branch pipes to each of the floors. He takes a lease upon that footing, and would be entitled to complain if his water supply failed. If he takes the benefit he must take the burden. There was no act either of omission or commission to bring the case within *Fletcher v. Rylands* (5), or within the words of the covenant.

I am of opinion that the judgment was right and should be affirmed.

Judgment affirmed.

Solicitors—C. T. Foster, for plaintiff; Pilgrim & Phillips, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN on the prosecution
Nov. 8, 15. { of THE CHURCHWARDENS,
Dec. 18. { ETC., OF ST. MARGARET
AND ST. JOHN THE EVANGELIST, WESTMINSTER (respondents) v. THE INSTITUTION OF CIVIL ENGINEERS (appellants).

Poor Rate—Exemption from—G & 7 Vict. c. 36—Civil Engineers—Institution—Primary Object of Society—Purposes of Science, Literature and Fine Arts.

[For the report of the above case, see 49 Law J. Rep. M.C. 34.]

[IN THE COURT OF APPEAL]

(Appeal from the Exchequer Division.)

1880. }
May 12. } HILLS v. RENNY AND OTHERS.*

County Court—Interpleader—Powers to stay Action—County Court Act, 1867 (30 & 31 Vict. c. 142), s. 31.

The County Court Act, 1867, provides that where a claim is made by any person to or in respect of any goods taken in execution under process of a County Court, or in respect of the proceeds or value thereof, the high bailiff may interplead by issuing a summons to bring before the Court the party issuing the process and the party making the claim, and the Court shall adjudicate between such parties and the high bailiff, and any action which shall have been brought in respect of such claim or of any damage arising out of the execution of such process shall be stayed:—Held (affirming the judgment of the Exchequer Division), that an action brought by a plaintiff, whose goods had been taken in execution, against the high bailiff and against the purchasers of the goods could be stayed against the former, but that there was no power under the above section to stay it against the purchasers.

Appeal from the Exchequer Division.

The plaintiff, whose goods had been seized and sold under process of a County Court, brought an action in respect of the seizure and sale against the defendant Renny, the high bailiff of the County Court, and against the other defendants, who had bought the goods at the sale.

The high bailiff took out a summons under 30 & 31 Vict. c. 142. s. 31 (1), whereon the Master made an order staying the action both against the high bailiff and against the purchasers.

The plaintiff appealed, and the Exchequer Division rescinded that order, and directed that the action should be stayed as against the high bailiff only.

The plaintiff appealed, but as the purchasers did not appear the case was adjourned in order to enable them to do so.

* Coram Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

Hills v. Renny (App.), Exch.

Cock, for the plaintiff.—The section under consideration applies to two classes of cases: it applies to cases in which the goods are claimed while they are still in the possession of the high bailiff, and it applies to cases in which the proceeds are in his possession; but it does not apply to such a case as the present, where the claimant desires to pursue his goods, which have reached the hands of third parties, such as these purchasers. The plaintiff has a right to more than the proceeds of the sale, for he claims damages. The words "taken in execution" mean while being taken in execution—that is, while the goods are in the bailiff's hands; but that is not the case here, and the plaintiff cannot be restrained from maintaining his action against all the parties whom he has made defendants, nor do the provisions of the section give the Court the power to bar his remedy by action.

Bigham, for the defendant *Renny*, the high bailiff.—Whether the words of section 31 of 30 & 31 Vict. c. 142 (1) apply to all these defendants may be doubtful, but they manifestly apply to and include

the case of the bailiff, and it is submitted that his rights cannot be cut down because there happen to be other defendants. The words "such claim," at the end of the section, mean the claim between the plaintiff and the high bailiff.

E. Harrison, for the other defendants, the purchasers of the goods.—This Act repeals section 118 of 9 & 10 Vict. c. 95, and is wider in its terms than the repealed section; it is submitted, therefore, that the intention of the Legislature was that complete justice should be done as between all parties. The County Court rules as to interpleader (Rules of 1875, Order XXI. rule 3) contemplate a case where damages are sought from the execution creditor or the high bailiff, so that it is not necessary that the purchasers should be a party to the action. But if the purchasers are brought before the County Court, then the words of section 31 of 30 & 31 Vict. c. 142 (1) are large enough to include them, and the action should be stayed against them, so that the whole matter may be finally settled by the Judge.

(1) 30 & 31 Vict. c. 142. s. 31.—"If any claim shall be made to or in respect of any goods or chattels taken in execution under the process of a County Court, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar of the Court, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the said Court as well the party issuing such process as the party making such claim, and the Judge of the Court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and shall also adjudicate between such parties, or either of them, and the high bailiff, with respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit, and such orders shall be enforced in like manner as any order in any suit brought in such Court, and shall be final and conclusive as between the parties, and as between them or either of them and the high bailiff, unless the decision of the Court shall be in either case appealed from; and upon the issue of the summons any action which shall have been brought in any Court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed."

BRETT, L.J.—We hoped to give a wide interpretation to the words of this section under consideration and to find ourselves able to let in all parties who are in any way interested in the goods seized; but we have not been able to come to that conclusion. I am of opinion that the facts of the case bring it within the section which has been cited, and I cannot agree with the argument that the words "taken in execution" are equivalent to "while held in execution:" that would be to put a violent construction on the language of the statute, and to make a violent change. It is not an unfrequent idiom of the English language to make such phrases as "taken in execution" mean "which have been taken in execution." This section makes it imperative on the registrar to issue the summons when a claim is made in respect of goods taken in execution under process of the Court. I agree that it is imperative on him to do so; but the section only empowers him to summon the execution creditor and the claimant, and only empowers the Judge of the Court to adjudicate between the execution

Hills v. Renny (App.), Excu.

creditor and the party claiming the goods, chattels or the proceeds or value thereof, and between either of those parties and the high bailiff on whose application the summons issues: these three parties are the only parties who can thus be brought before the Court.

It has been urged that the words of the section should be construed so as to embrace not only these three parties so mentioned, but other parties, and that the section should be extended so as to enable the Court to stay an action against the purchasers of goods which have been, as in this case, sold at an auction. I do not think that the words are large enough to enable us to do this, but I think that the power exercised under this section must be confined to proceedings between the three parties already mentioned. In this case the claimant has brought an action against the high bailiff, and he has added a claim against the purchasers who were unlucky enough to buy from the high bailiff. It has been said that the case is not within the section at all, but I am of opinion that it is. Everything described in the section exists in this case, and therefore we have power over the action. The action should therefore be stayed against the bailiff; but as the purchasers are not within the section there is no authority to stay the action as against them. I think that the Exchequer Division was right in ordering the action against the high bailiff to be stayed; but as the section does not cover the purchasers the action must go on against them. What the result will be I cannot say. I only decide that the action against the bailiff must be stayed. The dispute between the claimant and the bailiff and the execution creditor will come before the Judge of the County Court, and he will decide it under the authority given by the section under consideration—a section which does not apply to or include the case of the purchasers of the goods. The judgment will be affirmed, and the appellant must pay costs to the bailiff.

COTTON, L.J.—I am of the same opinion. I think that the words "taken in execution" do not mean while held in

execution; the section under consideration applies to a claim made in respect of goods or of the proceeds or value of goods, but the section does not apply to the case of a purchaser, and there is no power under it to bring the purchaser before the County Court. The Judge of the County Court has power to adjudicate between the party issuing the process, the party making the claim and the high bailiff, but the purchaser of the goods does not acquire any protection from this section, and we cannot stay the action against him.

THESIGER, L.J.—I agree that the action was rightly stayed against the high bailiff, although I do not think that section 31 of 30 & 31 Vict. c. 142 (1) is quite clear or easy to construe. It is said that Hills, the plaintiff, is not within the section, that he does not claim goods, or the proceeds or value of goods taken in execution, because he claims more than that value. I am of opinion that this contention cannot prevail, for his claim comes within the very words of the statute—it is a claim "in respect of goods," and "in respect of the value or proceeds thereof"—so that the claimant makes a claim under both of these clauses. It is then suggested that the Judge of the County Court can issue a summons calling before him all the parties to this action, and therefore that the action of the plaintiff should be stayed against them all, and that the Exchequer Division should have stayed it against the purchasers as well as against the high bailiff. I do not think that this is the right construction of the section; the words of the latter part are not clear, but they must, I think, be taken to be the complement of those which precede them, and therefore that the action is to be stayed against those only whom the Judge can summon before him.

Now the Judge can only summon before him the party issuing the process, the party making the claim, and the high bailiff, on whose application the summons is issued. I think, therefore, that these are the parties with respect to whom the section intended to provide that actions should be stayed, and that it did

Hills v. Renny (App.), Exch.

not contemplate the case of purchasers, so that we cannot now on this appeal deal with the rights or liabilities of those purchasers.

Appeal dismissed.

Solicitors—Pattison, Wigg & Co., for plaintiff; Gregory & Rowcliffes, agents for Cousins & Burbidge, Portsmouth, for Renny, Whiteman & Chalcraft; Sole, Turner & Knight, agents for King, Portsea, for Kinsale, Lock & Silvester.

[IN THE COURT OF APPEAL AND COMMON PLEAS DIVISION.]

1880. } THE PATENT SAFETY GUN
May 13. } COTTON COMPANY v. WIL-
June 2. } SON.*

Cheque—Stolen Cheque with Forged Indorsement—Negligence—Conversion.

To a statement of claim alleging that a cheque payable to the order of the plaintiffs was stolen from them, and the indorsement of their name forged upon it, and that it subsequently came into the possession of the defendant, who converted it to his own use, the defendant pleaded that the plaintiffs knowingly employed as clerk a man who had been convicted of embezzlement, and was a notorious thief; that the clerk was allowed access to the rooms where the plaintiffs' letters and cheques were kept, and was empowered and permitted to receive and open the said letters and cheques, and to witness the mode in which the plaintiffs indorsed their cheques; that the clerk was frequently paid his wages by the duly indorsed cheques of the plaintiffs, and sometimes employed by the plaintiffs to indorse cheques payable to their order; that the cheque in question was taken or stolen by the clerk, who thereupon forged the indorsement, and then procured one E., who had no notice of the forgery and theft, to cash the cheque; that the defendant received the same, with other cheques, from E., without notice of the forgery and theft, and in the ordinary course of business gave full value therefor; that, by their carelessness and wilful neglect in dealing

with their letters and cheques, the plaintiffs did not discover the forgery and theft for a considerable time; and after such discovery did not take any steps to prevent the negotiation of the cheque, and by such carelessness and neglect caused the defendant to become a bona fide holder for value of the cheque without notice of the forgery and theft:—Held, on demurrer, that the plea was bad.

Judgment of GROVE, J., reversed.

Action for conversion of a cheque.

The statement of claim alleged that Messrs. Greaves & Co. being indebted to the plaintiff company in the sum of 29l. 5s., drew a cheque for that sum on the North and South Wales Bank, payable to the order of the plaintiff company, and forwarded the same to the plaintiff company. It further alleged that the plaintiff company never indorsed such cheque, but that the indorsement of the name of the plaintiff company on such cheque was forged, and that the cheque with such forged indorsement came into the defendant's possession, and was converted by the defendant to his own use.

The amended statement of defence, after stating in paragraph 2 that the indorsement was made on behalf of the plaintiff company by a person duly authorised in their behalf, stated in the alternative that the plaintiff company knowingly employed as a clerk a man who had been convicted of embezzlement and sentenced to six months' imprisonment therefor, and who was a notorious thief. That the said clerk was allowed access to the rooms and offices where the plaintiff company's letters and cheques were left lying about, and empowered and permitted to receive and open the said letters and cheques, and to witness the mode in which the plaintiff company's officers indorsed the said cheques. That the said clerk was frequently paid his wages by the duly indorsed cheques of the plaintiff company, and sometimes employed by the plaintiff company or its officers to indorse cheques payable to its order. That the cheque the subject of this action was contained in an unregistered letter, and received or taken or stolen by the said clerk, who thereupon

* *Coram* Grove, J., in the Common Pleas Division; and Bramwell, L.J., Baggallay, L.J., and Brett, L.J., in the Court of Appeal.

Patent Safety Gun Cotton Co. v. Wilson (App.), C.P.

forged the indorsement set out in paragraph 2 of the statement of claim, and then procured one Entwistle, a publican, who had no notice of the forgery and theft, to cash the said cheque so indorsed. That the defendant received the cheque so indorsed with other cheques, amounting to over 60*l.*, in the ordinary course of business, from the said Entwistle, without notice of the said forgery and theft, and gave full value therefor. That by its carelessness and wilful neglect in dealing with its letters and cheques as aforesaid, the plaintiff company did not discover the said forgery and theft for a considerable time, and after such discovery did not take any steps to prevent the negotiation of the said cheque, and by such carelessness and neglect caused the defendant to become a *bona fide* holder for full value of the said cheque, without notice of the said forgery and theft.

Demurrer to the said alternative statement in the second paragraph of the statement of defence.

H. D. Greene (Pollard with him), in support of such demurrer.—The property in the cheque is in the plaintiffs, and the defence demurred to does not shew such negligence as will estop them from claiming their property. The defendant is liable, therefore, to refund the amount of the cheque, the indorsement of the plaintiffs' name thereon being a forgery—*Ogden v. Benas* (1). The plea does not shew as it ought to do in order to be a defence to the action that the plaintiffs were guilty of negligence towards the defendant or to the public, and that the negligence was such as conduced to the forgery—*Arnold v. The Cheque Bank* (2); *Rumball v. The Metropolitan Bank* (3); *Keith v. Burrows* (4); and *Bazendale v. Bennett* (5).

(1) 43 Law J. Rep. C.P. 259; Law Rep. 9 C.P. 513.

(2) 45 Law J. Rep. C.P. 562; Law Rep. 1 C.P. D. 578.

(3) 46 Law J. Rep. Q.B. 348; Law Rep. 2 Q.B. D. 197.

(4) 45 Law J. Rep. C.P. 876; Law Rep. 1 C.P. D. 722.

(5) 47 Law J. Rep. Q.B. 624; Law Rep. 3 Q.B. D. 525.

Medcalf, contra.—The case of *Arnold v. The Cheque Bank* (2) is in the defendant's favour. It does not appear there that the letter containing the cheque was abstracted by anyone in the plaintiffs' employ, or that they had in their service a person who ought not to have been trusted like the clerk whom the present plaintiffs had in their service; besides all that that case decided was that the neglect to follow the usual practice of sending an advice note was not such negligence as would disentitle the plaintiffs from suing. Here it appears from the statement of defence that this clerk, who was a notorious thief, if not authorised to indorse cheques payable to the plaintiffs' order, had at least every opportunity given him of committing the very forgery he committed, and the plaintiffs are, therefore, estopped by their negligence from recovering the amount of the cheque from the defendant, who took it *bona fide* and for value. Even although the plaintiffs' clerk had no authority to indorse this cheque, the plaintiffs had placed him in such a position, and with such apparent authority to deal with it, that they are bound by what he did, at least as against the defendant—*Muckey v. The Bank of New Brunswick* (6); *Charles v. Blackwell* (7).

Greene replied.

GROVE, L.J.—I am of opinion that the statement of defence demurred to sufficiently shews such negligence on the part of the plaintiff company as would relieve the defendant from liability, and I do not think that the two cases cited by Mr. Greene alter this in any respect. The facts, as they are alleged by the defendant's statement of defence, are these. The plaintiff company employed as their clerk a man who had been convicted of embezzlement, and who was a notorious thief. Now the duty of the plaintiffs when they took such a man into their service would be to watch him and to treat him otherwise than they would a person of perfect honesty; but what did they do in fact? It is stated that they

(6) 43 Law J. Rep. P.C. 31; Law Rep. 5 P.C. 394.

(7) 45 Law J. Rep. C.P. 543; Law Rep. 2 C.P. D. 448, 451.

Patent Safety Gun Cotton Co. v. Wilson (App.), C.P.

allowed him access to rooms where letters and cheques were lying about, and empowered and permitted him to receive and open letters, and to witness the mode in which the company's officers indorsed their cheques, and that sometimes he was employed by the plaintiff company or its officers to indorse cheques payable to its order. That seems to me to be very great and considerable negligence on the part of the plaintiffs, and to give opportunity to a man such as this of committing a fraud and crime which no reasonable person would have done. It is not a case of mere ordinary negligence, such as leaving cheques or papers about in open drawers, but it is the case of treating a man in one's employ, whose character was such as required him to be carefully watched, just as if he were a person of the most confidential and trustworthy character. Now if there be anything more than another which requires caution it is in the empowering a person to indorse one's name on cheques; and the plaintiff company employing this clerk to indorse cheques payable to its order was giving an opportunity to a fraudulent man of doing that which only a confidential and trustworthy clerk should be allowed to do. I think, therefore, that in the statement of defence demurred to there is ample statement of gross negligence on the part of the plaintiffs, by which the defendant, who has done no more than any other person might have done, will become a loser if the plaintiffs can recover in this action. The cases cited by Mr. Greene do not go so far as the present one. In *Arnold v. The Cheque Bank* (2) the plaintiff had neglected only the usual practice of sending a letter of advice, and the ground of the decision was that the neglect to adopt this caution was not such negligence as would estop the plaintiff from recovering; and the case of *Bazendale v. Bennett* (5) was only a decision that mere negligence in the mode of keeping the document, which in that case consisted of leaving it in an unlocked drawer, was not sufficient. But these cases are very different from a case like this, where the plaintiffs have in their service a notorious thief, and give him every opportunity of doing

what he did with the cheque. There was here, I think, a neglect of duty to the defendant as one of the public, and the pleading demurred to, in my opinion, is sufficient as a defence, and therefore the demurrer must be disallowed.

The plaintiffs appealed from this judgment.

Pollard (*T. Boddam* with him), on June 2, appeared for the plaintiffs.

Cavanagh, for the defendant.

BRAMWELL, L.J.—With great respect to the opinion of Mr. Justice Grove, I cannot agree with his judgment in this case. I think that the defect of the plea demurred to is perfectly plain, and that it affords no answer in point of law to the statement of claim. The plaintiffs' case is this: "We were possessed of a cheque which was stolen from us; an indorsement was forged; the cheque got into the hands of you, the defendant, and now we want our money back." The defendant admits all this, but says in answer that what happened was through the fault of the plaintiffs in not taking sufficient care of the cheque; that the plaintiffs employed a clerk of known bad character, and gave him many opportunities of acting dishonestly. I have a difficulty in dealing with the proposition that those facts afford any answer to the claim, because I am at a loss to find any reason in support of the proposition. The only answer to it is, it is not the law. I am of opinion that the demurrer must be allowed with costs.

BAGGALLAY, L.J.—I am of the same opinion.

BRETT, L.J.—The cause of action is founded on the facts that a cheque of the plaintiffs has been stolen and the indorsement of their name forged, and the action is brought to recover the value from the defendant, into whose hands the cheque has come. The defence seeks to justify, as against the plaintiffs, the stealing and forgery on the ground that they were entirely the result of the plaintiffs' negligent conduct. In point of law no negligence can justify a thief or forger;

Patent Safety Gun Cotton Co. v. Wilson (App.), C.P.

it may be taken into consideration in punishing him, but it is impossible to say that any negligence can be a justification or excuse. If so, there can be no reason why the plaintiffs should not take advantage of the fact that the cheque was stolen and forged, and recover. There is another ground upon which the plea is bad: there can be no negligence without neglect of some duty; there was no duty here—no relation between the plaintiffs and defendant which could cause any duty to exist from the plaintiffs to the defendant. I am of opinion that the demurrer should be allowed.

Judgment reversed.

Solicitors—Freshfields & Williams, for plaintiffs;
W. Medcalf, for defendant.

[IN THE COURT OF APPEAL.]

1880. }
June 29. } THE QUEEN v. SHEWARD.*

Certiorari—Discretion—Lands Clauses Consolidation Act, 1845 (6 Vict. c. 18)—Time within which Certiorari to quash Inquisition should be applied for.

A railway company, having power to take lands compulsorily, gave notice to treat, under the Lands Clauses Consolidation Act, 1845, for a portion of some leasehold land belonging to the claimant. Upon an inquisition to assess compensation before the under-sheriff and a jury, compensation was claimed for (amongst other things) loss to the claimant by reason of the portion of his land not taken by the railway company having been rendered, through the proximity of the railway, unfit for the carrying on of the claimant's business upon it. No objection to this claim, or the evidence in support of it, was raised by the company, and it was left by the under-sheriff to be considered by the jury. The inquisition and finding were signed on the 19th of February, and the claimant taxed his costs, and was paid them

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

on the 19th of April, without any objection. Abstract of title was furnished and requisitions thereon answered, and the draft assignment prepared. The railway company having failed to pay the compensation assessed, the claimant issued his writ in an action for the amount, and on the 21st of July the company obtained a rule for a certiorari to bring up and quash the inquisition, on the ground that there had been an excess of jurisdiction in considering the damage caused to the claimant in respect of his use of land not taken by the company. The Queen's Bench Division discharged the rule, on the ground that the application for a certiorari was too late, the Court stating that, as a rule, a certiorari to bring up, for the purpose of quashing it, an inquisition taken under the Lands Clauses Consolidation Act, 1845, should not be granted after the expiration of the time allowed for setting aside an award made under the same Act:—Held, that the rule stated by the Queen's Bench Division was a good one, and that their discretion had been rightly exercised.

Appeal from a judgment of the Queen's Bench Division discharging a rule for a certiorari to bring up, for the purpose of quashing it, an inquisition to assess compensation under the Lands Clauses Consolidation Act, 1845.

The case in the Court below is reported ante, Q.B. 329, where the facts are fully stated.

Bidder (Sir H. Giffard, J. G. Hollway and L. E. Pyke with him), for the prosecutors, The Metropolitan and St. John's Wood Railway Company.—The Queen's Bench Division exercised their discretion wrongly. The claimant has not been prejudiced by the delay in moving for the certiorari, and the Queen's Bench Division ought to have granted it. The prosecutors ought not to be deprived of their legal rights because they were some time in finding out what those rights were. The application for a certiorari is in sufficient time if made at any time before the amount of compensation assessed on the inquisition is paid over to the claimant.

On the question whether the jury ought to have considered the claim for compen-

The Queen v. Sheward (App.), Q.B.

sation in respect of loss caused to the claimant in consequence of the land not taken by the railway company having been rendered unfit for the business carried on upon it, he cited *The City of Glasgow Railway Company v. Hunter* (1), *The Hammersmith and City Railway Company v. Brand* (2), and *The Duke of Buccleuch v. The Metropolitan Board of Works* (3).

The Attorney-General (Sir H. James) and *Biron*, for the claimant, were not heard.

BRAMWELL, L.J.—I am of opinion that this appeal should be dismissed. It is not disputed that it is discretionary in the Court whether they will grant a *certiorari* or not. If we were inclined to interfere with the exercise of discretion by the Queen's Bench Division, a very strong case would be required to induce us to do so. But I think the Court below were right in the way they exercised their discretion. The defendants can shew nothing which has misled them so as to excuse their delay; all they can allege is that they did not know what the law was, but now that they do know they stand upon their rights. I think it would be unreasonable to set aside the inquisition even if the jury proceeded upon a wrong principle in assessing the plaintiff's loss. I have very great doubt whether they did. The plaintiff's case is that his interest in his leasehold property is worth 6,000*l.* less than it was before the company took part of his land, and he makes that out by shewing what use he made of the property before the company came, and what use he has been able to make of it since. I think all reason and justice is on his side, though I give no final opinion now upon the point, whether this case would come within the decision in *The Hammersmith and City Railway Company v. Brand* (2). I may also add a doubt whether the Court of Queen's Bench could have any power to quash an inquisition good upon the face of it, and not in excess of juris-

diction in the sense that the jury adjudicated upon a matter upon which they had no jurisdiction to adjudicate.

BAGGALLAY, L.J.—I am of the same opinion. It appears to be a general rule of the Queen's Bench Division not to grant a *certiorari* to bring up an inquisition taken under the Lands Clauses Consolidation Act, 1845, for the purpose of quashing it, after the expiration of the time allowed for setting aside an award made under the powers of the same Act. That rule is a reasonable one, and I for one am not disposed to take a different view from that of the Queen's Bench Division. I think they were right in acting upon the rule, and in refusing to grant the *certiorari* asked for. That ground is sufficient to dispose of this case, but I cannot help saying that I have considerable doubt whether there was any excess of jurisdiction. Reliance was placed, in argument, upon the earlier cases of *The City of Glasgow Railway Company v. Hunter* (1) and *The Hammersmith and City Railway Company v. Brand* (2); but both those cases were discussed in *The Duke of Buccleuch v. The Metropolitan Board of Works* (3), and the distinction was pointed out that in the two former cases no land was taken by the railway company, whereas there was land taken in the case of the Duke of Buccleuch. I think the distinction a well-founded one.

BRETT, L.J.—I think we are more at liberty than usual to review the discretion exercised by the Queen's Bench Division, because they stated that they exercised it upon a general rule, and if we thought that general rule wrong, there would be more ground than usual for considering the exercise of their discretion. I think their general rule is just and fair, and one with which we ought not to interfere. That is sufficient to determine this case. But I have a strong opinion that there was no excess of jurisdiction. I think the case of *The Duke of Buccleuch v. The Metropolitan Board of Works* (3) draws a broad distinction between cases where land is taken by a railway company and where it is not. I think that case shews

(1) Law Rep. 2 Sc. App. 78.

(2) 38 Law J. Rep. Q.B. 265; Law Rep. 4 E. & I. App. 171.

(3) 41 Law J. Rep. Exch. 137; Law Rep. 5 H.L. Cas. 418.

The Queen v. Sheward (App.), Q.B.

that, where part of the plaintiff's land is taken for the purposes of the railway, in assessing compensation it may be taken into consideration that the land is taken for the ordinary use of the railway with all its concomitants. If my view is right, every part of the evidence could have been objected to on the inquisition, and the only ground of complaint which the defendants could have would be that the verdict was against evidence, or that there was misdirection by the undersheriff. There could be no excess of jurisdiction. But my judgment is that this appeal ought to be dismissed on the first ground.

Judgment affirmed.

Solicitors—Allen & Son, for claimant; Burchells, for the railway company.

at the trial the plaintiff's counsel agreed to credit the defendant with 32l., being the admitted value of the policy when reinstated:—Held (affirming the judgment of FIELD, J.), that the defendant's position as a surety was not altered, so as to discharge him from liability, by reason of the course the plaintiff had pursued in the bankruptcy, as the policy was valueless when she sent in her proof. Held also, that, if the policy was of value when the plaintiff proved in the bankruptcy, and if she exercised her option, under the bankruptcy law, of handing over her security to the trustee, and proving for the whole amount of her debt, the defendant was not thereby wholly discharged from liability as a surety, but only to the extent of the value of the policy.

Appeal from a judgment of Field, J., after further consideration.

The facts are fully stated in the judgment of Field, J., *ante*, Q.B. 353.

Ward v. The National Bank of New Zealand
[IN THE COURT OF APPEAL.]

1880. } 52 L.R.C. 6. 66
June 10. } RAINBOW AND WIFE v. JUGGINS.*

Principal and Surety—Collateral Security—Bankruptcy—Policy of Insurance—Secured Creditor—Proof of Debt without valuing the Security—Whether Surety discharged.

The defendant became surety for the payment of a debt of 400l., owing from P. to the plaintiff; and by agreement between the parties, P. handed over a policy of insurance on his life to the plaintiff as collateral security. P. afterwards became bankrupt, and at that time two of the premiums on the policy remained unpaid, and the policy had lapsed. The plaintiff proved in P.'s bankruptcy for the full amount of her debt, stating in her proof that she held the policy as collateral security, but putting no value on it. The policy was afterwards given up to the trustee in bankruptcy for the benefit of the creditors, and the insurance company agreed to reinstate it. The plaintiff sued the defendant, as surety, for the amount of P.'s debt, and

H. Matthews and R. T. Reil, for the defendant.—The plaintiff, Mrs. Rainbow, when she sent in her proof in Pratt's bankruptcy, ought to have placed some value upon the policy of insurance on the debtor's life, and her omission to do so altered the defendant's position as a surety, so that he was altogether released from his contract of suretyship. The trustee in bankruptcy was entitled to have possession of the policy for what it was worth, and it had some value, because it is an almost universal practice of insurance companies to reinstate lapsed policies upon payment of the arrears of premium and interest. If the policy had no legal, it had a marketable, value. It is like the case of a slip on a marine insurance; it is the universal practice of insurance companies to pay on slips, and those slips have a marketable value. If the creditor attached no value to the policy, she was bound, under the Bankruptcy Act, 1869, and rules, to place a nominal value upon it, if she wished to retain the security. The question ought to be considered as between creditor and surety, not as between creditor and trustee in bankruptcy. The surety's position has, in fact, been altered if he is

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

Rainbow v. Juggins (App.), Q.B.

deprived of a reasonable anticipation of getting something, as he was here. Any alteration of his position, even though it be to his advantage, relieves him altogether from liability—*Polak v. Everett* (1).

A. Wills and H. D. Greene, for the plaintiffs, were not required to argue.

BRAMWELL, L.J.—This case has been argued for the appellant with great ability and force. I am of opinion that the plaintiffs are entitled to recover, and that the position of the defendant as a surety was not altered by that which Mrs. Rainbow did in the bankruptcy proceedings. I am inclined to think that she might have left this paper out of mention altogether, as much as if the security had been some article that had fallen into the sea and been carried away by the tide. When she proved in the bankruptcy nothing remained of the policy but a mere piece of paper. It was no more a security than a letter from anybody to the insurance company would have been, requesting that the company would take into consideration the circumstances of the principal debtor, and make some allowance to Mrs. Rainbow on account of the policy. There was nothing but a claim on the mercy of the insurance company. The situation of the surety could not then be altered by anything done with respect to the security. I think also there is another ground upon which the plaintiffs are entitled to succeed. It is true that when a man enters into a contract of suretyship it is a part of the bargain that the contract shall not be changed to his prejudice by any improper dealing with the security which may lose to him a benefit to which he is entitled. But he makes that bargain subject to the general law of the land; and if that law is that, under certain circumstances, certain things must happen to the security as a consequence of the creditor doing the best he can for himself and the best he can for the surety, then there is this general rule, that the contract to the benefit of which the surety is entitled, namely, that he shall not be prejudiced by dealings

with the security, must be modified accordingly. If, therefore, the law is, as undoubtedly it is, that Mrs. Rainbow could not prove for the full amount of her debt without a right on the part of the trustee to have the policy given up to him, she was entitled, if she thought fit, for her own protection, to prove for the full amount of the debt; and if, as a consequence, the trustee was entitled to the policy, and it was of some value, the utmost which, to my mind, the surety could say to her would be, "If you had a right to alter my position in a sense, you had no right to diminish what might have come to me from the policy; you must make me an allowance for the loss which has been occasioned by the way in which you have availed yourself of your rights." As an illustration, suppose a creditor, holding a policy of this sort: if there was no bankruptcy he would not have any right to sell it; all he could do, I imagine, would be to keep it on foot himself. *Prima facie*, the surety may say, "You have no right to sell;" but when the Legislature steps in on the bankruptcy of the debtor, and compels the creditor either to sell or to put a value upon the policy, the case, I think, is altered.

But here the policy was a mere piece of waste paper—a help to getting a favourable consideration from the insurance company. I cannot help saying that, in my opinion, the person entitled to that favourable consideration was the defendant, who paid the two premiums. Perhaps, if the whole of the facts had been brought before the directors, they might have recognised it as a reasonable thing to do that which would be practically keeping the policy on foot in favour of the defendant, and this dispute would be at an end. I only mention this in order to shew that our judgment is justified with respect to the moral obligation which the company had to continue the policy. However that may be, I am of opinion, in the first place, that this policy need not have been mentioned in Mrs. Rainbow's proof at all; that, if mentioned, it certainly was of no value whatever; in the second place, that the plaintiff here was entitled to avail herself of her rights, which she did; and that, if, as a consequence of her

(1) 45 Law J. Rep. Q.B. 369; Law Rep. 1 Q.B. D. 669.

Rainbow v. Juggins (App.), Q.B.

so doing, the surety's position has been altered, he is only entitled to be allowed in respect of the extent to which his position has been altered. Upon these grounds I think the plaintiff is entitled to recover.

BAGGALLAY, L.J.—Mrs. Rainbow was undoubtedly a secured creditor in the bankruptcy within section 16, sub-section 5 of the Bankruptcy Act, 1869. As such she was entitled to vote on the composition resolutions, and it was open to her to have taken the course indicated in sub-section 4 of section 16, which provides that “a secured creditor shall, for the purpose of voting, be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security; and the amount of such balance shall, until the security be realised, be determined in the prescribed manner. He may, however, at or previously to the meeting of creditors, give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him.” The “prescribed manner” is to be found in the rules. Rule 99 provides that “a secured creditor, unless he shall have realised his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security.”

But a creditor is placed in an awkward position as regards his security, if he puts a value on it, because if the security realises a larger sum than the price at which the creditor has assessed it, he has to account for the excess, and does not get any benefit in respect of it; so that a prudent creditor, under ordinary circumstances, would prefer to hand over the security to the trustee to be realised for what the trustee can make out of it, and prove himself for his whole debt. Now it appears to me that when you have three persons holding the relations of creditor, debtor and surety respectively, the surety, in the event of the bankruptcy of the debtor—an event which may fairly be said to have been in contemplation

by all—is not entitled to require the creditor to forego the rights he would otherwise have. It has been argued that, when the bankruptcy takes place, the secured creditor is deprived of the exercise of his option either to value his security or to hand it over to the trustee and prove for the whole amount of the debt, but that he must adopt the alternative most in favour of the surety. There is nothing that I can see in the Bankruptcy Act and rules or in the principles of bankruptcy law to put him in that position. It seems that in the present case the security was mentioned in Mrs. Rainbow's proof but that no value was placed upon it. In my opinion that was right at the time that it was done. The policy was of no value whatever. It depended on the goodwill of the directors of the insurance company whether they would allow it to be revived or not. By mentioning the policy the creditor practically recognised the right of the trustee in bankruptcy to it for what it was worth, because it became the property of the trustee if there was no assessment of the value, and if the whole amount of the debt was proved for. It appears to me that the order of the Court of Bankruptcy that the policy should be given up to the trustee for the creditors was right in view of the fact that the whole amount of Mrs. Rainbow's debt was proved for.

BRETT, L.J.—If this policy had been in existence and of value so that Mrs. Rainbow was a secured creditor of the bankrupt, I should have agreed, for the reasons given by Lord Justice Bramwell and Lord Justice Baggallay, that the fact of her not putting a value on the policy, and of her giving it up to the trustee, would not have wholly released the defendant. But, assuming that at one time she was a secured creditor of the debtor, yet it is manifest at the time she had to act in the bankruptcy that this policy was of no value whatever. It is absurd to say that she ought to have put a nominal value upon it, or that any legal result could follow from her not putting a value upon that which had no value. The defence to the action is founded on the assertion that the defendant's position as a surety was

Rainbow v. Juggins (App.), Q.B.

altered by something done or omitted to be done by the plaintiff Mrs. Rainbow. I am of opinion that when Mrs. Rainbow proved in the bankruptcy she had no collateral security for the debt; that she was therefore not a secured creditor of the debtor; and that the defendant was not the surety of a secured creditor of the debtor. It follows that what Mrs. Rainbow did was perfectly right, and that the defendant's position was not altered in the least. I say that she was not a secured creditor, because at that time the policy had lapsed; it was not in existence; there was no power in any Court of law or equity to make the insurance company reinstate it. The piece of paper, moreover, was of no marketable value at all. No business man would have given a penny for it. Even supposing that the surety's position would be altered in the case ingeniously put by Mr. Reid, where on a marine insurance you could shew a constant practice of insurance companies to pay on slips, this case is quite different. Here the holder of the policy had deliberately abstained from paying at least two premiums, and nobody would have given anything for the chance of the company reinstating the policy.

I am of opinion, therefore, that the judgment should be affirmed. I may add that if it were assumed that the policy was of value, and that Mrs. Rainbow had acted wrongly by neglecting or omitting to put a value upon it, or to hand it over to the trustee, I doubt whether I could agree with what seems to have been the view of Mr. Justice Manisty that nevertheless the surety would not have been wholly released from his liability, but only from so much of it as was represented by the value of the policy. I must not be taken to agree with that proposition.

Judgment affirmed.

Solicitors—Prior, Bigg, Church & Adams, agents for W. W. Robinson, Oxford, for plaintiffs; Charles Mallam, agent for F. & G. Mallam, Oxford, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880.

June 9, 14. }

HALL v. JUPE.

Marine Insurance—Constructive total Loss—Sale of Ship by Master—Urgent Necessity—Evidence—Misdirection—New Trial—Order XXXIX. rule 3.

A vessel struck upon a rock outside a harbour, and it was necessary to lighten her in order to get her off at the next high tide, and for that purpose her master entered into a contract with one G., who was the only person at the place who had a sufficient number of men to render effectual assistance, to find the labour required for that purpose. G. supplied only a small number of men, who worked very languidly in discharging the cargo for two or three hours, and at the end of that time G. persuaded the master to cancel this contract and to call a survey of the vessel and sell her. G. and some men he brought accordingly made a survey, and by it found the mainmast raised one inch, the main combings parted, the deck plank opening and the vessel unseaworthy, and advised that the ship and cargo should be sold for the benefit of all concerned. The master then sold her to G. for a very small sum of money. When the vessel struck on the rock there was a strong breeze blowing, but it afterwards got calmer, and at the time of the sale the weather was good, and the vessel lying on her bilge with no more danger than she had been in from the time she struck, but there was evidence that if the wind veered round to the south or west the sea would have heaved in and the vessel would have broken up in a short time. As a fact, directly after the sale G. brought a number of hands to discharge the cargo, and so got the vessel off and floated her at the next high tide, and he afterwards repaired and made her seaworthy at a trifling expense. In an action against the underwriter on a policy of insurance on the vessel for a constructive total loss, the Judge ruled on the above facts appearing at the end of the plaintiff's case, that there was no evidence upon which the jury could reasonably find the urgent necessity for the sale of the vessel at the time she was sold, and he accordingly withdrew the case from the jury and directed the verdict to be entered for

4 Z

Hall v. Jupp, C.P.

the defendant:—Held, by Lord COLERIDGE, C.J., that such ruling was right. Held, by GROVE, J., that it was wrong, and that the case should not have been withdrawn from the jury.

Quære, whether Order XXXIX. rule 3, directing that a new trial shall not be granted on the ground of misdirection, unless some substantial wrong has been thereby occasioned in the trial of the action, applies to such a case.

Action on a time policy of insurance which the plaintiff had effected with the defendant and other underwriters on the vessel the *Highflyer* valued at 2,800*l.*, and claim for a constructive total loss. The action came on for trial before Lord Coleridge, C.J., at the last London Michaelmas sittings. The following are the facts as they appeared at the end of the plaintiff's case. The *Highflyer* on the morning of the 6th of October, 1876, while she was covered by the said policy, struck upon a reef or rock close to the shore as she was going out of Tub Harbour on the coast of Labrador. She got on the reef on the top of high tide. The tides were, however, rising tides, but in order to get her off it was necessary to lighten her by discharging her cargo, or at least a large portion of it. Tub Harbour is a small place practically only inhabited during certain seasons of the year when fish are cured and loaded there. A person of the name of Green who had loaded the cargo of the *Highflyer* and was at the harbour at that time with about thirty or forty men under him engaged in the fishing business, was the only person who had a sufficient number of men to be able to render effectual assistance in lightening the vessel and getting her off the rock, and there was no magistrate or person of authority in the place. The master of the *Highflyer* having tried for a short time to discharge some of the barrels of herrings which formed the cargo, made an agreement with Green at about 2 o'clock on the same day, namely, the 6th of October, by which for 200*l.* Green agreed to give all the labour and assistance he could get in order to lighten the vessel and get her off. Under

this agreement Green sent some eight of his men who worked for about two hours, but very languidly and not fairly, and ultimately the captain was persuaded by Green to cancel this agreement and to call a survey of the vessel. There was a strong breeze blowing when the vessel struck, and it was stated by some of the witnesses that her mainmast had started out of the keelson, had got loose, and was raised about an inch or more, that the combings of the main hatch had broken, and that they were afraid the vessel would break in halves. One of the witnesses, the second mate, stated that about half-an-hour before the survey he examined the vessel and found the butts on the outside abreast of the mainmast open so that he could put his fingers in, the covering board and water-ways the same, and the mast partners opening, and the wedges coming up, that the vessel was making a little more water, and that in his opinion she might be broken up in the morning and be worth nothing then for sale. At the time of the survey it wanted only about three-quarters of an hour to low tide and the weather was fine, but the captain and some of the men stated that if the wind veered round to the south or west the sea would have heaved in and the vessel would have broken up in a short time. The survey was made by Green and three or four men whom he brought with him, and it was drawn up in the following form: "We find the mainmast raised one inch and the main combings parted, and the deck plank opening. Pronounce the vessel unseaworthy and advise to sell for the benefit of all concerned both ship and cargo." Afterwards, at six p.m. on the same day, the 6th of October, the master sold the ship and cargo to Green. At that time the weather was good, and the ship was in no greater danger than she had been. The ship was sold for 140*l.* and the cargo for 400*l.* The cargo was said to have been worth 2,000*l.*, and a considerable part of it was at that time safe on shore. As soon as the sale was effected Green brought sufficient strength to work at discharging the cargo, and on the second high tide after she had struck he succeeded in floating the vessel. She

Hall v. Jupp, C.P.

was ultimately repaired for about 20%. and made seaworthy, although she was said to be hogged and misshaped. At the conclusion of the evidence for the plaintiff the learned Judge ruled that there was no evidence upon which the jury could reasonably find the urgent necessity for the sale of the vessel at the time she was sold, and he accordingly withdrew the case from the jury and directed the verdict and judgment to be entered for the defendant.

Watkin Williams, for the plaintiff, subsequently obtained a rule *nisi* to set aside such verdict and judgment, and for a new trial on the ground of misdirection in not leaving the case to the jury on the evidence as to whether the master had done everything which he could to prevent the necessity of selling the ship.

Charles Russell and *Myburgh* shewed cause against this rule.

Butt and *J. O. Mathew* argued in support.

Our. adv. vult.

GROVE, J.—This was a case which was tried before Lord Coleridge. It was an action upon a marine policy of insurance against an underwriter, and the ship in coming out of a port on the coast of Labrador struck upon a rock or reef. The case of the plaintiff was that the ship was very much damaged and was likely to go to pieces, and that she was sold to a Mr. Green by the master, and the sole question in the case, as far as all events as it was argued before us, was whether the circumstances were such as to afford sufficient evidence to be laid before a jury that the sale was justifiable. I have in this case the misfortune to differ in opinion from my Lord, but upon the view I have been compelled to take of the evidence I cannot say it was a case that should have been withdrawn from the jury. It may be that I am prejudiced by my early education in these matters, and that I take a different view to that of Judges younger than myself, who have taken part in a more recent practice of the law, but I am bound to give my opinion to the best of my power, and it does seem to me that there was

evidence to be laid before the jury. It was not a case in which there was no reasonable evidence so far as that is explained by the cases of which *Ryder v. Wombwell* (1) is the principal, and I cannot agree with my Lord's view of a nonsuit being directed. Now the facts detailed in evidence (I am only taking the plaintiff's evidence) are that the vessel struck upon a reef, that she was fixed there amidships, that her butts parted, so that according to the evidence of more than one witness you could put your hand between them, that the mast was loosened, that it was raised either an inch or two inches out of its place, and that the partners of the mast were damaged. I understand the partners to be the wedges which are put round the mast, that they had become separated from the mast, and that the mast was to some extent detached and loose, and that in the belief of the plaintiff's witnesses, according to the best judgment they could form, the ship was likely to go to pieces in a very short time. Now I do not wish at all to exaggerate or to say that the case for the plaintiff was a strong one, that is to say, in one sense of the words which I shall presently explain, but I cannot help thinking there was some *prima facie* case to go to the jury. There are witnesses who say there was no alternative but to sell her, if they are speaking the truth, and in their judgment it was necessary to sell her; they all express their opinion and give their reasons for it. Now it appears a Mr. Green came on board and the master entered into an agreement with him that for 200% he, Green, would bring assistance and help to get the vessel off. He did not bring the assistance which after events proved he might have done. He brought only a few men, not, I think, exceeding eight. Subsequent events shew they could have done more, and I am almost satisfied Green was not honest in the matter. I have not enough evidence to satisfy me that the master was a party to anything wrong, but he seems, so far as I can judge, to have been taken in by Green.

(1) 38 Law J. Rep. Exch. 8; Law Rep. 3 Exch. 32.

Hall v. Jope, C.P.

He could not get much assistance, his own men were said to be drunk, and Green brought a few who worked languidly. Under these circumstances he sold the vessel and cargo for 600*l.*, a very small portion of the value, and the question is, whether there was anything to go to the jury that such a sale could be justified. One of the witnesses says the vessel was perfectly broken into two, and other expressions of that kind are used; and it is said that the weather came on very hard for an hour or two, and they could not get her off. The weather subsequently calmed, and about the time the ship was actually sold the weather was much calmer. I will not go into what subsequently happened, because I wish to comment upon the evidence as it stood at the trial as to the acts done at the time. This agreement with Green to supply men to assist was certainly not properly complied with, and it was subsequently cancelled apparently by the persuasion of Green. In favour of the nonsuit it is said that the captain should have insisted upon his agreement, but it is very doubtful whether, if he had insisted, Green would have done much to assist him, and the probable thing is that Green was looking for a bargain for himself. I do not see anything to satisfy me the captain knew of that, or that there was evidence to shew a corrupt bargain between him and Green.

I have given a very short outline of that of which there was a great body of evidence, and I now come to the counter matters disclosed upon the plaintiff's evidence. There were spring tides and the tides were rising, therefore there was a better chance of floating the vessel at each tide; but as we know, when a vessel is stranded, the increase of the tide drives her in further, particularly if there is any wind, and it is not anything like a certainty she will be got off. She was in fact floated at the next high tide but one after she stranded.

She was afterwards repaired by Green, and the repairs cost only about 20*l.* That is certainly very strong evidence to shew that these men probably exaggerated the state of the vessel. After the vessel was repaired it was said she

was never the same vessel as she was before, but that she was hogged and misshaped. That is pretty nearly an outline of the case. It may have been only a speculation, but I am inclined to think it was something more than a speculation on the part of Green, that he knew he could bring assistance to bear which the captain did not know of or could not get, and as soon as he made this bargain he brought all this labour to bear upon the vessel, and at the second high tide got her off. The question then is, whether there was sufficient to say there was no evidence to go to the jury. Now a case which goes very far indeed, and in its facts is very similar to the present case, is the case of *The Cobequid Marine Insurance Company v. Barteaux* (2). In that case the facts were in many respects similar, but there was no evidence that the ship was making water, or that she was considerably logged, or that she was badly strained; indeed the reverse was the case. In the present case I ought to say that a survey was held upon this vessel by four people, Green being one of them; they condemned the vessel as being unseaworthy, which in itself would not be sufficient, because a vessel being merely unseaworthy would not justify a sale, and they recommended the vessel should be sold for the benefit of all concerned. There is an expression in the judgment of the Court in *The Cobequid Marine Insurance Company v. Barteaux* (2), after quoting from Parsons and Arnold, from which it might seem the Court considered that even exceedingly imminent peril would not justify a sale. I apprehend the Court must have meant by that, peril in the shape of prospective danger, otherwise, supposing this vessel actually going to pieces, there would be no sale until the vessel was actually destroyed. I do not think the Court meant to go that length. No doubt a sale should not be begun except upon stringent necessity, still it cannot be a necessity which does not arise until the *corpus* is practically destroyed. A sale is a very dangerous thing to encourage on the one hand, but

(2) Law Rep. 6 P.C. 319.

Hall v. Jupp, C.P.

on the other hand if there was no sale it may be the underwriters or the owners of the vessel would very much suffer. Although this case of *The Cobequid Marine Insurance Company v. Barteaux* (2) would be very much more in point if we were deciding the question whether after the verdict there should be a new trial, it has still an important bearing upon the question we have now to decide.

Sir Henry Keating in giving judgment says, "Now their Lordships entirely agree with the learned Judge in their inability to discover on the evidence for the plaintiff himself why those efforts were not made; and insomuch as to justify the sale those efforts ought to have been made, there seems to be strong reason for ascertaining how far another jury would agree in the very sound and sensible opinions expressed by the majority of the Court themselves"—that is, the Court from which the appeal came—"or whether they would coincide in the view taken by the former jury. Of course their Lordships would be slow to advise a new trial when there was a substantial conflict of evidence. In the present case the record does not disclose the fact whether the Chief Justice expressed himself dissatisfied with the verdict. It does not state the fact either way, that he expressed himself to be satisfied or dissatisfied. That he was not perfectly satisfied with the verdict their Lordships can perhaps collect from the passage just read, and which must be taken to be the expression of the opinion of the Chief Justice himself. But in an ordinary case, although the non-expression of the dissatisfaction on the part of the Judge is generally looked upon as forming a serious obstacle to ordering a new trial, yet at the same time, if it is plain that the evidence was such that there is ground for the belief that the jury really did act without giving that weight which they ought to do to the evidence that was laid before them, there is no reason whatever why a new trial in the interests of justice should not be directed." "In this case," says Sir Henry Keating (and this is the part that appears to me to be important upon the point I am addressing myself to), "it would be too much to say there was no

evidence of the stringent necessity that would have justified a sale. Had there been no evidence there would have been a misdirection, but their Lordships are of opinion, having regard to the evidence given of the absence of those efforts upon the part of the master, which efforts would alone justify a valid sale—that is, a sale which should be valid as against the insurers—that the verdict of the jury as given was undoubtedly against the weight of the evidence." So that in that case the Judges say by the mouth of Sir Henry Keating it would be too much to say there was no evidence of the stringent necessity which justified the sale. I may say the Court, instead of granting a new trial in that case on the ground of misdirection, if there had been no evidence in support of the plaintiff's case, would have entered judgment for the defendant. They would not have sent the case down for a new trial unless they considered there was some evidence for the consideration of the jury.

Now in the present case two points were suggested: one was that if a verdict was wholly unsatisfactory to the Judge and the Court, a Judge would be entitled on a second trial to nonsuit. That was not pressed, and I must say I do not agree with it. If that was so, the whole course of our legal procedure would be changed, because in such cases as that, instead of sending it down for a new trial, they would at once enter judgment for the defendant. Therefore it does not appear to me that that argument can be sustained, namely, that a mere decision of the Court that the verdict was unsatisfactory and against the weight of evidence would be sufficient to ground a nonsuit upon. Then another point that was urged was that Order XXXIX. rule 3 of the Rules of the Supreme Court applied, and that if the Court thought that no substantial wrong or miscarriage had occurred, they could uphold the nonsuit. This is the first time this point has occurred, and upon this I give my opinion with very sincere diffidence, because it is a matter entirely new, but I cannot bring my mind to that construction of Order XXXIX. rule 3. The words of the order are these: [The

Hall v. Jupp, C.P.

learned Judge here read the order.] Now no doubt in one sense of the word, perhaps in a fair sense, nonsuiting where the Judge ought not to nonsuit is a misdirection, but I cannot help looking to the object of this Act, which, as I have always understood, was to prevent that which frequently occurred before, and which really was a matter of serious injury to litigants, when because a Judge might have misdirected in some particular which might be comparatively small with regard to the actual substantial merit and justice of the case, yet, as the Court could not say as a matter of certainty that such misdirection might not have influenced the jury's mind in giving their verdict, a new trial was ordered. I have no doubt that was what this order was intended to vary, and the word "misdirection" here does not mean misdirection in the sense of withdrawing a case from the jury, but misdirecting the jury in the direction which the Judge gives; and that opinion is confirmed in my mind by section 22 of the Judicature Act, 1875. I had better read the whole section. [The learned Judge here read the section.] It seems to me that in the contemplation of the Act a Judge is not to withdraw a case from a jury if there is anything that can be called a case to go to the jury. That helps my view that the word "misdirection" does not apply to a nonsuit. The consequence if it did would be very extraordinary; that is to say, it would change nearly the whole of our procedure, because it would come to this, that if a Judge was dissatisfied with a verdict, and at all events if the Court agreed with him, the case would be wholly removed from the jury. If the Court are dissatisfied with the verdict, and think it decidedly wrong, or if the Judge nonsuits and withdraws the case from the jury, and the Court say no substantial wrong can have occurred because they are of opinion the verdict would have been entirely unsatisfactory, they place themselves in the position of the jury. I do not think that was contemplated by the Act, and if it had been, I think it would have been more clearly expressed. Now, as to what is called reasonable evidence, no-

thing is more difficult to decide. We have repeated instances of Judges differing as to whether there was reasonable evidence. On that question I can only say in this case it seems to me there was within the meaning of *Ryder v. Wombwell* (1) not a mere scintilla of evidence, but reasonable evidence, upon which, in the absence of any answer, the jury might find a verdict. If the evidence of the witnesses stood alone I should say distinctly there was reasonable evidence for the jury, but there are things that conflict with that evidence. That the vessel was repaired for a very small sum, for instance, is a very strong fact. Still there was a conflict of evidence. In *Ryder v. Wombwell* (1), which is the leading case upon the subject, the evidence which the Judges held in the Exchequer Chamber was not fit to be submitted to a jury was to my mind absolutely ridiculous. It was a case for the supply of necessaries, as they were called, to a minor. The necessaries were a handsome goblet of gold and silver, to be presented to a marquis, and which the jury held to be necessary, and certain diamond and ruby studs for a shirt. It was said there that the evidence must be reasonable, that is, something that would affect the minds of reasonable men that it was not an extravagance; and they held that the jury could not come to any rational conclusion in supposing that such things as this goblet and these jewelled shirt studs could be necessaries. They might as well have supposed that a coach-and-four or a yacht were necessaries for a young man. I do not say that is conclusive, but I think it tends to shew the ground upon which the Court went, and that the Court would not remove from the jury a case where there was evidence upon which, if uncontradicted, the jury might act. In this case I cannot bring my mind to the conviction that there should have been a nonsuit. I am better satisfied in coming to this opinion, as it will make no difference, my Lord being of a different opinion, and the rule will drop; and if the Court of Appeal should decide that a nonsuit can be directed in such a case as this I shall be by no means dissatisfied.

Hall v. Jupp, C.P.

LORD COLERIDGE, C.J.—For the reasons I will state as clearly as I can I am still obliged to adhere to the opinion I expressed at the trial. If I had thought the point to be decided was that to which my brother Grove has directed attention, I am not at all sure I should not have come to his decision, but I think the point is not that to which my learned brother has directed his judgment, and that as to the point upon which I did decide, I was right, and that it was the true point to decide. Now this was an action for the purpose of fixing the insurers to pay their proportion on a total loss of a ship, not totally lost in fact, but said to be totally lost to the owners by reason of a sale. The sale, therefore, could only be justified in my apprehension of the law if at the time it took place there was at least a constructive loss of the ship; it is not a question of whether a total loss was imminent—it is not a question of whether the person who sold thought *bona fide* there would be a total loss, but whether there was a total loss; and the question I have to consider is whether there was evidence on that point. To that point alone was my ruling directed, and on that point alone did I consider, and do now consider, whether there was evidence or not. What I ruled was in these terms: “I think there is no evidence upon which the jury can reasonably find the urgent necessity for the sale of the *Highflyer* at six o'clock on the 6th of October, the time of the sale, which alone could justify the sale, that is, that at that time there is no reasonable evidence of a total loss.” Now that is the point of law I decided, and that is the point only as it appears to me as to which the existence or non-existence of evidence is to be considered. It is not for me to define the law upon that subject—I apprehend the law to be established. Formerly there was great doubt, and if the old cases and old books be looked at, it will be found I am by no means exaggerating the statement when I say there was great doubt whether under any circumstances the master had a right to sell. It was a right obviously capable of great abuse. It will be found that in the earlier books it had been laid down that there was no

authority to the master under any circumstances to sell the ship so as to fix the insurers. That state of the law was modified by subsequent decisions, and I suppose by the general feeling of convenience and reason that affected the great Judges who have in fact created our mercantile law. But the point always to be decided, as I apprehend, is not, as I have said, the imminence of peril, not the *bona fides* of the person who sells believing the peril is imminent, but the existence of a state of facts which at the time of sale makes the ship constructively totally lost; and unless there is evidence given of that state of facts, the owners, whatever they may do between themselves and their captain, cannot sue the insurers for a total loss when the ship has been sold. The question here, therefore, is, whether there was any evidence (subject to the observations I will make upon *Ryder v. Wombwell* (1)) of that fact to be left to the jury? I put aside with all respect, as having nothing to do with that point, the opinions of persons given with regard to the state of the ship earlier in the day. The question is, whether at six o'clock on the night of the 6th of October the ship was constructively totally lost? Now at that time she was not making water—there had been no jettison, there was no real danger; as a matter of fact, within five or six hours, she was got off the rock, and she was repaired for 20*l*. Those are undisputed and indisputable facts in the case, and it appears to me to be wholly unnecessary to consider what was the true effect of the evidence of the mate and other people as to the parting of the timbers and as to the starting of the mast, and so on. They referred to another part of the day, if true—I mean if given honestly, and, whether given honestly or not, are proved by the indisputable facts of the case to have been pure mistakes, because the ship was got off; the ship was not totally or constructively totally lost, and was repaired for a trifle. Now it appears to me that if I am right in saying that the question is whether the ship was constructively totally lost when she was sold, there was no evidence in this case from which a

Hall v. Jupp, C.P.

jury could reasonably find such a matter as that. If the question had been whether the master had acted *bona fide*, and thought that there was a total loss at that time, I admit that this evidence, though it is to my mind exceedingly unsatisfactory, might properly have been submitted to the jury, and ought not to have been withheld from them; but in my view, for the reasons I have given, that is not the point to be considered.

Now am I right in so limiting the point? I find that in the case of *The Cobequid Marine Insurance Company v. Bartheaux* (2), in the judgment delivered, not only by a great but very cautious lawyer, whose statements are always to be taken with the greatest possible confidence, he states this: "With reference to the law upon the subject, there seems now to be no doubt whatever, and it cannot be questioned, that the master under circumstances of stringent necessity may effect a sale of the vessel so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a variety of cases unnecessary more particularly to be referred to, as they are well summarised in the work of Mr. Parsons at page 47, where he also takes the distinction between the rule that a sale is justified by stringent necessity only, and what was sometimes supposed to be a rule that the sale would be justified if made under such circumstances that a prudent owner uninsured would have made it." I apprehend, therefore, that the evidence must be limited to that which is the point ascertained by the true rule—the fact of stringent necessity—and not to the question of whether the sale was made under circumstances that a prudent uninsured owner would have made it. "He distinguishes," says Sir Henry Keating, "between the two, and establishes upon satisfactory authority that, whilst what a prudent owner would have done under the circumstances if uninsured may illustrate the question as to how far there was a stringent necessity for selling, yet the rule is that there must be a stringent necessity." That is, it must exist, as I understand it, at the time of the sale, and to that, and to that point only, is evidence admissible

in a case of this kind. "In *Arnould on Marine Insurance*," says Sir Henry Keating, "the circumstances that will justify the master in selling seem to be well and clearly put, and to be quite borne out by the authorities that are cited in support." Then there is a passage cited from *Arnould* which I pass over for the present, because it does not go beyond what Sir Henry Keating has summarised from *Parsons*. Then he says afterwards (the facts in this case are not the same as the facts in the *Privy Council*), "in judging of the question how far the sale was justified by stringent necessity, of course the state of the vessel—that is, not the reported state, but the true state of the vessel—becomes an important element for consideration." Now what here was the true state of the vessel upon the uncontradicted evidence? That she was not totally lost, and that she was repaired for 20*l*. How can it possibly be said there was any evidence in the face of those admitted facts? If I am right in saying that was the only point to be considered, how can it be said there was any evidence to go to the jury that this ship, which was never constructively totally lost and which was repaired for 20*l*., was constructively totally lost at the time of the sale? The greater part of the evidence to which my learned brother has referred is apart from the question which alone has to be considered in this case, and is really irrelevant to the question for decision by us. Now that being so, what is it that ought to guide a Judge in refusing to submit a case to a jury? As long as juries sit, where there is evidence which by law is fit for their consideration, whatever conclusion a Judge may draw from it, he must allow a jury to draw theirs, and if their conclusion in the opinion of the Court is very wrong and very prejudiced it will be set aside, as I have heard great Judges in earlier days say, *toties quoties*. The Court will not have a verdict forced upon them by perversity or prejudice; but I quite agree where there is evidence fit for the consideration of the jury it must be submitted to them. I am not at all prepared to differ from the principle my learned brother has laid down, which, for the reasons I have given,

Hall v. Juge, C.P.

I do not think applicable to this case. Now in the case of *Ryder v. Wombwell* (1), to which he has referred, I find a very sensible observation, if I may so say, made by a Court, not of co-ordinate authority, but of appeal, which is binding upon us, and I submit cheerfully *ex animo* to the law as laid down in that case. The question there was whether there was any evidence to go to the jury that either of the articles were necessities for an infant, in the state of life in which the young man was. "Such a question," the Court says, "is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject, no doubt, to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence upon which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not" (here I myself will interpose words which are not in the report, but to make it more clear)—if there is no evidence upon which the jury could properly find—"the Judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was at one time supposed to be requisite in all cases to leave the question to the jury if there was any evidence, even a *scintilla*, upon the mere balance of probabilities in support of the case, but it is now settled that the question for the Judge, subject of course to review, is, as is stated by Maule, J., in *Jewell v. Parr* (3), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey v. The London and Brighton Railway Company* (4) Williams, J., enunciated the same idea thus: 'It is not enough to say that there was some evidence, . . . a *scintilla* of evidence . . . clearly would not justify the

Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence'—the fact in that case to be established. And in *Wheelton v. Hardisty* (5), in the considered judgment of the majority of the Court, it is said 'the question is, whether the proof was such that the jury could reasonably come to the conclusion' that the issue was proved? 'This,' they say, 'is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have, in our opinion, so properly put an end to what had been treated as the rule that a case must go to the jury if there were what had been termed a *scintilla* of evidence.' Therefore, in that case, the Judges of the Exchequer Chamber, adopting the *dicta* of Mr. Justice Maule and Mr. Justice Williams, and adopting the judgment of the Court of Queen's Bench in *Wheelton v. Hardisty* (5), say the true question is whether the proof was such that the jury could reasonably come to the conclusion that the fact to be proved was established. I adopt that rule in the fullest sense, supposing the point I decided to be right, namely, was there in fact urgent necessity at six o'clock on the 6th of October for the sale, which alone could fix the insurers? I confess I am wholly unable to see what evidence there was in this case in which a jury could reasonably without perversity have come to any such conclusion. I therefore think, upon the authority of the case in the Privy Council, and founding my judgment also upon the older cases, as shewing the great importance of maintaining the rule that these sales are not to take place, so as to fix the insurers, unless there is in point of fact a stringent necessity that the ruling in this case was right. Other questions have been raised which I do not know, from the point of view I take, if it is at all necessary to consider. It is suggested something may turn upon the third rule of Order XXXIX. Certainly if I was to decide the case upon that question, I should desire time to consider the matter. I think the case was within the purview of that rule, but

(3) 13 Com. B. Rep. 916; 22 Law J. Rep. C.P. 253.

(4) 3 Com. B. Rep. N.S. 150; 27 Law J. Rep. C.P. 30.

(5) 8 E. & B. 262; 26 Law J. Rep. Q.B. 265.

Hall v. Jope, C.P.

for the reasons I have given I do not think it necessary to decide that point. I take my stand upon the direction I gave at the trial upon that which I say I conceive it was necessary to make out, that is, the existence of a constructive total loss at six o'clock on the 6th of October, of which not only does it appear to me there was no evidence, but against which and disproving which there was conclusive evidence. I am therefore of opinion that this direction was right, and that the rule should be discharged.

The Court being equally divided the rule dropped.

Solicitors—Parker & Co., for plaintiff; Waltons, Bubb & Co., for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } BARKER AND CO. v. HEMMING AND
June 21. } ANOTHER.

Practice—Taxation of Costs—Set-off—Same party successful Defendant in Action, and unsuccessful Claimant in Interpleader—Rules of the Supreme Court (Costs)—Special Allowances, rules 19, 28.

In an action against two defendants, J. and H., H. obtained a judgment, but execution issued against J. The sheriff seized goods of J. which H. claimed, the sheriff interpleaded, and the claim of H. was barred with costs.

On taxation of the costs of the action, the Master allowed the plaintiff to deduct from the costs due to the defendant H. the amount of costs due from him, as unsuccessful claimant in the interpleader, to the plaintiff as execution creditor:—

Held, that he was wrong in so doing, as the action and the interpleader were wholly distinct proceedings.

Appeal from an order of Lindley, J., affirming the taxation of costs in the action by Master Gordon.

On the 10th of October, 1879, an action was commenced by the plaintiffs against

Johnson and Hemming, as the drawer and acceptor respectively of a bill of exchange.

On the 29th of October application was made under Order XIV. of the Judicature Act, and judgment was obtained against both defendants.

On the 10th of December execution was issued against the defendant Johnson only.

On the 12th of January, and while the sheriff was still in possession, the defendant Hemming claimed the goods, and the sheriff interpleaded.

The defendant Hemming also applied in the action to have the judgment as against him set aside, on the ground that his name on the bill was a forgery. This application was granted, and final judgment was signed on his behalf.

On the 30th of January Field, J., at chambers made an order barring Hemming's claim in the interpleader, with costs.

Hemming appealed from this order to the Divisional Court, but that Court affirmed the order; and on a further appeal to the Court of Appeal, their decision was upheld.

The Master, in taxing the costs in the original action, allowed the plaintiffs to deduct from the costs due from them to Hemming in respect of such action the amount of the costs due from Hemming, as claimant in the interpleader, to them as execution creditors.

Lindley, J., refused to review this taxation.

Hemming now appealed.

*Gore, for the defendant Hemming.—The Master was wrong in allowing the costs in the interpleader to be set off against those in the action. The action and the interpleader are quite distinct proceedings, and it is only "interlocutory costs in the same suit" which may be set off. The question is governed by rule 63 of the Rules of Hilary Term, 1853: the provisions in the rules with regard to costs in the Judicature Acts do not alter the practice. They are to be found in rules 19 and 28 of *Special Allowances and General Provisions—Rules of the Supreme Court (Costs)*.*

Barker v. Hemming, Q.B.

The principle is clearly expressed in the judgment in *Roberts v. Brice* (1). He also referred to *Throckmorton v. Crowley* (2).

Mellor (*P. Baylis* with him), for the plaintiff.—Both sets of costs have really arisen out of the same matter, and have been so treated by the Master and the Judge. The goods the ownership of which was disputed, were the goods seized in the original action.

[*BOWEN, J.*—The costs of the interpleader were not costs in the cause.]

I submit they are costs which may be set off in the cause.

PER CURIAM (3).—The interpleader is not a part of the original action, it is a matter quite distinct, although it is true it arises out of it. This appeal must be allowed with costs.

Solicitors—Wordsworth, Blake, Harris & Parson, for plaintiff; Harper, Broad & Battock, for Hemming.

[IN THE COURT OF APPEAL.]

1880. }
April 27. } *BARBER v. GREGSON AND WIFE.**

Married Woman—Separate Estate—Resettlement after Action brought—Form of Judgment against Married Woman.

At the trial of an action, brought against husband and wife to recover the amount of a bill of exchange indorsed by the wife to the plaintiff, it appeared that the wife, when she indorsed the bill, was a married woman possessed of a life interest in certain property settled to her separate use without any restraint upon anticipation, and that after writ issued, but before trial, her life interest was, by deed, resettled upon her for her separate use without power of anticipation. Judgment having been entered for the plaintiff for the amount claimed, with a direction to the Master to enquire as to

the wife's separate estate and report to the Court, and also with an injunction restraining the defendants from dealing with the separate estate until the debt was paid or the money paid into Court, it was,—Held, on appeal, that this judgment was wrong: that the proper order to make was one declaring the plaintiff entitled to be paid the amount of the debt out of the estate (if any) to which the wife might be entitled for her separate use without restraint on her power of dealing therewith; judgment to be entered for the husband; and (the plaintiff having failed to shew that the wife at the time of the trial was entitled to any separate estate with power of dealing therewith) no further order to be made, except that the judgment was to be without prejudice to such proceedings as the plaintiff might be advised to take in order to set aside the deed of re-settlement.

Appeal from the judgment of Stephen, J., at a trial without a jury.

The action was to recover the balance due on a bill of exchange, indorsed by the defendant, *Maud Anna Gregson*, to the plaintiff.

Mrs. Gregson's husband was joined as a formal defendant.

The bill was drawn on the 4th of March, 1875, payable three months after date. At that time *Mrs. Gregson* was entitled to a life interest in certain real and personal estate vested in trustees, in trust for such person or persons as she or her husband should jointly appoint, and, in default of appointment, upon trust that the trustees should pay the annual income to her for her separate use, free from the control of her husband. After action brought, and before the trial, *Mr. and Mrs. Gregson*, by deed of the 5th of July, 1879, executed a joint appointment of her life interest in the trust property to *Mrs. Gregson* for her separate use without power of anticipation.

The action was tried on the 7th of August, 1879, and *Stephen, J.*, then directed that judgment should be entered for the plaintiff against both defendants, for 64*l.* and costs, with a direction to the Master to enquire as to the separate estate of the defendant *Mrs. Gregson*, and report to the Court; and an injunction

(1) 47 *LAW J. Rep. Chanc.* 414.

(2) *LAW Rep.* 3 *Eq.* 196.

(3) *Cockburn, C.J.*, and *Bowen, J.*

* *Coram Lord Coleridge, C.J.*; *Brett, L.J.*; and *Cotton, L.J.*

Barber v. Gregson (App.), Exch.

was also granted, restraining the defendants from dealing with Mrs. Gregson's separate estate until the debt and costs were paid, or the money paid into Court.

The defendants appealed.

L. W. Cave and Gainsford Bruce, for the defendants, referred to *Johnson v. Gallagher* (1), *The National Provincial Bank of England v. Thomas* (2), *Davies v. Jenkins* (3).

A. Wills and *A. Forbes* appeared for the plaintiff.

COTTON, L.J.—The other members of the Court have asked me to give judgment in this case. A difficulty has arisen from the fact that this action has been brought against husband and wife without ascertaining what could be done to make a judgment, when obtained, effectual. It has been assumed that judgment could be recovered against each defendant personally. It is undoubted that the engagements of a married woman do not bind her separate estate until an order of Court is made that they shall. Here it is doubtful whether the plaintiff has satisfactorily shewn that when Mrs. Gregson indorsed the bill, she had, as a married woman, any separate estate which she could bind. At all events, it has not been shewn that, at the time of the trial, there was any separate estate belonging to the defendant Mrs. Gregson, without restraint on anticipation, which could be bound by the order of the Court. No doubt a deed was produced shewing that, when Mrs. Gregson indorsed the bill, she was entitled under a settlement without restraint on anticipation to a life interest in certain property, but that settlement appears subsequently to have been converted into a settlement without power of anticipation. Then, there being a reference directed to the Master to report what separate estate there was, the defendants come here on appeal from the judgment. The judgment against the husband is clearly wrong, and, as respects the defendant Mrs. Gregson, the matter is not

ripe for final judgment. We are of opinion that the following is the proper order to make :—

Discharge the judgment appealed from. Declare that the plaintiff is entitled to be paid 64*l.* 6*s.* out of the estate (if any) to which the defendant Maud Anna Gregson may be entitled for her separate use, without restraint on the power of dealing therewith.

Enter judgment for the defendant Gregson (the husband); and, it appearing that by an indenture dated the 5th of July, 1879, the property in which the defendant Maud Anna Gregson was, at the time when she indorsed the note in the pleadings mentioned, entitled to a life estate for her separate use, was re-settled; and the plaintiff having failed to shew that the defendant Maud Anna Gregson was at the time of the trial of this action entitled to any separate estate with power of dealing therewith, no further order, except that this judgment is to be without prejudice to such proceedings (if any) as the plaintiff may be advised to take to set aside the re-settlement of the 5th day of July, 1879.

LORD COLERIDGE, C.J., and BRETT, L.J., concurred.

Order made accordingly, and judgment appealed against discharged.

Solicitors—Ridsdale, Craddock & Ridsdale, agents for Chadwick & Sons, Dewsbury, for plaintiff; M. K. Braund, agent for J. G. Hutchinson, Bradford, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. { BURNAND AND OTHERS *v.* RODO-
June 1, 30. { CANACHI, SON AND COMPANY.

Marine Insurance—War Risks—Valued Policy—Total Loss—Money received by one Sovereign State under Treaty with another for War Losses of Subjects.

A cargo belonging to the defendants which had been insured by the plaintiffs against war risk was captured and destroyed by the "Alabama" cruiser during the war between the United States and the Confederate States of America. Under an arbitration held pursuant to a treaty between Great

(1) 3 De Gex, F. & J. 494; 30 Law J. Rep. Chanc. 298.

(2) 24 W.R. 1013.

(3) Law Rep. 6 Ch. D. 728.

Burnand v. Rodocanachi, C.P.

Britain and the United States, a sum of money was awarded, which was afterwards paid by Great Britain to the United States in satisfaction of the claims made by the United States on Great Britain for losses arising in part from the acts of the "Alabama." An Act of Congress of the United States was afterwards passed for the constitution of a Court to distribute money out of the sum so paid by Great Britain to the parties who might be adjudged entitled to compensation. The defendants (who were paid by the plaintiffs, as for a total loss, the whole of the sum insured, such sum being stated in the policy to be the value of the cargo) claimed in the Court so constituted under the Act of Congress a sum of money, which was the difference between the sum so received from the plaintiffs and the actual value of the cargo, which exceeded the sum insured. This claim was allowed, and its amount was paid to the defendants after certain deductions for the expense of obtaining it. This Act of Congress contained a clause which would have prevented the plaintiffs from obtaining such money from the said Court either by their applying for it in their own names or in those of the defendants:—Held, first, that the valuation of the cargo stated in the policy was conclusive as between the parties; second, that the defendants were trustees for the plaintiffs in respect of the money so recovered from the United States Court; third, that the plaintiffs were entitled to recover it from the defendants in an English Court, although the American statute intended that they should not receive it.

In 1862, during the war between the United States and the Confederate States of America, the defendants, who were merchants in London, effected two policies of insurance for 7,500*l.* each with the plaintiffs (who were underwriters) on a cargo of tobacco, valued in the policies at 15,000*l.*, per the *Lamplighter*, an American vessel, from New York to Genoa. The perils insured against included war risk, and in the course of the said voyage, and whilst the cargo was covered by the said policies, the vessel and cargo were captured by the Confederate cruiser the *Alabama*, and the said cargo was destroyed and wholly lost to the defendants, and

the plaintiffs thereupon paid to the defendants the sum of 15,000*l.* so insured by the said policies for a total loss. Subsequently—namely, in May, 1871—a treaty was entered into at Washington between the United States of America and Her Majesty the Queen providing for the appointment of a tribunal of arbitration to adjust claims made by the said United States upon Her Majesty for losses arising in part from the acts committed by the *Alabama*. The said tribunal of arbitration afterwards made its award at Geneva, and thereby awarded a sum of money as the indemnity to be paid by Great Britain to the United States in satisfaction of the said claims, which sum was duly paid to the said United States; and on the 23rd of June, 1874, an Act of Congress of the said United States was passed for the constitution of a Court of Commissioners of *Alabama* claims, in order to appropriate the money so received from Great Britain, and to distribute sums out of it amongst the parties who might be adjudged entitled to compensation. By the said Act it was provided that it should be the duty of the said Court to receive and examine all claims admissible under the said Act that might be presented to it directly resulting from damage caused by the cruisers, *inter alia* the *Alabama*, and to decide upon the amount and validity of such claims in conformity with the provision contained in section 13. (That section is fully set out in the judgment of Lord Coleridge, C.J.)

In 1862 the defendants put forward a claim under the said Act of Congress for 6,557*l.* 7*s.* 3*d.*, as the amount of their personal loss by the *Alabama*, being the difference between the 15,000*l.* received from the plaintiffs under the policies and the actual value of the cargo to the defendants. This claim was allowed by the Court, but in respect of it the defendants only received 2,803*l.* 17*s.* 2*d.*, after deducting fifty per cent. and other expenses, according to agreement with their agent in America, for his prosecution of their claim.

The plaintiffs alleged in this action that under the above circumstances the defendants received this sum of money for

Burnand v. Rodocanachi, C.P.

and on account of and in trust for the plaintiffs, who had, on payment of the 15,000*l.*, become subrogated to the position of the defendants with respect to the said cargo.

The defendants denied this, and stated in their statement of defence that the said sum was obtained by them in their personal capacity only, and as compensation for their personal loss over and above the amount insured, and that the payment of it was a voluntary act of grace on the part of the United States. They further stated that they could not have recovered the same or any part thereof as trustees for the insurers, and that their claim would not have been admissible or allowed had it been put forward on behalf of the said insurers.

The case was heard before Lord Coleridge, C.J., without a jury, at the last Middlesex Trinity sittings.

Butt, Cohen and J. O. Mathew argued for the plaintiffs.

Sir Henry James and the *Hon. A. Gathorne Hardy*, for the defendants.

Cur. adv. vult.

The following judgment was (on June 30) delivered by

LORD COLERIDGE, C.J.—In this case a sum of 15,000*l.* has been paid by the plaintiffs to the defendants on two valued policies effected with the plaintiffs at a premium covering the war risk. The subject of the insurance, the cargo of the ship *Lamplighter* (a cargo of tobacco), was totally destroyed by the *Alabama*. The loss of the cargo of the *Lamplighter* formed one of the items of the claim made by the United States against Great Britain, which claim was dealt with by the treaty of Washington in May, 1871, and by the award subsequently made at Geneva under that treaty. When the sum awarded under that arbitration had been paid by Great Britain to the United States, it was dealt with and payments were made out of it to claimants by a Court constituted under an Act of Congress passed in 1874, the provisions of which Act undoubtedly bound the Court and the suitors in it. In that Court the defendants were suitors,

and were awarded by the Court a sum of many thousand pounds under the provision of the 13th section of the Act of Congress, which it is important to set out in full. It is as follows, namely: "That no claim shall be admissible or allowed by the said Court for any loss or damage for or in respect to which the party injured, his assignee or legal representatives, shall have received compensation or indemnity from any insurance company, insurer or otherwise; but if such compensation or indemnity so received shall not have been equal to the loss or damage so actually suffered, allowance may be made for the difference. And in no case shall any claim be admitted or allowed for or in respect to unearned freights, gross freights, prospective profits, freights' gains or advantages, or for wages of officers or seamen for a longer time than one year next after the breaking up of a voyage by the acts aforesaid. And no claim shall be admissible or allowed by the said Court by or on behalf of any insurance company or insurer, either in its or his own right or as assignee or otherwise in the right of a person or party insured as aforesaid, unless such claimant shall shew to the satisfaction of such Court that during the late rebellion the sum of its or his losses in respect to its or his war risks exceeded the sum of its or his premiums or other gains upon or in respect to such war risks, and in case of any such allowance the same shall not be greater than such excess of loss. And no claim shall be admissible or allowed by the said Court arising in favour of any insurance company not lawfully existing at the time of the loss under the laws of some one of the United States. And no claim shall be admissible or allowed by the said Court arising in favour of any person not entitled at the time of his loss to the protection of the United States in the premises, nor arising in favour of any person who did not at all times during the late rebellion bear true allegiance to the United States."

Two things are clear from the facts as applied to this section: first, that the defendants got their money from the Court on the proofs, or allegation at least, that their actual loss in respect of the cargo of the *Lamplighter* exceeded the compen-

Burnand v. Rodocanachi, C.P.

sation or indemnity paid them by the plaintiffs under the policies; secondly, that the money could not have been obtained from the Court either by the plaintiffs suing in their own names or by the defendants suing on the plaintiffs' behalf, and the question is, Now that the defendants have obtained the money under these circumstances, can the plaintiffs recover it from them? in other words, Have the defendants obtained the money under circumstances which make them in respect of it trustees for the plaintiffs?

Two points arise: first, Is the value in the policies which have been paid absolutely conclusive in case of actual loss between the parties to the policies? and secondly, Was the payment of this money to the defendants more than a free gift, a pure act of grace on the part of the United States?

As to the first question there has been an actual total loss, a positive complete destruction of the thing insured, and I think that in this case the valuation in the policies is conclusive between the parties; they have by agreement settled the value, and not left it open to future enquiry and dispute as between themselves—*Shawe v. Felton* (1), and per Lord Abinger delivering judgment in *Young v. Turing* (2).

It is conclusive between the parties in respect of all rights and obligations which arise upon the policy—*Bruce v. Jones* (3) and (a very strong case on this point, though perhaps not so strong upon the other) *The North of England Insurance Association v. Armstrong* (4). Even the cases which it is said shew the valuation not to be for all purposes conclusive are, when looked at carefully and their principle considered, no exceptions to the general rule. *Irving v. Manning* (5) shews indeed that in ascertaining whether or not there has been in fact a constructive total loss the valuation in the policy is to be disregarded on principles of sense and

justice, but when the fact of the constructive total loss is *aliunde* established, the valuation in the policy fixes conclusively the sum which the insurers are to pay. If, then, there was in this case any right in the defendants it arose out of the subject-matter of the insurance, and the valuation in the policy was conclusive between the plaintiffs and the defendants.

But was there any right, or was the awarding of the money by the United States Court merely a free gift of the money, a mere act of grace on the part of the United States Government? If it were, I am of opinion that this action would clearly not be maintainable, and at first sight there is much to be said for the contention that it is a mere act of grace. The money out of which this is paid to the defendants is a sum of money paid by Great Britain to the United States, from one Sovereign State to another; and *Rustomjee v. The Queen* (6) is a distinct authority for holding that money being paid by one Sovereign State to another in respect of war losses occasioned by the paying State to the subjects of the receiving State, gives no legal right whatever to a particular subject of the receiving State to compensation for a loss which has been paid to that State, capable of being enforced in any Court against the Sovereign or the Government of that State. It is, therefore, no doubt clear that the defendants could have had no legal claim capable of being enforced against the United States in their sovereign character. But it seems to be equally clear, as the result of great authorities both in England and America, that if a country puts a fund of this sort in course of distribution by regular process amongst such of its subjects as were morally entitled to share in the fund, then what these subjects so recover they recover as a right, not perhaps enforceable by law, but yet with such a character of morality and equity about it as makes them in respect of what they so recover trustees for those who in equity and justice are entitled to it. This appears to me to have been held in principle by Lord Northington, Lord

(1) 2 East, 109.

(2) 2 M. & G. 693.

(3) 1 Hurl. & C. 769; 32 Law J. Rep. Exch. 132.

(4) 39 Law J. Rep. Q.B. 81; Law Rep. 5 Q.B. 244.

(5) 6 Com. B. Rep. 391.

(6) 45 Law J. Rep. Q.B. 249; Law Rep. 1 Q.B. D. 487; and on appeal, 46 Law J. Rep. Q.B. 238; Law Rep. 2 Q.B. D. 69.

Burnand v. Rodocanachi, C.P.

Hardwicke and Chancellor Kent, when Chief Justice of New York. The cases of *Blaauwpot v. Da Costa* (7), *Randal v. Cockran* (8), and *Gracie v. The New York Insurance Company* (9), appear to me clearly to shew that those great lawyers would have held the defendants in this case liable. The language of Lord Hardwicke and Lord Northington appears to me to shew that there is a right to the benefit of which the insurers are entitled. The language of Chancellor Kent, it may be said, is extra-judicial, for there was no such right in existence in the case before him. It is so, but the judgment is considered, and the deliberate opinion of Chancellor Kent is an opinion to which great deference is due. If this money had been received by the defendants before the plaintiffs had been sued, or if the cargo had not been physically destroyed but had been captured and restored by the United States in specie, could it be maintained that the full amount of the policies would nevertheless have been due from the plaintiffs? I think it could not, yet in principle there is no distinction between the cases. It has been said that the Act of Congress prevents the plaintiffs from recovering. Probably in the American Court that is so; but the Act of Congress cannot affect the rights of litigants in English Courts, and if the defendants are possessed of money to which, according to the principles of English law, the plaintiffs are entitled, an English Court must give it to the plaintiffs, although it may have been the intention of the American statute by which the defendants got the money that the plaintiffs should not have it. For these reasons I give judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors—Waltons, Bubbs & Co., for plaintiffs;
Markby Stewart & Co., for defendants.

(7) 1 Eden, 130.

(8) 1 Ves. sen. 98.

(9) 8 Johnson's New York Rep. 193.

[IN THE HOUSE OF LORDS.]

1880. { THE PHARMACEUTICAL SOCIETY
July 20, 22. { OF GREAT BRITAIN v. THE
LONDON AND PROVINCIAL SUPPLY ASSOCIATION (LIMITED).

Pharmacy Act, 1868, 31 & 32 Vict. c. 121. ss. 1, 15—Chemist and Druggist—Corporation—"Person."

In sections 1, 15 of the Pharmacy Act, 1868, which prohibit under a penalty any person, not being a duly registered chemist, from selling or keeping open shop for the sale of poisons, or using the name of chemist or druggist, the word "person" does not include a corporation; and a corporation having a department for sale of drugs under the management of a duly registered chemist, are not liable to the penalty.

Semble (per LORD BLACKBURN), a corporation employing an unqualified manager would be liable.

This was an action in the Bloomsbury County Court against the respondents, a limited company, for the recovery of a penalty for selling or keeping open shop for retailing, dispensing and compounding poisons without being a duly registered chemist within the meaning of the Pharmacy Act, 1868. The drug department of the respondents' business was attended to by a manager and two assistants, who were all duly qualified under the Act.

Sections 1 and 15 of the Pharmacy Act, which are the material sections, are as follows:—

Section 1.—"From and after the 31st day of December, 1868, it shall be unlawful for any person to sell or keep open shop for retailing, dispensing or compounding poisons, or to assume or use the title 'chemist and druggist,' or chemist, or druggist, or pharmacist, or dispensing chemist or druggist, in any part of Great Britain, unless such person shall be a pharmaceutical chemist or a chemist and druggist within the meaning of the Act, and be registered under this Act, and conform to such regulations as to the keeping, dispensing and selling of such poisons as may from time to time be prescribed by the Pharmaceutical Society with the consent of the Privy Council."

Pharmaceutical Society v. London and Provincial Supply Assoc., H.L.

Section 15.—“From and after the 31st day of December, 1868, any person who shall sell or keep an open shop for the retailing, dispensing or compounding poisons, or who shall take, use or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist and druggist, or who shall take, use or exhibit the name or title pharmaceutical chemist, pharmacist or pharmacist, not being a pharmaceutical chemist, or shall fail to conform with any regulation as to the keeping or selling of poisons, made in pursuance of this Act, or who shall compound any medicines of the British Pharmacopœia, except according to the formularies of the said Pharmacopœia, shall for every such offence be liable to pay a penalty or sum of 5*l.*; and the same may be sued for, recovered and dealt with in the manner provided by the Pharmacy Act for the recovery of penalties under that Act; but nothing in this Act contained shall prevent any person from being liable to any other penalty, damages or punishment to which he would have been subject if this Act had not been passed.”

The Judge of the County Court decided in favour of the respondents. This decision was reversed on appeal by the Queen's Bench Division, and their decision was in turn reversed by the Court of Appeal, from whose judgment this appeal was now brought.

Reports of the case in the Courts below will be found at 48 Law J. Rep. Q.B. 387, *ante*, p. 338; Law Rep. 4 Q.B. D. 313; and 5 Q.B. D. 310, where the facts of the case are also fully set out.

Benjamin and Lumley Smith (with them *Sir J. Holker*), for the appellants.—The word “person” in a public statute naturally and regularly includes corporations or artificial persons—2 Instit. 720, 721. Even if the word “sell” refers to the servant actually selling and not to the master, it must be the master who keeps the open shop. Corporations selling drugs before the Act, such as the Apothecaries' Company, are, if “person” does mean corporation, excepted by the Act itself (section 3). The word “person” has

been held to include corporation—*The Corporation of Newcastle v. The Attorney-General* (1); *The Mayor of Hereford v. Martin* (2). Under Bishop Porteous's Act, 21 Geo. 3. c. 49, an Act analogous to the present in the mischief it was intended to meet, a corporation was held liable—*Terry v. The Brighton Aquarium Company* (3).

It is well settled that a corporation can be guilty of an offence. It is liable for a nonfeasance—*The Queen v. The Birmingham and Gloucester Railway Company* (4), for a misfeasance; *The Queen v. The Great North of England Railway Company* (5).

A corporation is completely within the mischief struck at by the Act, which was intended to secure that the responsible person, the master, should be qualified. If corporations are excluded from the operation of the Act, they may employ unqualified persons, and the Act will become a dead letter.

They also referred to the Pharmacy Act, 1852, 15 & 16 Vict. c. 56; 7 & 8 Geo. 4. c. 28. s. 14; the Apothecaries Act, 55 Geo. 3. c. 194. ss. 20, 30; 13 & 14 Vict. c. 21. s. 4; and to the cases of *Boyd v. The Croydon Railway Company* (6); and *The Guardians of St. Leonard's, Shoreditch v. Franklin* (7).

Wills and Finlay, for the respondents.—If in any statute a person is prohibited from doing a particular thing except in compliance with conditions which in the nature of things cannot be complied with by a natural person, the word “person” in such statute will not include a corporation. The word “person” does not necessarily extend to a corporation—*Harrison's Case* (8). In *Reynard v. Chase* (9) a sleeping partner not properly qualified was held not liable to a penalty under the statute of Elizabeth relating to apprenticeship (5 Eliz. c. 4. s. 34). Almost

(1) 12 Cl. & F. 402.

(2) 15 Law Times, N.S. 187.

(3) 44 Law J. Rep. M.C. 173; Law Rep. 10 Q.B. 306.

(4) 3 Q.B. Rep. 223; 10 Law J. Rep. M.C. 136

(5) 9 Q.B. Rep. 315; 16 Law J. Rep. M.C. 16.

(6) 4 Bing. N.C. 669.

(7) 47 Law J. Rep. C.P. 727; Law Rep. 3 C.P. D. 377.

(8) 1 Leach C.C. 180; 2 East P.C. 988.

(9) 1 Burr. 2.

Pharmaceutical Society v. London and Provincial Supply Assoc., H.L.

all modern statutes contain an interpretation clause extending the meaning of the word "person" to corporations. The words "keeping open shop" are thrown in incidentally rather to facilitate proof than to create a separate offence. The gist of the danger aimed at by the statute lies in the selling by unqualified persons, and at most the case of corporations was a *casus omissus*. It is absurd to suppose that the Legislature intended by a side-wind entirely to prohibit joint-stock companies from dealing in drugs, still less to stop the business of a corporation such as the Apothecaries' Hall.

THE LORD CHANCELLOR (LORD SELBORNE).—I cannot say that this case appears to me to be one free from difficulty, especially as we have two Courts of high authority differing from each other, the Lord Chief Justice and Mr. Justice Mellor having taken the view of the statute for which the appellants contend, and the Court of Appeal the opposite view. The question really comes to be one upon the construction of particular words in the 1st and 15th sections of this statute, having regard to the general principles on which ambiguous words such as "person" ought to be construed. There can be no question that the word "person" may, and I should be disposed myself to say *prima facie* it does, include in a public statute a person in law, that is a corporation as well as a natural person; but it is never to be forgotten that although that is a sense which the word will bear in law, and, as I said, perhaps should be attributed to it in the construction of such a document as a statute, unless there be any reason for a contrary construction, yet, that in its popular sense and ordinary use it would hardly extend so far. Therefore, as statutes like other documents are constantly conceived according to the popular use of language, it is probable, and may be taken to be certain, that the word is often used in statutes in a sense in which it cannot be intended to extend to a corporation, and that accounts for the frequent occurrence in some statutes, in interpretation clauses, of an express declaration that it shall extend to a body politic or corporate, and in other statutes

(of which an example will be found in one cited during the argument by Mr. Benjamin—I mean the Act as to apothecaries) of clauses which say, as in that instance, that remedies by persons who complain of acts done under colour of the authority of the Act, or in pursuance of it, must be prosecuted within a certain limit of time against all persons or bodies politic or corporate; which upon the face of the Act shews that corporations were contemplated. Now, I hold that with some qualification the language used by the junior counsel for the respondents is substantially right, that if a statute provides that a person shall not do a particular act, except on condition of his complying with a certain proviso, *prima facie* it is the natural and reasonable construction of such a statute, unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter to exclude it—*prima facie* I say it is the natural and reasonable construction of such a clause that by the use of the word "person" the Legislature contemplates one of a class of persons who may or may not do the act, or who are capable of doing the act, the doing of which is to take them out of the scope of the provision. Now, if that be a sound observation, it appears to be decisive of this case when we look to the language of the 1st and 15th sections. The 1st section, merely transposing the place in which certain words are used, is this: "From and after the 31st day of December, 1868, it shall be unlawful for any person, unless such person be a pharmaceutical chemist, or chemist and druggist, within the meaning of this Act, and be registered under this Act," to do certain things. *Prima facie* that contemplates a class of persons who may or may not be pharmaceutical chemists, or chemists and druggists, within the meaning of the Act, and be registered under the Act. What class of persons can be such pharmaceutical chemists, or chemists and druggists, and be registered? Can a corporation, or can it not? I think it clear upon the sequel of the Act that a corporation cannot be so. A corporation certainly, looking to the former Pharmacy Act, cannot be a pharmaceutical chemist,

Pharmaceutical Society v. London and Provincial Supply Assoc., H.L.

nor can it be a chemist and druggist within the meaning of this Act, and be registered under this Act; because the 3rd section says: "Chemists and druggists within the meaning of this Act shall consist of all persons, who, at any time before the passing of this Act, have carried on in Great Britain the business of a chemist and druggist in the keeping of open shop for the compounding of the prescriptions of duly qualified medical practitioners." That indeed might have applied to a corporation if a corporation could be registered. But then with regard to that class of persons who had previously carried on such a business, the 5th section requires them to be registered, and in order to registry requires a claim to be made by a notice in writing, signed by the person, which notice is to be in the form set forth in the schedule. I do not see myself that it is possible to suppose that the Legislature contemplated that anyone but a person who could sign the claim was to be registered under those clauses. In addition, I find in the 18th section this is expressly provided: "Every person who at the time of the passing of this Act is or has been in business on his own account as a chemist and druggist, and who shall be registered as a chemist and druggist, shall be eligible to be elected and continue a member of the Pharmaceutical Society according to the by-laws thereof." That appears to me plainly to shew that the Legislature enforced and required the registration of persons who before the Act carried on business as chemists and druggists in a sense applicable only to those who could become members of the Pharmaceutical Society—in other words, only to individual persons. With regard to those who should afterwards carry on business as chemists and druggists, the Act plainly, I think, shews that they must undergo certain examinations which are wholly inapplicable to any corporation. The conclusion, therefore, which I come to is, that these words, "unless," and so on, are inapplicable to any corporations; that there being not a general prohibition of the trade or business, but merely a declaration that it shall be unlawful for a person, unless he complies with certain

conditions, to carry on these otherwise lawful trades or businesses, not only keeping a shop for retailing poisons or selling poisons, but also assuming the title of chemist and druggist, or chemist or druggist, I cannot but think that it is a sounder construction of the word "person" to hold that only such persons are contemplated as might, by taking proper means, comply with the condition and so enable themselves to carry on the trade. Exactly the same observations occur upon the 15th section. There, again, transposing only the words which occur in it, we find—and this is the section which imposes the penalties in question—the enactment is this: "From and after the 31st day of December, 1868, any person not being a duly registered pharmaceutical chemist, or chemist and druggist, who shall sell," &c., and again, or who not being a pharmaceutical chemist, "shall take, use or exhibit the name or title of pharmaceutical chemist," shall be subject to certain penalties. The words follow also, "or who shall compound." I think, having reference to the particular act of compounding mentioned on each occasion, it rather fortifies than otherwise what I may describe as the individual—I was going to say personal—construction, but the very use of that word exemplifies the difficulty of applying the word "person" in the popular sense otherwise than to individuals. Well, if you look through the Act it will be found that there is only one place in the Act where it is necessary to put upon the word "person" the larger sense, and that is in a clause which is in several respects remarkably contrasted with the rest of the provisions of the Act; I mean the 17th section. It begins with a general prohibition in unequivocal terms. Not it shall be unlawful for any person not coming under a certain definition to sell, but it shall be unlawful to sell at all, absolutely, unconditionally unlawful, to sell any poison as to which certain precautions are not observed. And that is repeated. It shall be unlawful to sell, it says, at the beginning; and four lines afterwards, it shall be unlawful to sell again; and as I say, that is a universal prohibition not qualified by any exception as to the person, though no doubt the

Pharmaceutical Society v. London and Provincial Supply Assoc., H.L.

thing which is made unlawful is a thing done in a certain manner, or without the observance of certain conditions. In addition to that, the penalty there is not like the penalty under the 15th section, a civil debt to be recovered by a civil form of proceeding or action, notwithstanding that it is for what is called an offence; but it is a penalty to be recovered upon summary conviction before two justices. And then these words are added: "And for the purposes of this section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller," which, the thing being made universally unlawful, I think must include a corporation, if the sale was made by any apprentice or servant on behalf of the corporation. It appears to me that the difference in the phraseology of that section from the rest is such as not to justify any other construction of the word "person" in the other sections than that which it ought to have received if the 17th section had not been in the Act. And with regard to the main argument of the appellants, which would be a very important argument indeed if it were sustained, that the object of the Act would be defeated unless a corporation as well as an individual were included, it seems to me that that argument cannot be successfully maintained. The act of selling, the act of compounding, and every other act mentioned in these two sections, by which penalties are imposed, and also the act mentioned in the 1st section are struck at, whether done by the principal to whom the business belongs or done by the person whom he employs to carry on the business. The words "keeping open shop" may not perhaps be so, and upon those I will make an observation presently; but that the word "sell" is, and that the word "compound" probably is, I think is clear from that very clause I just now read in the 17th section, that for the purpose of that section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller. That indicates—I will not say necessarily—but naturally implies that that is a special construction for the purpose of the particular section, and is not to be extended

to sale where mentioned in other sections; and I will add that regard to the mischief which, beyond all controversy, the Act was intended to prevent, leads necessarily to the same conclusion: that he who sells, whether he be master or servant, whether he be the principal or the person delegated to conduct and manage the sales, is struck at by the 15th section, because otherwise you get this, that a very wide door would be open to all the things which the Act is intended to prohibit. Nothing more would be necessary, according to the appellants' argument, if it were otherwise, than that the business should belong to a person who does not himself carry it on, but who is qualified under the Act; and he might be at liberty to employ in the management of his business persons not qualified. By them the actual sales would be conducted, and the public would suffer those very evils which the Act was intended to prevent. The Act, therefore, to be effectual, must strike at the particular acts of those who actually conduct the sales—who actually compound the medicines. No doubt the words, "keeping open shop" extend to something more, and will comprehend a person who keeps an open shop, although he may not, with his own hands, do all the business of the selling or compounding medicines, and who is the master or proprietor of the premises, if he be a "person" within the proper construction; but to say that you must, in order to include a corporation, which may keep an open shop, necessarily extend the construction of the context, because, if you do not, there may be a shop kept by a person who will do nothing and who is not qualified—to say that is necessary for the objects of the Act appears to me to be really begging the question, because on that hypothesis the corporation does nothing. It does not itself conduct the business, and the particular mischief which the public would suffer from the sale of things which ought not to be sold, is sufficiently guarded against by prohibition of such sales, and the conditions to which they are made subject. Well, I said, to begin with, that I did not regard the matter as free from difficulty; but in a difficulty, if there be one, it does seem to me to be best to remember the

Pharmaceutical Society v. London and Provincial Supply Assoc., H.L.

principle that the liberty of the subject is not by unnecessary construction to be held to be abridged any further than the words require; and inasmuch as it was open to Her Majesty's subjects before this Act passed to carry on the business of chemists and druggists, using the title of chemist and druggist, and, for the purpose of that business, keeping open shop for the sale, amongst other articles, of poisonous drugs; as it was perfectly lawful to do that by means of a company incorporated under the Companies Act, and as there is nothing whatever to shew that the Legislature had grounds for assuming that there could be no such companies, and moreover, as there was a very great and leading company incorporated as a company of sellers of drugs and pharmacopists as long ago as the reign of James I., in whose name it is admitted the business of selling drugs has been carried on by their authority down to the present time—as that was the state of the law, I do think that it would be wrong for your Lordships to impose upon the word "person," used in such a context as that in which you find it used here, a construction which would at once render illegal that mode of carrying on the business of chemists and druggists by such corporations, without any reference from the beginning of the Act to the end to that class of persons, or to that kind of case; more especially when you do find in the Act, in the 16th section, a special provision for the case of individuals carrying on that kind of business, who may die, whose executors or trustees may carry it on after their deaths. It is true that the Legislature there requires for the safety of the public this safeguard, that there shall be an assistant duly qualified, but the Legislature shews that having that case in view it was not thought that the object or policy of the Act required that such a business should be prohibited. It was not thought necessarily inconsistent with the object and the policy of the Act that the principals, the proprietors of the business, the persons to whom those actually selling the drugs would be responsible, should be unqualified, provided that there was in the business a duly qualified assistant. It by no means follows that all the drugs

would be sold by that duly qualified assistant, or that he might not be, as in this case, under the general superintendence of a manager not himself duly qualified. All that is left open, but it is not thought indispensable that the persons carrying on such businesses should be themselves duly qualified. If there were not safeguards against the sale of poisonous drugs in a manner contrary to the provisions of the Act by the persons actually conducting the business for the corporation, then, I think, the argument would have been extremely strong against a corporation being permitted to carry on the business; but where you find that there are such safeguards and that the keeping open shop in the case of executors is permitted although they be not qualified, I think it is impossible to infer that the object of the Act did require a larger construction to be put on the word "person," which the context appears to me upon a fair construction to exclude. I shall, therefore, advise your Lordships that this appeal should be dismissed with costs.

LORD BLACKBURN.—I am of the same opinion. The question really, when it is cleared of all superfluity, is reduced to a very short point, but I agree that it is one not free from difficulty. The difficulty which I feel about the case is not generally upon those things which seem to have troubled most of the members of the Court below. I own I have no great doubt myself, for instance, that the word "person" may very well include both a natural person, a human being, and an artificial person, a corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (I would not like to pledge myself to that) it ought to be held to include both. I have equally no doubt that in common talk in the language of men, not speaking technically, a "person" does not include an artificial person—that is to say, a corporation. Nobody in common talk, if he were asked who was the richest person in London, would answer, The London and North Western Railway Company. It is plain that in common speech "person" would mean a natural person. In technical language it may mean the

Pharmaceutical Society v. London and Provincial Supply Assoc., H.L.

other, but which meaning it has in any particular Act must depend on the context and the subject-matter. I do not think that the presumption that it includes an artificial person, a corporation, if the presumption does arise, is at all strong. Circumstances, and indeed very slight circumstances, in the context might shew which way the word is to be construed in an Act of Parliament; whether it is to have one or the other meaning. And I am quite clear about this, that whenever you can see the object of the Act requires that "person" shall have the more extended sense or the less extended sense, whichever of those the object of the Act shews that it requires, then you should apply the word in that sense and construe the Act accordingly. My view of the matter is that the question what the word "person" means in this particular Act gives rise to the whole difficulty; but I may further say now, in order to avoid coming back to it, that I do not feel the least difficulty arising from what seems to have troubled some of the Judges below in this case. If this means a corporation, I quite agree that a corporation cannot commit crime in one sense—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged and put to death, if that be the punishment for the crime. In all those senses a corporation cannot commit a crime; but a corporation may be fined or may pay damages, and I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said, from the supposition that a corporation that incorporated itself for publishing a newspaper could not be fined, or an action for damages brought against it for libel, or that a corporation that commits a nuisance could not be convicted of the nuisance, or the like. I must really say I do not feel the slightest doubt about that part of the case, and I think if we could get over the first difficulty of saying that the "person" here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon the other grounds that have been suggested. But then, my conclusion, looking at this Act, is, that it is clear to my mind that the word "person" here is so used as to

shew that it does not include a corporation, and that there is no object or intention of the statute which shews that we should require to extend the word to a sense which probably those who used it, the Legislature, did not think of and were not thinking of at all. I do not think the Legislature were thinking of bodies corporate at all. They begin with a preamble. "Whereas it is expedient for the safety of the public that persons keeping open shop for the retailing, dispensing or compounding of poisons, and persons known as chemists and druggists, should possess a competent practical knowledge of their business." Stopping there, it is quite plain to my mind that those who used that language were not thinking of corporations. A corporation may, in one sense, possess a competent knowledge of its business, if it employs competent directors, and so forth, but it cannot possibly have, for all substantial purposes of the public protection, a competent knowledge of itself. The metaphysical entity, the legal person, cannot possibly have a competent knowledge, nor can, I think, a corporation be supposed to be a person known as a chemist and druggist. They were not thinking of a corporation; they said that henceforth it was desirable that those who carried on this business should have a competent knowledge. It afterwards appears that the Legislature were persuaded by the Pharmaceutical Society (I dare say very rightly) to think that the best test of competency was that such persons should be members of this Society. It then goes on to the enacting part, and the 1st section is the most material, that "it shall be unlawful for any person to sell or keep open shop for retailing, dispensing or compounding poisons, or to assume or use the title of chemist and druggist, or chemist or druggist." Now, stopping there, it does seem to me that, without laying down any technical rule, the plain meaning of the words "any person" and the words are used in that sense, is such a person as could become a pharmaceutical chemist. A corporation cannot, an individual can. It seems to me, therefore, it plainly says in section 1, that it shall be unlawful to sell or keep open shop, or assume the name of chemist or

Pharmaceutical Society v. London and Provincial Supply Assoc., H.L.

druggist for any person—that is to say, any natural person—unless he becomes a pharmaceutical chemist. The 15th section imposes a penalty, and in imposing the penalty repeats the words which made the thing unlawful. I think those two sections must be construed together. Now, is there anything here in the context or in the object to shew that we should take that word “person,” which I think must have been used by those who framed the Act, and understood by the Legislature as meaning a natural person, and extend it, and say that it applies to a corporation? I cannot see anything. If there had been anything in the Act or anything in the nature of things which made it reasonable that it should be provided that all the profits to be derived from vending poisons or poisonous drugs should be shared amongst those who are pharmaceutical chemists, and that nobody else should intermeddle with that trade; if there was anything of that sort, in order to carry out that object it would be necessary to say that “person” includes corporation, and not a natural person only. But that object is certainly not avowed on the face of the Act. Whether any of those who promoted the Act had any such idea in their minds or not I cannot tell; but they have not brought it forward or put it in such words as would at all lead the Legislature to think of it; and if they had boldly said “and bodies corporate and joint-stock companies shall not deal in drugs,” or, if you like, in poisonous drugs, “unless they pay black mail to us,” I think the Legislature would hardly have done it. They have not done that in distinct terms. Now, is there anything in the object of the Act which requires such an interpretation? I quite agree that a body corporate may keep an open shop, and no mischief is done there, if they employ for the purpose of conducting the sale qualified assistants and people who may manage the sale; if those qualified persons do superintend the sale there, I see no harm that can arise. But no doubt the Legislature have, for what reason it is for those who passed the Act to say, thought it best to say that a person—whom I take to be a natural person—shall not only not sell, but shall

not keep an open shop for the sale. I think myself that probably one reason for that was to facilitate convictions; and another reason may have been that it was thought if there may be a person who keeps a shop, who is unqualified, and he may have a qualified assistant, he may overrule the qualified assistant at any moment he pleases and there may be danger in that. Those are intelligible motives; but neither of those motives applies where it is a case of a corporation; for the body corporate itself could not interfere, and however much the body corporate may have been unqualified, their being so would not affect the matter. Then comes another objection. It is said, if you put that construction you defeat the Act altogether. That I cannot admit. I hold distinctly that there can be no sale, whether a corporation be the ultimate vendor or not, unless a person, a natural person, manages the sale, and that natural person, if unqualified, would in my mind clearly become liable to the penalty under the Act. And though I am not so clear on this, I feel strongly inclined to think that, if a corporation or anybody else caused an unqualified person to conduct sales, and it could be brought home to them and shewn that they deliberately did cause the person to infringe the Act, I am by no means clear that they would not be, under section 15, liable to penalties themselves. *Qui facit per alium facit per se.* I do not, however, say that I am quite certain of that; but I think it necessary to say that because so repeatedly in the argument it was assumed that a corporation was entirely out of this Act altogether, which is not at all my view of it. I say that a corporation is out of that clause which prohibits persons from keeping open shop. I do not go further than that, and say anything more. Now, as to the rest, I really do not think that there are any sections of the Act, or any of the cases cited, or any general legal principle, which require to be noticed. It does seem to me that the case will come after all to this: Does “person,” which may include a corporation, include it here? For the reasons I have given, I think it does not. Is there anything in the context or anything in the object of the Legislature which requires that,

Pharmaceutical Society v. London and Provincial Supply Assoc., H.L.

although the word "person" would not properly include a corporation, yet in this particular case we should extend it and make it include a corporation? I think there is not in this section. In section 17 there is quite sufficient reason for doing so; but in sections 1 and 15 I think there is not.

LORD WATSON.—It is impossible to disguise the fact that this statute is characterised by great ambiguity, I would almost go the length of saying confusion, of language. That probably arises from the circumstance that the framers of this Act were dealing with two separate matters: the one, improvement of a society called the Pharmaceutical Society; the other, the regulation of the sale of poisons generally throughout Great Britain. That Society had existed from 1843, when it was incorporated by royal charter for the avowed purpose "of advancing chemistry and pharmacy, and promoting an uniform system of education of those who should practise the same; and also for the protection of those who carry on the business of chemists and druggists." In 1852 the Legislature, by the statute 15 & 16 Vict. c. 56, made various improvements in the constitution of the body upon the recital that it was "expedient to prevent ignorant and incompetent persons from assuming the title of or pretending to be pharmaceutical chemists or pharmacentists in Great Britain." When you come to the Act of 1868, the Act which we are dealing with, you not only have further improvements made in the character of the body and its constitution but you have very important changes made, and a position and privilege accorded them by statute. Down to 1852, and subsequently to 1852, they had no special privilege; nothing in the nature of monopoly or exclusive privilege, and the Act of that year was simply intended not to prevent other persons from dealing in drugs of any description, but to prevent those persons when dealing in drugs from assuming a title which the members of the society were alone entitled to. But when you come to the Act of 1868, the provisions of the statute undoubtedly give to them the sole right to sell drugs as individuals,

or to keep open shops for the sale of poisonous drugs as individuals, because all individuals who are not possessed of the qualification of membership of the Society, or who have not passed the requisite examination and had their names on the register, are prohibited under penalties from dealing by retail in these articles. Now, I must say that when I come to deal with what is called—I say it with respect—the intention of the Legislature, I find the greatest possible difficulty in making up my mind as to what it should be. I think the considerations of policy on either side are pretty evenly balanced, in fact I have almost been inclined to hold that considerations of policy rather preponderate in favour of the appellants' argument; but that is not enough; it is not enough for me to speculate as to what was in the mind of the framer of this statute: whether he had forgotten the fact that there were corporations which either were dealing or might deal in poisonous drugs, or whether, having this in view, he framed this Act for the purpose of subjecting them to certain disabilities. I can only look at the language the Legislature have employed in the enacting clauses, sections 1 and 15; and I can only say this, that even if I were satisfied that it had been the intention of the framer of these two sections to give to individuals registered under the Act the exclusive privilege of selling poisonous drugs by retail, and so impose penalties upon a corporation keeping open shop for that purpose, I must say I come to this conclusion, that it would have been very simple for the Legislature to have said so in express terms. And I, for my own part, am quite satisfied, even apart from those considerations which have led your Lordships to put another construction on the terms of the statute, that the framer, if that was his intention, has entirely failed to use language adequate for the purpose which he intended.

*Judgment appealed against affirmed,
and appeal dismissed with costs.*

Solicitors—Flux & Co., for appellants; Crouch & Spencer, for respondents.

[IN THE HOUSE OF LORDS.]

1880. { THE MANAGERS OF THE ME-
 May 28. { TROPOLITAN ASYLUMS DISTRICT
 v. HILL AND OTHERS.

Appeal as to Costs.

An order for a new trial obtained by the defendants was, by the Court of Appeal, confirmed conditionally on the defendants paying the costs of the first trial:—Held, that an appeal by the defendants against the confirming order was not within the rule which prohibits appeals as to costs only.

This was an appeal by the defendants from the judgment of the Court of Appeal, reported *ante*, p. 228.

The preliminary question was raised whether, the Court of Appeal having confirmed the order for a new trial conditionally on the defendants paying the costs of the first trial, this appeal was not as to costs only, and therefore incompetent.

The Solicitor-General (Sir F. Herschell) (with him Bompas and Finlay), for the respondents.

Sir J. Holker and Anderson, for the appellants, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).—The objection to the competency of this appeal has been clearly presented to your Lordships by the learned counsel; but I believe you do not think it necessary to call upon the other side for an answer. The rule, subject to certain exceptions, is established, that an appeal is not to be allowed in respect of costs only; which means that when the merits of a question have been determined, and when a Court has thought fit to give or refuse costs, in the exercise of its discretion, and in the absence of any settled principle upon the subject, the Courts of Appeal must give so much credit to the exercise of that discretion as not to allow the merits, when they are no longer in controversy, to be again gone over with great expenditure, not only of money, but also of judicial time, for the mere purpose of re-

viewing that discretion. It may be doubtful whether that rule does not in some cases, when costs are very large, practically operate so as to inflict some injustice; but, within the limits within which the rule is properly to be confined, I assume that your Lordships would not be disposed to depart from it.

But it is a rule not to be extended to cases which do not properly fall within its scope, and I think that the present case does not fall within it. In this case, the Court of first instance granted a new trial, on the ground that the findings of the jury upon the evidence were not satisfactory. As part of that order, it reserved the costs. An appeal from that order was taken to the Court of Appeal, and the object of that appeal was to discharge the order for the new trial. The Court of Appeal conditionally discharged the order for the new trial, and in the alternative conditionally dismissed the appeal. The present appellants say that they were entitled to retain the order which they had obtained from the Court of first instance, unlogged and unfettered by conditions; and that the appeal, of which the object was to discharge that order altogether, ought to have been unconditionally dismissed.

On principle, it appears to me that such an appeal is competent. A condition imposing upon one party or another, as the price of an order, which is to be made or permitted to stand in his favour, some election to be made by him as to the payment of costs, does not appear to me to bring it within the rule applying to an appeal for costs only. I think, therefore, that this present petition, seeking to have the appeal stopped for incompetency, must be dismissed; but, inasmuch as it may turn out upon the hearing of the appeal that the order of the Court of Appeal was perfectly right, and that the terms imposed were proper terms, I submit to your Lordships that, in dismissing this petition, you will not now dispose of the costs occasioned by it, but will reserve them to be dealt with when the appeal is heard.

LORD BLACKBURN.—I also think that, without in the slightest degree wishing

Managers of Metropolitan Asylums District v. Hill, H.L.

to break in upon the rule which says that appeals shall not be brought merely for costs, or in relation to costs, this case does not fall within that principle. Here, in fact, the Queen's Bench Division, having the question before it whether there should be a new trial or not, made an order for the new trial with this condition, that as to the costs of the former trial, it was to be decided hereafter who should pay them. Consequently, in effect the Court said that it was right to have a new trial, but to consider afterwards, according to the event of the new trial, whether the costs of the former trial were to be borne by the one side or by the other. That might be quite right or it might be quite wrong. The Court of Appeal thought it was quite right to make an order for a new trial, but altered the condition. Instead of leaving it to be the condition that the costs should, after the event of the new trial had been decided, be reconsidered and disposed of, the Appeal Court ordered at once, "New trial there is to be if the defendants will now within a limited time elect to pay and pay those costs; if not, there shall be no new trial at all." That might be perfectly right or it might be wrong, but that clearly was attaching a condition to the new trial which had not been attached to it by the Court below. I apprehend that when the case comes to be heard at the bar of this House, your Lordships may possibly come to the conclusion that there ought to be a new trial absolute and simple, without any condition at all, or it may be that you will think it right for there to be a new trial with the condition which the Queen's Bench Division imposed, or with the condition which the Court of Appeal imposed, or it may possibly be that you will be of opinion that there should be a new trial with some other condition different from either of the conditions which have been hitherto imposed.

Now, I think, upon that question as to what condition (if any) should be imposed, there should be an appeal. I quite agree with what my noble and learned friend the Lord Chancellor has already said, that it is not because the condition involves the payment of costs that therefore the question whether there is to be

a condition or not is to be considered a mere dispute about costs. I think that is a fallacy in the use of language; and consequently I perfectly agree in the motion made, and think it quite right and reasonable that the costs of this particular application should not be disposed of until we know what are the merits of the whole case.

LORD WATSON.—I also quite agree with the opinions which have been just expressed. I quite concede the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs, but it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined, and where the Judges who have decided the cause have applied their minds to the right of the parties to receive an award of costs, looking to the whole circumstances and the conduct of the case; because it must be kept in view that the right to costs does not, in most cases, merely depend upon the merits of the cause as finally decided, but may, to a very great extent, depend upon the mode in which it has been conducted throughout by the parties. Accordingly, I think it would be out of the question to require that the Court of Appeal should investigate not only the merits of the cause, but the whole proceedings in the cause, *ab initio*, for the purpose of ascertaining whether the discretion of the Court below had been rightly or wrongly exercised.

But the question here, although in one sense it may be called a question of costs, has not been determined by the Court of Appeal at all upon any consideration of the merits of the action; for it has not yet been determined whether the appellants are in the right or in the wrong. In point of fact, the Court has resorted to this as a convenient way of imposing a condition upon the right to the new trial which has been granted; and, inasmuch as an order for a new trial, coupled with any other condition but that of paying costs, would be an appealable order, I have no hesitation in coming to the conclusion that we cannot refuse to entertain this appeal simply

Managers of Metropolitan Asylums District v. Hill, H.L.

because this particular mode of imposing and enforcing a condition has been resorted to.

Ordered that the competency of the appeal be sustained, and that the costs be reserved until the hearing of the appeal.

Solicitors—Few & Co., for appellants; Bischoff, Bompas, Bischoff & Co., for respondents.

[IN THE COURT OF APPEAL.]

1880. { THE QUEEN v. CASTRO (OTHER-
June 24, 25. { WISE ORTON, OTHERWISE
TICHBORNE, BART.)*

Criminal Law — Practice — Joinder of several Misdemeanours in one Indictment — Perjury — Power to award Successive Sentences for several Misdemeanours, exceeding in the aggregate the maximum Punishment fixed for the Offence charged— 2 Geo. 2. c. 25. s. 2.

The first count of an indictment charged C. with committing perjury in an action of ejectment in the Court of Common Pleas; the second count charged him with committing perjury in a suit brought in the Court of Chancery, in order to obtain an injunction to prevent the defendants to the action of ejectment from setting up certain defences. Upon conviction on both counts, C. was sentenced on each count to the maximum term of penal servitude fixed by statute for perjury, the second term being directed to commence at the expiration of the first.

A writ of error having been issued,—

Held, by the Court of Appeal, that the charges contained in the two counts were charges of two distinct offences; that upon conviction on both charges the maximum sentence allowed by law for the offence charged could be awarded for each of the two offences, and that the commencement of the second term could be postponed until the expiration of the first term of punishment. Held also, that 2 Geo. 2. c. 25.

* *Coram* James, L.J.; Bramwell, L.J.; Brett, L.J.

s. 2, and 20 & 21 Vict. c. 3. s. 2, which enact "that besides the punishment already to be inflicted for" perjury, "it shall and may be lawful" for the Court to send to penal servitude, for "a time not exceeding seven years," persons convicted of perjury; and "thereupon judgment shall be given that the person convicted" shall be sent to penal servitude "accordingly, over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being," do not require that any other sentence should be prefixed to that of penal servitude.

Error on a judgment of the Court of Queen's Bench, on an indictment for perjury.

The record upon which error was assigned set out that a presentment was made at the Central Criminal Court, to the effect that on the 10th of May, 1871, at Westminster, before Bovill, C.J., an issue joined in an action of ejectment between the plaintiff in error as claimant, and certain persons, the guardians of Sir H. Tichborne, Bart., an infant, as defendants, came on to be tried; and that upon such trial the plaintiff in error appeared, and was sworn as a witness on his own behalf; and that he on such trial committed perjury.

The first count contained the following assignments of perjury: that Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Bart., falsely swore that he was Roger Charles Tichborne, eldest son of Sir J. Tichborne; that he had resided at Paris from his birth till 1845; that a person named Chatillon had been his tutor; that in 1845 he came over from France to attend the funeral of Sir H. Tichborne; that he had been a student at Stonyhurst College; that he had been an officer in the British army; that he had, in July or August, 1852, seen Lady Doughty and her daughter, K. M. E. Doughty, in the drawing-room of Tichborne House, Hants; that he had, in July or August, 1852, seduced K. M. E. Doughty; that he had, after the 22nd of June, 1852, and before March, 1853, seen K. M. E. Doughty; that he had seen Mary Hales in the presence of her

The Queen v. Castro (App.), Q.B.

mother or aunt at Canterbury; that he had been at Bilton Grange; that he had never been to Lloyd's Rooms, London; that he was not Arthur Orton; that he had never been at Wapping before 1866; that he had never gone by the name of Arthur Orton; that he did not leave England in a vessel called the *Ocean* in April, 1848; that he did not arrive at Valparaiso in November, 1848; that he had not been at any time between 1848 and 1851 at Melipilla in Chili; that he did not in 1851 come back from Chili to England in a vessel called the *Jessie Millers*; that he had not seen M. A. Loader before 1867, and did not keep company with her in 1851; that he did not go out to Hobart Town in a vessel called the *Middleton*; that he had not seen E. Jury, M. A. Tredgett and M. A. Jury, or any of them, on more than one occasion before the trial before Bovill, C.J.; that he had, in 1859, at Castlemain, Victoria, been jointly charged with Arthur Orton with horse stealing.

The second count of the indictment contained a further presentment to the effect that on the 7th of April, 1868, a suit was depending in the Court of Chancery, wherein the plaintiff in error was plaintiff, and Lady Tichborne, Sir H. Tichborne and others were defendants, in which suit the plaintiff in error prayed that a certain decree might be made granting an injunction to prevent the defendants from setting up certain defences in case he should bring an action of ejectment; and that in support of the motion for such decree the plaintiff in error appeared on the 7th of April, 1868, before a commissioner appointed to administer oaths, and tendered an affidavit and swore before the commissioner that the matters contained in the affidavit were true; and that this affidavit was afterwards filed and read in support of the motion.

The assignments of perjury committed in this affidavit were that the plaintiff in error falsely swore that he was the eldest son of Sir J. F. Tichborne, Bart.; that he had resided at Paris from his birth till 1845; that he was brought from Paris to England and placed at Stonyhurst College; that in July, 1849, he had been cornet and subsequently lieutenant

in the 6th Dragoon Guards; that he had joined the regiment in October, 1849, at Dublin, and remained on duty with the regiment till January, 1853; that he had retired from the regiment in February, 1853; that in March, 1853, he had taken passage on board a ship bound for Valparaiso, and arrived there in due course, and from that time up till April, 1854, he had travelled in South America; that in April, 1854, he had at Rio Janeiro taken out a passage in the ship *Bella*, for New York. Both counts concluded with the allegation that the plaintiff in error committed perjury "against the peace of" the Queen, and neither count contained the words "against the form of the statute."

The record then set out the removal of the indictment into the Court of Queen's Bench, the plea of not guilty, the order for trial at bar and other formal orders, the commencement of the trial upon the 23rd of April, 1873, and the adjournments until the 28th of February, 1874, and then concluded as follows: "And now at this day—that is to say, on the said Saturday, the 28th day of February, in the year of our Lord, 1874—the jurors aforesaid, so empanelled and sworn as aforesaid to try the issues so joined as aforesaid, upon their oath say that the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, is guilty of the premises on him above charged in and by both counts of the indictment aforesaid above specified in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him. Whereupon all and singular the premises being seen, and by the Court here fully understood, it is considered and adjudged and ordered by the Court here that he the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Robert Charles Doughty Tichborne, Baronet, for the offence charged in and by the first count of the said indictment be kept in penal servitude for the term of seven years now next ensuing; and that for and in respect of the offence charged in and by the second count of the said indictment he, the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles

The Queen v. Castro (App.), Q.B.

Doughty Tichborne, Baronet, be kept in penal servitude for the further term of seven years, to commence immediately upon the expiration of his said term of penal servitude for his offence in the first count of the said indictment. And he, the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, is now committed to the custody of the keeper of the prison called Her Majesty's gaol of Newgate, to be by him kept in safe custody in execution of this judgment."

The writ of error was dated the 16th of December, in 43 Vict., and error was duly assigned.

Benjamin and A. Jones (with them *Hedderwick* and *Spratt*), for the plaintiff in error.—The plaintiff seeks by this writ of error to reverse the sentence which it is contended was illegally passed upon him. It is submitted that it was illegal because two sentences were passed as for two offences; whereas there was but one offence. The perjury committed was committed in an action of ejectment tried in the Court of Common Pleas, and the proceedings in the Court of Chancery, which form the subject of the present charge, were but preliminary proceedings in that suit; they were initiatory proceedings rendered necessary by the fact that there existed then different Courts with different jurisdictions. The verdict of the jury was that the plaintiff in error was guilty of the premises charged in the indictment; but such a verdict does not mean that he was guilty of all the charges alleged in the indictment, or necessarily of all the charges contained in both counts of the indictment; there was really no issue in the second count on which perjury could be charged, so that there was only a verdict of guilty of one offence on one charge; and thus the Court had no power to pass two sentences for that one offence.

There is a difference between felony and misdemeanour; felony is not *nomen collectivum*, whereas misdemeanour is, and the offence of perjury is committed by breaking the oath; and when once a witness has broken his oath to tell the

truth with respect to a particular issue, it matters not if in that suit and on that issue he repeats his falsehood many times, or utters in that relation many different falsehoods. In this instance the act of perjury was the declaration by the plaintiff in error that he was Sir R. Tichborne, and all the other instances of false swearing were but repetitions in detail of that falsehood, flowing from and forming part of that false statement—*The Queen v. Powell* (1), *O'Connell v. The Queen* (2), *The Queen v. Jones* (3), *Ryalls v. The Queen* (4), *The Queen v. Benfield* (5), *Campbell v. The Queen* (6).

[JAMES, L.J.—Those cases shew that if felony differs from misdemeanour, still a general verdict of guilty on the different counts of an indictment for misdemeanour means that the defendant has been guilty of all the misconduct charged.]

If that be so, then it surely follows that there has here been but one offence, which can be the subject of but one sentence—*Crepps v. Durden* (7). As a matter of practice, when sentence has been passed on two counts, it has not been usual to give a sentence exceeding the whole sentence which might be given on one count.

[*The Attorney-General* (*Sir H. James*), for the Crown, referred to *The King v. Robinson* (8).]

That case was not decided on this point; the accused there was charged in the first count with uttering counterfeit coin, and in the second count with a second uttering on the same day, and the sentence given was two years' imprisonment. The question was, whether that sentence was good, regard being had to the provisions of 2 Will. 4. c. 34. s. 7. The sentence was held bad, and although there was a *dictum* that two consecutive sentences would have been lawful, that was not of the substance of the judgment.

The punishment for perjury was as

- (1) 2 B. & Ad. 75.
- (2) 11 Cl. & F. 155, at p. 417.
- (3) 2 Campb. 130.
- (4) 11 Q.B. Rep. 781; 17 Law J. Rep. M. C 92.
- (5) 2 Burr. 980.
- (6) 1 Cox, Cr. C. 269.
- (7) 2 Cowp. 640; 1 Sm. L.C. 711, ed. 8.
- (8) 1 Moo. C.O. 413.

The Queen v. Castro (App.), Q.B.

stated in Coke (9), "fine and ransom, and never to bear testimony." Then by 5 Eliz. c. 9, the punishment was imprisonment and fine. The sentence in the present case is founded, it is supposed, on the provisions of 2 Geo. 2. c. 25. s. 2, which enacts that "besides the punishment already to be inflicted by law for so great crimes" (i.e. perjury and subornation of perjury), "it shall and may be lawful for the Court or Judge before whom any person shall be convicted of wilful and corrupt perjury . . . according to the laws now in being, to order such person to be sent to some house of correction . . . for a time not exceeding seven years, . . . or otherwise to be transported . . . beyond the seas for a term not exceeding seven years, as the Court shall think most proper; and thereupon judgment shall be given that the person convicted shall be committed or transported accordingly over and beside such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being." By 20 & 21 Vict. c. 3. s. 2, penal servitude is substituted for transportation. The special provisions of 3 Geo. 4. c. 114, do not apply to this case.

Under the statute of 2 Geo. 2. c. 25, therefore, there can be no sentence of penal servitude passed without a prior punishment of fine and imprisonment—*The Queen v. Price* (10). Moreover, the Court had no power to give cumulative sentences. Such sentences can be passed in felonies in certain cases by express enactment, 7 & 8 Geo. 4. c. 28. s. 10; but that shews that without express enactment it could not be done—*Everett v. Wills* (11).

But further, this is a common law offence; it is not alleged to be a statutory offence by the indictment, and therefore no punishment created by statute is applicable—2 *Hale P.C.* 191; *Bacon's Abridgment Indictment H.* p. 5; 2 *Hawkins's Pleas*, c. 25, s. 116; *Chitty's Criminal Law*, vol. ii. c. 9, p. 316; but in any event the Legislature intended that there should be a punishment both under

the statute 2 Geo. 2. c. 25, and the common law; the Judge has a discretion as to the proportion to be given under each, but both must be inflicted if penal servitude be awarded at all. Moreover, the statute authorises a certain sentence, and that sentence has been exceeded; for there is nothing in the statute to warrant the giving of a sentence to begin on a future day; if there had been two indictments, tried before two different Courts, one Court could not have given a sentence to begin at the conclusion of a sentence already given by another Court. If *The King v. Wilkes* (12), be relied on by the Crown, it is to be observed that there were there two informations and two indictments; and the case is, therefore, to be distinguished.

The writ of error in the present case was granted in consequence of a decision of the Court of Appeal in New York in *The People ex relatione Tweed v. Liscomb* (13), which lays down that in misdemeanours the law does not allow cumulative sentences to be imposed which exceed in the aggregate the extreme limit of punishment allowed by law for a single misdemeanour; that is the principle contended for by the plaintiff in error, and if the judgment of the American Court of Appeal be correct, the plaintiff in error is entitled to judgment on this writ of error.

The Attorney-General (Sir H. James) (with him *The Solicitor-General, Sir F. Herschell, Poland, and A. L. Smith*), for the Crown, was desired to confine himself to the question raised as to the power to award successive sentences.—The proposition on which the argument on behalf of the plaintiff in error is based will be found broadly laid down in *Tweed v. Liscomb* (13); but that case was decided in express terms on the difference admitted to exist between the law of England and that of the United States; the case cannot be considered as an authority, and the contention founded on it is met directly by the observation of Paterson, J., in *O'Connell v. The Queen* (14). *The*

(9) 3 Inst. c. 74, p. 163.

(10) 6 East. 323.

(11) 2 Sc. N.R. 631.

(12) 4 Burr. 2527; 4 Bro. P.C. 360.

(13) 15 Sickel's N.Y. Ca. 559.

(14) 11 Cl. & F. at pp. 260, 261.

The Queen v. Castro (App.), Q.B.

Queen v. Galloway (15) shews that several charges of felony may be legally joined in one indictment; although, as a practice, this has not been done, lest it should prove embarrassing to the accused, and deprive him of his right of challenge. These reasons do not, however, apply to charges of misdemeanour, and the reason why successive sentences were expressly authorised in the case of felonies by 7 & 8 Geo. 4. c. 28, was, that as prior to the passing of that statute almost all felonies were capital, the question as to successive sentences could not be a practical one. *The King v. Robinson* (8) seems conclusive as an authority that where two offences are charged, a second sentence can be passed, to commence at the expiration of the first, and that, too, though the whole sentence thus passed may exceed that which would be lawful were there but one offence; and to the same effect is *Gregory v. The Queen* (16), where Parke, B., who was not present when the case of *The King v. Robinson* (8) was decided, held that sentences on each of four counts for libel, each sentence beginning at the conclusion of the former sentence, were good in law. In *The King v. Rhenwick Williams* (17) successive sentences were passed on three indictments for assault, each sentence beginning at the expiration of that immediately preceding it. In *The Queen v. Outbush* (18), Blackburn, J., stated that 7 & 8 Geo. 4. c. 28, was "passed to give the Court the same power in cases of felony as it had at common law in misdemeanours;" and Cockburn, C.J., said that as far as living judicial memory could go the practice had been in the case of more than one conviction at the same time to make the sentence for the second offence commence at the expiration of the first sentence awarded.

In the case now under consideration there were two separate offences committed on two distinct occasions before two distinct tribunals at two different

times in two different proceedings; so distinct, indeed, that but for the provision of the statute (19) creating the Central Criminal Court, they could not have been tried together, inasmuch as the venues were distinct. The offences then being distinct and separate, it was open to the Crown to charge them in separate counts or separate indictments. As the accused cannot be prejudiced by either course it makes no difference whether a grand jury presents different charges in several counts of one indictment or in several indictments, and, strictly speaking, the whole finding of the grand jury from first to last constitutes but one indictment against all the persons who have committed the felonies therein presented—per Pollock, C.B., in *The Queen v. Heywood* (20).

Benjamin, in reply.—It is clear that the statute under discussion in *The Queen v. Outbush* (18) applies only to a person already in prison undergoing sentence for an offence, and not to an accused charged with two offences in one indictment. If the plaintiff in error had been tried in two different Courts on the same day, such a sentence could not have been given, and yet the Courts all have the same power. *The King v. Robinson* (8) is not an authority against the defendant, for that case was decided under a statute which gave a special sentence for repetition of the offence, and the sentence suggested did not exceed in length the sentence so affixed to such a repetition; so that it is an authority in favour of the maximum punishment being the limit,

JAMES, L.J.—It seems to me that in this case the writ of error has been improvidently issued, except as to one point, which is alleged to be governed by a case decided in the United States. The case for the Crown is established by the practice of the Courts, and by the current of authority. It has not been really questioned at the bar that the practice has been to join several counts in one indictment and to put together upon one piece of parchment several charges, upon which

(15) 1 Moo. C.C. 234.

(16) 15 Q.B. Rep. 974; 19 Law J. Rep. Q.B. 366.

(17) 1 L. C.C. 529.

(18) 36 Law J. Rep. M.C. 70; Law Rep. 2 Q.B. 379, at p. 381.

(19) 4 & 5 Will. 4. c. 36.

(20) L. & C. 451, at p. 458; 33 Law J. Rep. M.C. 183.

The Queen v. Castro (App.), Q.B.

men might at one and the same time be tried and convicted. In cases of felony, which, with the exception of those to which benefit of clergy was attached, were almost all capital offences, it was thought right that an accused man should not be tried upon more than one charge at a time. No such practice has prevailed with regard to misdemeanours; but if the presiding Judge saw that the accused might be embarrassed by the number of charges, no doubt he would have compelled the prosecuting counsel to elect upon which charge he would proceed; but the exercise of his discretion upon this point never could be reviewed by writ of error. It being the law that a man might be tried at the same time upon several charges contained in several counts of that same indictment, to my mind no valid reason can be given for drawing a distinction between a trial and conviction upon an indictment charging several misdemeanours and separate trials and convictions upon separate indictments. In the case of *The King v. Wilkes* (12) it was certainly settled by a decision of the House of Lords that for several misdemeanours the subject of distinct informations or indictments, one tried after the other, one sentence of imprisonment might be passed to take effect after the expiration of the other. This rule has been acted on ever since. No Judge, no writer, has ever expressed an opinion in England that this practice was inconsistent with the common law of England. It is too late now, after the lapse of a century, to attempt to dispute in this country the propriety of that decision, especially when it has been adopted and acted upon in hundreds, perhaps thousands, of cases since that time. That this was the general rule of law in England does not seem to have been questioned in the case decided in the United States, upon the authority of which the former Attorney-General was induced to grant his fiat for a writ of error in the case before us; but it has been argued that that case has introduced an exception, or rather a restriction, upon this general rule. In the case decided in the United States it is laid down that in misdemeanours the law does not permit

cumulative sentences to be imposed upon conviction for several distinct offences charged in different counts of a single indictment, in the aggregate exceeding the punishment prescribed by law as the extreme limit of punishment for a single misdemeanour. That was the rule laid down by the American Court. It has been in effect conceded that no principle of this kind has been laid down in any case to be found in the English reports, no doctrine of this kind is contained in any treatise on the English criminal law. I think that it must also be conceded—at all events it is to be inferred from what took place in that case itself—that no doctrine of that kind has ever been laid down in any case decided in any of the several states of the United States, which have adopted the English common law as their guide. Are we to follow that Court and to say that it has laid down a proper restriction upon that principle, which up to the time of its decision had always been stated without any restriction or qualification? I have always felt, and I have always spoken with, the most unfeigned respect for the many decisions of the Courts of America which have dealt with matters and principles of law common to their jurisdiction and ours; but I am bound to say that I am startled by the mode in which the Judges dealt with the case which has been cited, both with reference to the authorities and with reference to legal principles. The *ratio decidendi* adopted by the Judges was in substance this: "It is true that no qualification of that kind has ever been laid down in the English Courts or by the English authorities, but then the contrary has never been laid down or even contended for; and we have to look at what the common law of England was in 1775, and we cannot accept anything that has been said or done since 1775 by any Court in England, which is inconsistent with the practice prevailing in the Courts of this State of New York." That is the ground upon which the Judges proceeded, and which they thought sufficient to enable them to get rid of the decision of the Court of Queen's Bench in the case before us. That Court has the highest criminal jurisdiction in England. The

The Queen v. Castro (App.), Q.B.

decision was cited to the Judges of the State of New York, but they passed it by as a decision not binding upon them, and treated it as deserving only a passing reference. I cannot help thinking that a decision of that kind pronounced in the State of New York is not in any way binding on us. In the first place, it was the decision of Judges overruling the decision of other Judges, the former being Judges of the Court of Appeal and the latter being Judges of the Supreme Court. We cannot measure the weight which ought to be attached respectively to the judgment of the Supreme Court and of the Court of Appeal. To us the judgments of Courts in the United States are merely what our decisions have been to them. To us they are merely the opinions of eminent and learned men on a question of law, which is common to them and to us. Eminent Judges have given their opinion one way, and other eminent Judges have given their opinion another way; but with regard to the eminent Judges of the Court of Appeal who decided *Tweed's Case* (13), they lay down that which is contrary to what has been laid down in the English Courts. What is the principle pursuant to which this limitation or qualification of the general rule is introduced? I am unable to understand the principle suggested, and it is to my mind startling, if not shocking. The principle suggested seems to be this, that if a man commits a misdemeanour of so grave a character that the full sentence of the law would be inadequate, he is not to be tried and punished for any other misdemeanour which he may have committed, until after the expiration of his sentence upon the indictment upon which he has been convicted. The inconvenience of this course is obvious. If the trials for the other misdemeanours be postponed until after the expiration of his sentence, he gets the chance of escape from failure of evidence which the lapse of time always brings about. To my mind this proposition is startling, and no authority for it is to be found in the English law. A great deal of the judgments in the Court of Appeal in *Tweed's Case* (13) proceeded upon what is inconsistent with

VOL. 49.—Q.B., C.P. & EXCH.

our law. The Judges came to the conclusion that it was improper and unjust that a man should be tried for more than one misdemeanour in one indictment, and that seems to have been the governing motive of their decision. These reasons will dispose of the chief point urged in this case.

I do not forget to notice another point which has been urged before us, namely, that the sentence is bad because it did not begin with an additional punishment: in other words, that the sentence is bad because the statute 2 George 2. c. 25. s. 2, directs that the sentence of seven years' imprisonment or transportation (for which penal servitude is now substituted) is to be passed in addition to any punishment which at the time of passing the statute might be inflicted under the laws then in force. According to this argument the judgment in the Court of Queen's Bench is bad, because, in addition to the sentence of seven years' penal servitude, the accused man has not been sentenced to be fined one shilling or imprisoned for one hour. The practice observed by criminal Courts as to this point has been, that Judges have considered themselves at liberty either to pass or not to pass the additional sentence; the statute has been construed to be permissive, and not compulsory upon criminal Courts. If no other punishment than seven years' penal servitude is passed, no harm or injustice is done to the prisoner, and no reason can be suggested why there should be a nominal fine of one shilling or a nominal imprisonment of an hour or a day for the purpose of making valid the sentence of penal servitude actually pronounced. These considerations effectually dispose of the objection which I have just been dealing with. It is unnecessary, therefore, to rely upon the statutory provision, which would make the objection futile: I allude to the power which this Court has of correcting any technical slip in the judgment, and of passing a sentence which will be valid in point of law (21).

It was further argued, that in truth and in substance the perjuries charged

(21) See 11 & 12 Vict. c. 78. s. 5.

The Queen v. Castro (App.), Q.B.

in the two counts constituted but one offence, and that the sentence of fourteen years' penal servitude was awarded for that which was really one perjury. In support of this proposition it was contended that there was one fraud and one imposture, by which the plaintiff in error endeavoured to pass himself off as some other person with the view of obtaining certain lands, and therefore that any number of false statements made on any number of occasions in any number of suits constituted only one perjury, and that one perjury alone could form the subject of a legal sentence. To my mind it is only necessary to state the proposition in order to dispose of it. It is simply monstrous to suppose that the law allows a man to be punished only once for any number of perjuries which he may commit, merely because they are committed in furtherance of one fraudulent scheme and design. There is no substance in the objection. On the face of this record there is nothing which alleges, nothing from which it can be inferred, that the perjuries were committed in the prosecution of one and the same fraudulent scheme. A modified form of this objection was that the alleged perjuries were committed in only one suit, but it is quite obvious that they were committed in two distinct suits; the one suit was brought in the Court of Chancery for one specific object, although it might be ancillary to the action at common law, and in that suit one set of false statements was uttered in violation of an oath taken in the course of it; the other set of false statements was uttered in another place, at another time, in violation of an oath taken before another tribunal, namely, the Court of Common Pleas, during the trial of an action of ejectment. It is perfectly idle to suggest that these two sets of false statements constituted but one and the same perjury, or that there is no legal power to pass more than one sentence for those distinct perjuries.

These are all the objections really urged before us. In my opinion there is no weight in any of them. The sentence of fourteen years' penal servitude was warranted by law: we have nothing to do with its length; that was for the exercise

of the discretion of the Court of Queen's Bench. No error has been shewn to exist upon this record.

BRAMWELL, L.J.—I have very great doubt whether I ought to occupy further time by expressing any opinion upon this case. I am quite certain that the writ of error was not allowed to issue without a due degree of care and caution on the part of the former Attorney-General. I think that he was warranted in allowing it to issue by the American case which has been cited, but now that it is before us, I think it one of the plainest cases that have ever come before a Court of justice.

The first point made on behalf of the plaintiff in error, as I understand it, was, that if a man brings a suit, or several suits, with a view to establish a certain proposition which will entitle him to certain property, although he may tell an infinite number of untruths upon his solemn oath or upon more than one solemn oath, at a distance of time from each other, and varied in form as much as they can be, he commits but one perjury, because the substance of his statement is this: "I am the person entitled to that estate;" and, therefore, that if he says at one time, under one oath, "I seduced a particular woman," it really only means, "I am the person entitled to that estate," and is a mere modification of the same statement and a varied way of putting it; and that, if he afterwards says, "I was placed at a particular school," that, again, merely means, "I am the person entitled to the estate," and is a mere modification of the mode of stating the proposition. I really should have thought it impossible that such an argument as that could be presented in a Court of justice. The counsel for the plaintiff in error were driven to admit that, according to their argument, if a man were indicted and convicted of having made a false statement upon oath, he would have power to make with impunity as many false statements with reference to the same subject-matter as he pleased. It is enough to state the proposition to perceive that it cannot be true. It was argued that it would be monstrous that a man should be punished twice for what was practically

The Queen v. Castro (App.), Q.B.

one perjury. To my mind it would be monstrous if he could not be punished twice. On the contrary, I think that if, unwarned by the first prosecution, he persisted in the crime of perjury by telling fresh untruths, not only ought he to be punished again, but he ought to be punished more than he was upon the first occasion. I can understand that if a witness at the beginning of an examination said, "I am A. B.," and at the end repeated the words, there might be injustice in saying that he had committed two perjuries: possibly it might be also unjust to charge him with two perjuries, if he had merely repeated the statement at some interval of time. But suppose that a witness were to say falsely, with the view of proving an *alibi*, "I saw the prisoner upon a certain occasion," and suppose that he afterwards were to say upon his oath that he had not been convicted of felony, when in truth he had been so convicted, I see no reason why he should not be punished twice for the two distinct false matters to which he pledged his solemn oath. I need not say more upon this point: the argument is wholly unsustainable which has been addressed to us upon behalf of the plaintiff in error.

The next point urged before us was that since the statute 2 Geo. 2. c. 25. s. 2, as varied by subsequent legislation, says that a person guilty of perjury may be sentenced to seven years' penal servitude, he cannot have further punishment awarded to him for additional perjuries. As I understand the argument, it is founded upon the language of the statute, which, after containing the provision which I have mentioned, does not go on to say that if he commits perjury again he shall be again subject to punishment. Such an argument might be used with regard to almost every crime, the punishment of which is regulated by statute. What was meant by 2 Geo. 2. c. 25. s. 2, was that for every time a person commits perjury, he shall be subject to the punishment therein provided. I cannot help regretting that such an argument should have been addressed to us.

The next point I understand to be this: the plaintiff in error has been sentenced to seven years' penal servitude upon each

count; but he ought in addition to that to have been sentenced to some amount of fine and imprisonment. I very much doubt whether he has any right to make such a complaint as that upon error, even if the objection were sustainable when urged upon behalf of the Crown. He cannot say that any wrong has been done to him. The utmost that he can say is that he has not had sufficient punishment awarded to him, and I very much doubt whether error will lie at the suit of the person indicted under these circumstances. Suppose that a statute were to enact that a person guilty of a particular offence should be fined and imprisoned, and suppose that a person convicted of that offence were to be sentenced to imprisonment, but that no fine were to be awarded: I very much doubt whether the offender could complain that he had not been fined a shilling; it, however, seems to me unnecessary to decide this point, because upon the true construction of 2 Geo. 2. c. 25. s. 2, it was not imperative that any fine or imprisonment should be inflicted. The statute uses the words, "over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being:" these words seem to me to indicate that the Court need not pass any other sentence than that prescribed by the statute. But there is another argument, which to my mind is conclusive. The counsel for the plaintiff in error were compelled to admit that an hour's imprisonment and the fine of one shilling would have satisfied the statute; is it conceivable that the statute has rendered it necessary to inflict such a punishment as that? I cannot think so. I am satisfied that there is no weight in the objection which I am considering, although it is not so hopeless as those which I have already noticed.

Whether it would be lawful to pass a sentence on a person not already under sentence to commence on a future day, need not be discussed: I am not prepared to say it would not be; I incline to think it would. But unless for some sufficient reason it would, in my opinion, be unreasonable, and what I suppose may be called unconstitutional. But where there is a necessity for a deferred sentence,

The Queen v. Castro (App.), Q.B.

there must be a power to pronounce it. In my opinion there is such a necessity, when the prisoner is already under sentence or has to receive two sentences for offences, and concurrent sentences would not be adequate.

With these prefatory remarks I come to that matter which no doubt formed the chief reason why this writ of error was allowed to issue, and that is, that there can be no cumulative punishments to the full extent allowed by law for one offence, where two offences are joined in two different counts of the same indictment. The effect of the objection is that, although the counts may and, as in the present case, do, charge different offences, yet the person indicted cannot upon conviction be sentenced upon one count to a punishment of the full duration allowed by law, and upon another count to a like punishment for a second term beginning at the expiration of the first term. This proposition seems to me very remarkable. It is certain that in the case of separate indictments for felony it is lawful by 7 & 8 Geo. 4. c. 28. s. 10, to pass a sentence of imprisonment or penal servitude to commence at the expiration of a previous sentence, and it is clear from numerous authorities, the chief of which is *The King v. Wilkes* (12), (I need not go through them), that the same course may be taken in cases of misdemeanour; no authority to the contrary can be produced either from the *dicta* of Judges or from the text-books of writers upon law. The proposition has been stated by the counsel for the plaintiff in error somewhat in this shape: there may be different punishments upon two different counts, one of them commencing upon the expiration of the other, provided the two together do not exceed the maximum which the law would allow for each offence in each of the counts; for instance, in the present case there might be a sentence of five years' penal servitude on the first count of the indictment, and a sentence of five years' penal servitude on the second count to commence from the expiration of the second year of the first period of punishment, because that will make the term of seven years altogether, the maximum term of penal servitude allowed by

law upon an indictment for perjury containing one count. By the provisions of Magna Charta and the Bill of Rights, Judges are restrained from giving inordinate punishments; but as the common law has not drawn a limit to the punishment which may be inflicted for a misdemeanour, even according to the proposition urged before us, no difficulty arises as to a conviction upon an indictment for misdemeanour at common law; the defendant might be sentenced at common law to seven years' imprisonment and a fine upon the first count, and to seven years' imprisonment with or without a fine upon the second count, to commence at the expiration of the sentence upon the first count. But it is urged that when a statute has prescribed a punishment for an offence, it draws a hard and fast line which cannot be transgressed within the limits of one indictment. It has been in effect contended that inasmuch as a statute prescribes seven years' penal servitude as the maximum amount of punishment which may be awarded, although there may be twenty counts for twenty distinct offences each deserving seven years' penal servitude, yet the total punishment must not exceed seven years' penal servitude. In support of that proposition has been quoted a case decided in the Court of Appeal in New York; a great many authorities from the English Courts were cited in the course of it; but I think it manifest that the Judges who decided it did not understand the practice followed in England of quashing indictments, which are right on the record, which present no ground for error, but which it is right for the Judge in the exercise of his discretion to quash as a matter of fair dealing towards the defendant; and probably the Judges of the Supreme Court whose decision was reversed were as learned and entitled to as much consideration as the Judges of the Court of Appeal; but, however that may be, with the exception of that case there is not a shadow of authority for the proposition, and no reason can be given why it should be adopted. Let me point out to what consequences it leads. I will begin by premising that if two offences committed on totally different occasions are joined in the

The Queen v. Castro (App.), Q.B.

same indictment, the presiding Judge would probably order it to be quashed; for instance, if a person were charged in one count with having committed perjury in an action upon a bill of exchange brought against him by A., and in another count with having committed perjury in an action brought against him by B., the probability is that the Judge would not permit those charges to be joined, but would either quash the indictment or put the prosecutor to his election. But I will suppose a case like the present where the perjuries, although committed upon different occasions, relate to the same subject-matter, and I will suppose that each of the offences is deserving of seven years' penal servitude. Is the Crown to prosecute for one offence, and after the defendant has been convicted to wait for seven years before it prosecutes for the other? This, however, is the preposterous result of the argument for the plaintiff in error. Or is the Crown to prosecute upon two separate indictments? And if it does, what is to happen then? Is judgment to be respite upon the second indictment until the first period of imprisonment is over? Surely the Crown ought to do what is reasonable and consistent, what it has done in the present case, namely, when two offences of the same character are alleged to have been committed, to join them in separate counts of the same indictment; and it cannot be said that the defendant, if convicted, ought to receive the punishment for one offence only. I am of opinion that no reason in law can be assigned why the plaintiff in error should receive punishment for only one act of perjury; the authorities are entirely opposed to a proposition of that kind, and therefore I think that the judgment of the Court below must be affirmed.

BRETT, L.J.—I have listened very attentively to the argument which has been addressed to us on behalf of the plaintiff in error; but it has failed to produce any effect upon my mind.

Two objections to the judgment have been chiefly relied upon in the present case; one of these, if it had been well-founded, would have been fatal, even

although there had been only one sentence of seven years' penal servitude; the other objection only arises because two terms of seven years' penal servitude were passed; nevertheless, if it had been valid, it would have existed from the moment when the sentence was passed. I cannot help remarking as to both these objections that, notwithstanding all the attention which has been naturally attracted to this case, they are now brought forward as having existed from the time when the sentence was passed; nevertheless they do not appear to have presented themselves to the mind of any person until several years had elapsed since judgment was pronounced. It seems to me that this circumstance shews that the opinion of the legal profession was wholly against both these objections. However, as they are now brought forward, they must be dealt with and disposed of.

As to the first objection which I have mentioned, it is urged that even although there had been only one sentence of seven years' penal servitude, it could not have been sustained in error, because it was not preceded by a nominal sentence of fine and imprisonment. As has been pointed out, it is an objection of no consequence, for we have power to amend it by passing a proper sentence (21). The objection, therefore, is merely formal; nevertheless I think it important that we should give our opinion upon the true construction of 2 Geo. 2. c. 25. s. 2. I am of opinion that that section is an enabling enactment and gives to the presiding Judge power either to add transportation to the sentence which might be passed according to the laws then in force or to give a sentence of penal servitude in substitution for it. The proper construction of the words at the beginning of section 2 of 2 Geo. 2. c. 25, seems to me to point to this conclusion; but reliance has been placed upon the words, "and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being;" if the words had been "besides such punishment as was formerly inflicted" possibly

The Queen v. Castro (App.), Q.B.

the argument on behalf of the plaintiff in error might have prevailed; but the words actually used seem to me to be a strong indication that the argument is not correct; the true view is that the presiding Judge may award any punishment previously allowed, and may also give the punishment allowed by the statute in addition; if he does not award any punishment previously allowed by law, he may give the statutory punishment in substitution for it. It is obvious to my mind that the presiding Judge has power to give imprisonment under the previously existing law, and to add to it penal servitude under this statute; but that does not shew that he is obliged to add the one to the other, or that he may not give one in substitution for the other. Our construction of the section is that it is an enabling enactment, and that it does not oblige the presiding Judge to add one punishment to the other.

I come now to the objection upon which the greatest stress was laid. In order to support it, the counsel of the plaintiff in error argued that in the present case there were not in reality two offences, but only one. It is not necessary to consider whether there could be two perjuries at one trial upon one oath; for in the case before us there were separate perjuries in respect of two oaths taken before different tribunals, and it seems impossible to shew that they were not separate perjuries. I have no doubt that the plaintiff in error committed two distinct and separate offences. It was further urged that as the two offences were joined in one indictment, they for that reason ought to be treated as one offence, although there are separate counts; and it was suggested that although distinct punishments might be given upon separate indictments, yet this could not be done where there was one indictment with separate counts. This was in effect to suggest that separate counts charging separate offences in one indictment are not equivalent to separate indictments. For a very long period of time it has been again and again decided in England that where separate offences are charged in different counts of the same indictment, the legal result is the same as if they had been charged in

separate indictments. It was said that counts alleging separate offences could not be joined in indictments for felony; but in point of law they may be joined, and it is no objection upon a writ of error that two felonies are charged in the same indictment. The only question is for the discretion of the Court, whether the presiding Judge would quash the indictment, or at least would put the prosecutor to his election as to which of the felonies he would proceed upon. It was further urged that the punishment could not be considered to have been inflicted pursuant to 2 Geo. 2. c. 25. s. 2, because the counts did not at the end thereof charge that the offences were committed *contra formam statuti*; but apart from legislative provisions (22), that seems to be an invalid point, because the punishment is no part of the indictment, which contains nothing but the allegation that the offence has been committed; and if the offence had been created by statute, the conclusion *contra formam statuti* must formerly have been inserted, but otherwise it need not. We therefore come to the question whether, in an indictment for misdemeanour containing two offences, the commencement of the punishment for one of them can be postponed until the punishment of the other is ended. I confess that this seems to me to have been decided by an authority which we have no right to question, that is, by the House of Lords. The counsel for the plaintiff in error naturally attempted to get rid of the force of the answer by the Judges in the House of Lords by referring to the circumstances under which *The King v. Wilkes* (12) was decided. But when the Judges were consulted by the House of Lords, they were asked an abstract question; and the question which they were asked was, whether a sentence of imprisonment, to commence from and after the termination of an imprisonment to which he had been before sentenced for another offence, was good in law. It is to be observed that the answer has no reference as to whether the sentences were passed for offences charged in one

(22) 14 & 15 Vict. c. 100. s. 24, provides that no indictment shall be held insufficient "for want of a proper or formal conclusion."

The Queen v. Castro (App.), Q.B.

indictment or in separate indictments. The question was general in its terms, and the Judges answered the question put by the House of Lords in the very words in which it was asked, and that answer was that a judgment of imprisonment against a defendant may commence from and after the determination of an imprisonment to which he was before sentenced for another offence. Ever since that answer was given in the House of Lords, it has been taken to be an exposition of the law with respect to misdemeanours, and it is wholly irrespective of the consideration whether the offences were charged in one indictment or in two. As to the practice which has been followed since *The King v. Wilkes* (12), I may refer to *The King v. Rhenwick Williams* (17), where the prisoner was convicted upon three indictments, and the operation of the sentences upon two of them was postponed. I may remark that the expression "cumulative punishments" seems to me incorrect. It is true that in *The King v. Wilkes* (12), from the form in which the question was put to the Judges, and from the manner in which it was answered, the Judges appear to confine the possibility of postponing a sentence to instances where other sentences are already in existence at the time when the deferred sentence is passed, and they seem to have held that if no sentence exists to which another can be postponed, it is not lawful in England to sentence a person to a term of imprisonment to commence at a subsequent time. They appear to have thought that the postponed sentence must take effect before the defendant is totally dismissed from the power of the Court—*Wilkes v. The King* (23). I do not know whether this limitation is correct, if indeed it was really intended to be laid down; and it is unnecessary now to consider it, inasmuch as the question is immaterial to the present case. Besides *The King v. Rhenwick Williams* (17), other cases are to be found in which the principle laid down in *The King v. Wilkes* (12) has been carried out; I may mention *Gregory v. The Queen* (16), which is a remarkable

case, and *The King v. Robinson* (8). Therefore several authorities exist shewing that deferred sentences can be passed, whether there are separate indictments, or whether there is only one indictment containing several counts.

But it has been argued on behalf of the plaintiff in error that, even if deferred sentences can be passed upon different counts of the same indictment for a misdemeanour, they must not exceed the punishment allowed by law for one offence. By 7 & 8 Geo. 4. c. 28. s. 10, power is given to pass a postponed sentence for felony, and it is expressly provided that the aggregate term of imprisonment or transportation may exceed the term for which either of those punishments could otherwise be awarded. It has been contended that because that enactment was requisite with respect to felonies, the proper inference was that the power to pass sentences upon one indictment exceeding the term of punishment allowed for one offence did not in misdemeanour exist at common law. I cannot agree that this is the inference which ought to be drawn. It is to be recollected that 7 & 8 Geo. 4. c. 28. s. 10 was passed long after the answer of the Judges was given in *The King v. Wilkes* (12), and I draw the inference that misdemeanours were not dealt with by statute, because the Legislature was of opinion that as to them the requisite power already existed, and that the enactment was passed because doubts had been felt as to the power to pass deferred sentences in cases of felony. And the fact of 7 & 8 Geo. 4. c. 28. s. 10 having been passed is really an argument against the plaintiff in error upon referring to the remark made by Mr. Justice Blackburn, during the argument in *The Queen v. Outbush* (18); the learned Judge there says that the statute was passed in order to put the law upon the same footing with regard to felonies as it was with regard to misdemeanours. The enactment cannot be limited to a case where the person convicted of felony is already in prison under a sentence; in order to put the enactment into operation, it is not requisite that he should have been already confined in a gaol pursuant to the order

(23) Wil. Opin. 384.

The Queen v. Castro (App.), Q.B.

of a Court; for immediately that a person has received a sentence, he is in prison under that sentence. The date for the commencement of the imprisonment of a person convicted at the assizes is usually a day or two, or perhaps more, before the day when the sentence is actually pronounced; and the real meaning of 7 & 8 Geo. 4. c. 28. s. 10 is that with regard to felonies a sentence may be postponed for one offence until after the completion of a sentence for another, although the aggregate term of imprisonment may exceed the term for which either of those punishments may be awarded. There is, therefore, a great amount of authority to shew that the Legislature merely intended to put the law upon the same footing with regard to felonies as it already was with regard to misdemeanours.

I must notice the circumstance that the Legislature has thought fit to enact that three charges of certain kinds of felony, such as larceny and embezzlement (24 & 25 Vict. c. 96. ss. 5, 71), may be included in the same indictment; and this has been relied upon as shewing that at common law separate offences cannot be joined together; but I think that a satisfactory answer may be given to this argument, namely, that the statutory provisions alluded to relate wholly to procedure and do not extend to punishments; they merely take away the power of quashing the indictment or of putting the prosecutor to his election, and they have no greater effect.

Our view has been attempted to be met by *The People ex relatione Tweed v. Liscomb* (13). I need hardly say that I am always anxious to hear if there be any American decisions bearing upon the question before me, not because they are binding authorities upon me, but in order that I may get the very great assistance which I have over and over again derived from the decisions of accomplished Judges who are dealing with what is very much the same law as our own; I have therefore endeavoured to ascertain what were the reasons upon which the decision was founded. The proposition relied upon seems to be this: where one of two sentences of imprisonment is ordered to commence at the termination of the

other, the two terms of imprisonment taken together shall not exceed the extreme limit of punishment for one offence. It sounds a strange proposition when it is enunciated. It derives no assistance from 2 Geo. 2. c. 25. s. 2, because that statute provides that any person convicted of perjury may be sentenced to seven years' penal servitude; the words "convicted of wilful and corrupt perjury" are used, and surely they must mean "convicted of a wilful and corrupt perjury;" and it follows from this that if there be two perjuries, a sentence of penal servitude can be awarded in respect of each of them. I have examined the judgments in *The People ex relatione Tweed v. Liscomb* (13), and I cannot find any valid reason either in form or in substance suggested for the determination at which the Judges arrived. Therefore I cannot treat this case as a guide in coming to a conclusion in the case before us. In favour of the argument for the Crown upon this point authority of English Judges may be found. All English lawyers know that the opinion of Mr. Justice Patteson ought to be treated with the highest respect, and the irresistible inference from what he said in *O'Connell v. The Queen* (24) is that in his opinion where one sentence is postponed to another it is no objection that the two sentences taken together exceed the whole punishment which might be awarded for one offence. To my mind *The King v. Robinson* (8) is a clear authority. The indictment contained two counts for passing false coin, and the defendant was sentenced to two years' imprisonment; the Judges held that this sentence was wrong, but they stated that a sentence of one year's imprisonment might have been passed for each offence, and that the commencement of the second might be postponed until the termination of the first. It is true that this statement was not, technically, part of the decision; but it is hard to conceive a more deliberate judicial opinion. I will again mention the opinion of Mr. Justice Blackburn, in *The Queen v. Cutbush* (18); it seems to me a strong authority to shew

The Queen v. Castro (App.), Q.B.

that in cases of misdemeanour the aggregate of separate punishment for separate offences may be greater than the punishment which would be inflicted for any one of them.

Therefore, notwithstanding the argument which has been addressed to us, it seems to me that on principle and authority this case is clear, and that the judgment of the Court of Queen's Bench was in law absolutely right.

Judgment affirmed.

Solicitors—Kimber, for plaintiff in error; Solicitor to the Treasury, for the Crown.

[IN THE QUEEN'S BENCH DIVISION.]

1880.	} SAUNDERS (appellant) v. THE	
May 28.		SOUTH EASTERN RAILWAY
July 5.		COMPANY (respondents).

Railway Company—By-Law, validity of—Refusal of Passenger to shew Ticket—Variable Penalty—Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 103, 108, 109.

The holder of a season ticket, entitling him to travel over parts of the lines of two railway companies, refused to shew his ticket to the collector of the first company, after having completed his journey on their line, and as he was leaving their station to go to the station of the second company. He had no fraudulent intention in so refusing.

The first company summoned him under a by-law, which was in these terms: "Every passenger shall shew and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorised servant of the company when required to do so for any purpose. Any passenger travelling without a ticket or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." He was convicted in the amount of the fare

from the place whence the train by which he had travelled had originally started.

On appeal against this conviction,—

Held, that the penal clause of the by-law was ultra vires and void on the ground that the penalty imposed by it was variable. Held, further (by COCKBURN, C.J.), that section 108 of the Railway Clauses Consolidation Act, 1845, did not empower the company to make regulations with respect to persons travelling by the company's own carriages, but that even if it did, the refusal to shew a ticket could not be constituted an offence unless accompanied by an intention to defraud, and such by-law must not be carried beyond the scope of section 103. Secondly, that the by-law, being made under the powers of the 109th section, was inapplicable to the present case, for the appellant was not when he refused to shew his ticket "travelling upon the railway." Held, further (by LUSH, J.), that the clause in the by-law requiring a passenger to "deliver up his ticket," without any limitation as to time or purpose, was also unreasonable and void.

This was a case stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43. He convicted the appellant, a season-ticket holder over the lines of the South Eastern and South Western Railway Companies for a breach of the by-laws of the former company, in refusing to shew his ticket at the junction station, where he was passing from the South Eastern to the South Western line. The detailed facts and the by-laws appear fully in the considered judgments of the Court.

H. Tindal Atkinson, for the appellant.—These by-laws are unreasonable and so void as against a person who is not acting fraudulently. The appellant here had a ticket, and was entitled to travel by the railway, and he cannot be condemned in a penalty, there being no fraud in his refusing to shew his ticket—*The London, Brighton and South Coast Railway Company v. Watson* (1).

Then the by-law is unreasonable, be-

(1) 47 Law J. Rep. C.P. 634; Law Rep. 3 C.P. D. 429.

Saunders v. South Eastern Rail. Co., Q.B.

cause it inflicts a varying penalty according to the distance the train may have come, although the offence is precisely the same. The magistrate has no discretion as to the penalty; if this by-law be good he must convict in the amount of the fare from the station from which the train originally started.

In *Chilton v. The Croydon Railway Company* (2) it was held that refusing to pay the whole fare was not an offence so as to justify an arrest.

Then here no specific sum was mentioned or demanded, and that was essential—*Brown v. The Great Eastern Railway Company* (3).

[COCKBURN, C.J.—The collector said that he must pay from Blackheath, and that as there was no power to stop him the amount could be ascertained before the magistrate.]

Cohen (Warr and Bremmer with him), for the respondents.—The case of *Brown v. The Great Eastern Railway Company* (3) is distinguishable, as substantially a demand was made here.

Then, next, it is quite reasonable that all persons getting out at the same station, who perversely refuse to shew their tickets, should be liable to the same fare. The penalty is the same at each station; and this is more reasonable than if a fixed sum were provided applicable to all stations. Then, too, the penalty is only incurred when a man refuses to produce the ticket which he has; and it is quite different from the case where a man, without intention to defraud, does not produce a ticket because he has not got one. In *Dearden v. Townsend* (4) the Court points out that such a by-law might apply properly to the case of a person having and wilfully refusing to produce or give up his ticket.

The offence here is not shewing the ticket, and it is one which the company are entitled to impose a penalty for by virtue of section 108 of 8 Vict. c. 20. And this case is not governed by section 109 at all. It is necessary for regulating

the travelling on the railway, and only reasonable for preventing fraud, that some such rule should be made by the company as this, which enables the collector at each station to demand a certain sum.

Atkinson replied.

Cur. adv. vult.

The following judgments were delivered on July 5:—

COCKBURN, C.J.—This is an appeal against the conviction of the appellant by a metropolitan police magistrate for breach of a by-law of the respondent company, which by-law is in these terms: "No passenger will be allowed to enter any carriage used on the railway unless furnished by the company with a ticket specifying the class of carriage, and the stations to or conveyance between which such ticket is issued. Every passenger shall shew and deliver up his ticket (whether a contract or season ticket or otherwise) to an authorised servant of the company, whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally started to the end of his journey."

The facts were as follows: The defendant is in the habit of travelling to and fro between London and Windsor. The journey is accomplished by means of two lines of railway—by that of the respondent company, from Cannon Street or Charing Cross, as far as the Waterloo Station of the South Western Railway Company, and from thence to Windsor on the line of the latter company. Joint tickets are issued by arrangement between the two companies, which enable the traveller to travel the whole distance without taking a second ticket. The defendant has been for some time the holder of a season ticket, enabling him thus to travel over both lines.

The carriages of the South Eastern Company do not run on to the line of the South Western. On arriving at the junction the passenger has to alight on and pass along a platform belonging to the South Eastern Company, and in doing

(2) 16 Mee. & W. 212; 16 Law J. Rep. Exch. 89.

(3) 46 Law J. Rep. M.C. 231; Law Rep. 2 Q.B. D. 400, 406.

(4) 35 Law J. Rep. M.C. 50; Law Rep. 1 Q.B. 10.

Saunders v. South Eastern Rail. Co., Q.B.

so has to pass a barrier at which the company have ticket collectors. The defendant had travelled from London by a train of the South Eastern Company which had started from Blackheath. On arriving at the barrier, for the purpose of passing on to the South Western Company's station he was called upon by the respondents' ticket collector to shew his ticket, but refused to do so. Thereupon the collector said he must charge him the fare from Blackheath; the collector did not, however, demand or mention any specific sum. The appellant refused to pay. The appellant has been convicted by the magistrate in the amount of the fare from Blackheath, and against this conviction he now appeals. In my opinion the conviction was wrong, and the appeal must prevail.

In the first place it was held by the Court in *Brown v. The Great Eastern Railway Company* (3) that under such a by-law as the present, assuming such by-law to be otherwise good, there must be a demand of the specific amount payable in respect of the penalty imposed by the by-law, which condition was not satisfied in the present instance. I have, however, considerable doubt whether that decision governs this case, as I gather from the facts stated that, upon the ticket collector informing the appellant that he should charge him the fare from Blackheath, the appellant at once stated that he should not pay it. This fact, which did not exist in the case of *Brown v. The Great Eastern Railway Company* (3), I am disposed to think sufficient to dispense with the necessity of a demand of the specific amount, which, under the circumstances, would have been useless.

But, passing by this point, I am of opinion, first, that the by-law is bad; secondly, that it was inapplicable, under the circumstances, to the case of the appellant.

As regards the validity of the by-law, I am strongly disposed to think that such a by-law was *ultra vires*. The power to make by-laws is given by the 108th section of the Railway Clauses Consolidation Act. This section empowers a railway company to make regulations for

regulating the use of the railway in certain specified instances; that is to say, for regulating the speed of trains, the times of arrival and departure, the loading and unloading of carriages, the receipt and delivery of goods and, as regards passengers and others, "for preventing the smoking of tobacco and the commission of any other nuisance in or upon such carriages, or in any of the stations or premises occupied by the company;" after which follows this more general term, "and generally for regulating the travelling upon or using or working of the railway." I am greatly disposed to think that this enactment has reference to what, at the time the Act was passed, was, as will be remembered, generally contemplated, namely, the use of the railway by other locomotives and carriages than those of the company constructing the line. I say so, because the first four specified purposes, in respect of which power to make regulations and by-laws is given by the section in question, are obviously purposes for which, when a railway company was working its own line, with its own carriages and servants, such power would be wholly unnecessary. A company would need no by-laws to enforce its own orders as to the rate of speed at which its carriages should travel, or the time of their departure and arrival, or as to their loading or unloading, or as to the receipt and delivery of goods conveyed by them. But they might well need such by-laws when their line was worked by persons not under their immediate order and control. The next purpose might, no doubt, apply either to persons travelling in the carriages of the company or in others. For not only had the case of any fraudulent travelling on the line been provided for by the 103rd and 104th sections, and assuming section 109 to be applicable to the case of persons travelling in the company's carriages, any misconduct on the part of such persons had been made capable of being dealt with under a by-law of the company by this very section, but the proviso which immediately follows shews that the words in question had reference to the use of the railway by others than the

Saunders v. South Eastern Rail. Co., Q.B.

company, the proviso being as follows: "But no such regulation shall authorise the closing of the railway, or prevent the passage of engines or carriages on the railway at reasonable times;" a proviso manifestly applicable to other locomotives or carriages, but inapplicable to persons travelling by the company's own train. And that this is so becomes more apparent from what follows after the enactment enabling the company to make by-laws to enforce its regulations by a penalty to the amount of five pounds; viz., that "if the infraction or non-observance of any such by-law or regulation as aforesaid be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, it shall be lawful for the company summarily to interfere, to obviate, or remove such danger, annoyance, or hindrance, without prejudice to any penalty incurred by the infraction of such by-law." All which, as it seems to me, clearly points to the use of the railway by others. I am therefore led to think that the power lastly given has no reference to the case of persons travelling by the company's own carriages.

Assuming, however, that the power thus given to make by-laws would enable the company to make a by-law applicable to passengers travelling in the company's carriages otherwise than as expressly mentioned in the 109th section, it again occurs to me to doubt whether the power must not be taken to apply only to cases *ejusdem generis* with those mentioned specifically in the section. I entertain considerable doubt whether it can involve a power to modify in so essential degree the contract between the company and a person whom they undertake to carry. The company have a perfect right to say that they will not undertake to carry, and therefore will not admit into their carriages, anyone who does not pay his fare beforehand and take a ticket; and, having made this the condition of the contract, they have the right to remove anyone from their carriages who has not provided himself with a ticket. And I am not prepared to say that a by-law, making it compulsory on a party so circumstanced—that is to say,

who has no ticket, or who, having a ticket, refuses to shew it, from which it may reasonably be presumed that he has none—to leave a company's carriage, under a penalty if he refuses to leave, would not be a reasonable by-law and within the power given in the Act. But it seems to me a very different thing to say that where a ticket has actually been taken and the fare paid, and so a contract has been entered into, a company can by a by-law superadd to the contract the important modification that the traveller shall be subject to a penalty if he fails to produce the ticket whenever called upon. If it had been intended to give the company the power of thus modifying the contract in so essential a particular, I should have expected to find it expressly given, either as an appendage to the 103rd section or as part of the 109th.

But there are far more urgent grounds for holding this by-law to be bad. It is found expressly in the case that "the appellant, in refusing to shew his ticket, had no intention to defraud, and did not in any way defraud, the South Eastern Railway Company." In *Dearden v. Townsend* (4) this Court intimated a very clear opinion that such a by-law as the present could not apply to the case of a person travelling on a railway beyond the distance for which he had taken his ticket and paid the fare, where there was no intention to defraud. And the point was expressly decided to that effect in *The London, Brighton and South Coast Railway Company v. Watson* (1). I am perfectly satisfied of the soundness of this construction of the statute.

The principle of these decisions, namely, that the by-law would be bad if in excess of the 103rd section of the 8 Vict. c. 20, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare, appears to me to apply, *a fortiori*, to the case of a person who has paid his proper fare, and is travelling with his ticket in his pocket. If the man who is travelling without having paid his fare, and who consequently has no ticket, is not within the by-law, where the element of fraud required by the statute is wanting, the man who has

Saunders v. South Eastern Rail. Co., Q.B.

paid his fare and got his ticket can surely be in no worse a position. It may no doubt be said that it is not for travelling without having paid his fare that the appellant has been convicted under the by-law, but for having refused to shew his ticket when properly called upon to do so. But when the by-law is looked at—as I think it should be looked at—as a whole, it seems plain that its main and primary purpose is to prevent persons from travelling on the railway in fraud of the company, without paying the necessary fare, and that the obligation to show the ticket when required is subsidiary only to such primary purpose. Indeed, if this were otherwise, and the exhibition of the ticket were not made subsidiary to the prevention of the fraudulent purpose of travelling without paying the fare, this remarkable consequence would follow in the case of such attempted fraud, namely, that in addition to the penalty fixed by the statute, a penalty of forty shillings, and which must have been intended to be the maximum of punishment, the offender might be subjected to the additional penalty established by the by-law—and this to the extent of an additional five pounds, that being the amount to which the penalty can be carried by the by-law under section 109—a result which cannot have been contemplated by the statute.

It seems to me to follow that, with reference to the exhibition of the ticket, as well as to the travelling without one, the by-law must not be carried beyond the scope of the 103rd section.

Even when confined within these limits, such a by-law, if otherwise within the power to make by-laws given by the statute, will not be without its use. The want of a ticket affords *prima facie* evidence of fraud, and entitles the company to put the traveller to the proof of the absence of a fraudulent intention. The refusal to produce a ticket leads in a like manner *prima facie* to the inference that the party has none, and consequently to the inference of fraud. To this extent a by-law, if not otherwise open to objection, would be reasonable as subsidiary to the 103rd section of the Act by affording the company *prima facie* evidence of fraud, and so enabling them to proceed

against the offender for the penalty under the statute, independently of any civil proceeding to recover the amount of the fare. But, otherwise than as subsidiary to the 103rd section, the by-law would appear to me to be beyond the power of making by-laws conferred on the company.

It was unnecessary in *Dearden v. Townsend* (4) to decide on the validity of the by-law in this respect, nor did the decision involve it. It was sufficient to hold that the case did not come within the by-law, as the by-law imposed a penalty on the party refusing to produce a ticket; it was enough to say that a person not having a ticket, and therefore being unable to produce one, could not be said to refuse to do so.

Let us assume, however, that to make a by-law imposing a penalty on a traveller for not shewing his ticket when he has one, would be within the competency of the company: we have still to consider whether this by-law is in itself reasonable.

Now it is settled law, not only that it is essential to the validity of a by-law that it be reasonable (*Com. Dig. By-law, C. 6*), but also that, “a by-law being entire, if it be unreasonable in any particular, shall be void for the whole” (*Com. Dig. By-law, C. 7*)—of which Comyns gives as an instance—“as if the penalty be unreasonable.”

Here the penalty, that of paying the fare from the station from which the train originally started, cannot under certain circumstances be otherwise than unreasonable. For where crimes are the same and the criminality equal, equality of punishment is of the essence of penal legislation and justice. Here the offence being the same, and the criminality equal, whether the offence occurs at one end of the line or the other, the degree of punishment is made to depend on whether the offence has been committed at the one end or the other, its severity increasing as we advance towards the terminus *ad quem*. To illustrate this position, let us suppose a line of sixty miles in length, with stations at every ten miles. The man who, having travelled to the station next to that from which the train started,

Saunders v. South Eastern Rail. Co., Q.B.

refuses to produce his ticket, will have to pay the precise fare for the distance he has travelled, in other words, will not have to pay any penalty at all. The man who does the corresponding thing at the further end of the line—that is to say, who travels the last ten miles of the distance, and then fails to produce his ticket—has to pay, in addition to the proper fare for the distance he has travelled, the fare due to the fifty miles over which he has not travelled, as a penalty; while as we have just seen, the offender at the other end of the line pays no penalty at all. And the same thing occurs—though of course the disproportion is not so striking—in all the other instances which may happen, according to whether the offence was committed nearer to or farther from the terminus *a quo*. The injustice arising from a law operating thus unequally, and so much more heavily when the offence has been committed at the one end of the line than when it occurs at the other, is too manifest to admit of such a by-law being held to be reasonable.

It is not a sufficient answer to say that it is “reasonable that facility should be thus afforded to the company to protect themselves against persons travelling without having taken tickets, it being in most instances impossible for the company or their officers to know how far a person may have travelled.” Facility is not to be afforded to a prosecutor, or his convenience consulted, at the expense of injustice committed in the inequality of punishment. Besides which, the company may to a great extent protect itself by greater care in seeing that no person is admitted into their carriages without shewing a ticket.

But even if we could hold the by-law to be valid, it does not appear to me to be applicable to the case of the appellant.

The power given to the company by the 109th section of the Act is to make by-laws, to be enforced by penalties, for regulating, *inter alia*, “the travelling upon the railway;” and it is under this power that the by-law in question is made. But not only must such a power, being in derogation of common right, be construed strictly, but the whole enactment appears to me to point to travel-

ling upon the railway in the actual meaning of the term. Now here the appellant, when he refused to shew his ticket, cannot be said to have been “travelling upon the railway” in point of fact; nor do I think he can be said to have been even constructively travelling upon it. He had entirely left the carriages of the South Eastern Company. He was quitting their station. That the stations of the two companies happen to be more or less contiguous is an accident; they might be some distance apart; as it is, it takes some minutes to pass through the passages which extend from one platform to another. It seems to me impossible to say that a person traversing this distance in order to pass on to a different line of railway is still travelling upon the South Eastern line. The by-law, the effect of which must be construed by the light of the statutory power under and by authority of which it has been made, and beyond which it cannot be carried, is therefore, in my opinion, inapplicable to the case.

On these grounds I am of opinion that the conviction cannot be upheld.

LUSH, J.—The question left open at the close of the argument, and upon which we took time to consider our judgment, was the validity of the by-law upon which the magistrate proceeded.

It is in these terms: “No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued.

“Every passenger shall shew and deliver up his ticket (whether a contract or season ticket, or otherwise) to any duly authorised servant of the company, when required to do so for any purpose.

“Every passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey.”

It appears to me that the penal clause of this by-law is *ultra vires* and void, on the ground that the penalty it imposes for

Saunders v. South Eastern Rail. Co., Q.B.

refusing to shew the ticket is variable, and dependent on the accident of the ticket being demanded at an early or a late stage of the train journey. A passenger who has travelled only the last ten miles in the train which has travelled a hundred miles is fined ten times as much as another who started at the station *a quo*, and whose ticket was demanded at the end of the ten miles, although the offence of refusing to shew the ticket is precisely the same in the one case as in the other. A by-law which has this effect cannot be deemed a reasonable by-law.

The clause which precedes the penal clause seems to me equally objectionable. The passenger is not only required to shew his ticket when demanded—a requisition which is perfectly reasonable and which may be enforced by a reasonable penalty—but he is required to “deliver it up,” whatever the purpose may be for which it is demanded, and without any limitation as to the time at which the demand is made. A season ticket is a contract by which the company engages to carry the holder, free of any further charge, for a specified period, between certain specified stations. Until that period has expired, the holder is entitled to retain the ticket as his own property. He is bound to shew it when required, in order that the company’s servant may see that it is still in force, and that it entitles the owner to be where he is. The by-law would in terms justify the company in demanding it back on the first journey which the holder makes under it, though it be on the very day the ticket was purchased.

The same objection applies to a journey ticket. The holder of such a ticket is entitled to keep it till he has arrived at the station where the tickets for such a journey are collected.

I do not intend, and am far from wishing, to impute to the company that the by-law was framed with a view to its being so applied, or that they would sanction any arbitrary or capricious use of the power which it proposes to give. No instance has ever come to my knowledge in which any company or any official has shewn a disposition so to act. Our duty, however, is to test it by established

principles of law, and regard what the by-law authorises, and not how it is applied in practice; and so regarding it, I feel bound to hold that on this ground also the penal clauses of it are wholly void.

I do not discuss the validity of that part of the by-law which imposes, as a penalty for travelling without a ticket, the whole fare from the starting station of the train. That point has already been decided by the Common Pleas Division.

I am of opinion, for the reasons given, that the appellant is entitled to our judgment.

Conviction quashed.

Solicitors—James Robinson, for appellant; W. R. Stevens, for respondents.

Pennenden v. Roberts 57 L.J. 2312.

[IN THE COURT OF APPEAL]

1880. }
March 13. } VERNON v. COOKE.*

Bill of Sale—Registration—Affidavit sworn before Solicitor to Parties—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36).

An affidavit filed with a bill of sale is good, though sworn before a solicitor acting for grantor and grantees of the bill.

Judgment of LORD COLERIDGE, C.J., reversed.

Appeal from a judgment of Lord Coleridge, C.J., after trial without a jury.

This was an interpleader issue directed to try the right to certain goods as between an execution creditor and the grantee of a bill of sale from the debtor.

At the trial it was proved that the affidavit required by the Bills of Sale Act, 1854, verifying the date, execution, &c., of the bill of sale was sworn by one partner in the firm of solicitors who were acting both for the grantor and grantee of the bill, and also that it was sworn

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thegiger, L.J.

Vernon v. Cooke (App.), C.P.

before the other partner in the firm, who was a commissioner duly appointed to take affidavits. Lord Coleridge, C.J., on these facts held that the bill of sale was bad, and gave judgment for the execution creditor against the claimant under the bill of sale.

The claimant appealed.

Arnold Morley (J. C. Lawrence with him), for the claimant.—The affidavit was properly sworn before the solicitor acting for both parties to the bill of sale. It is admitted that a practice has prevailed in the Courts of common law of refusing to receive affidavits sworn before the attorney in the cause. But the practice has not been universal, and it has differed in the different Courts. Thus R.E. 13 Geo. 2. rule 1, C.P. provides that affidavits so sworn to hold the defendant to bail or of service of process may be used, and two years later, by R.E. 15 Geo. 2. rule 2, K.B. a similar provision is made with respect to affidavits used in the King's Bench. To secure uniformity of practice, a rule applying to all the Courts was laid down by Reg. Gen. H.T. 2 Will. 4. s. 6, and that rule is substantially continued in Reg. Gen. H.T. 1853, rule 143. In *Smith v. Woodroffe* (1), the rule is stated to have been acted upon up to that time on the equity side of the Court only. The rule has been applied exclusively to affidavits used in litigation before, or in applications to the Court. Where application has been made to the power of the Court, they have refused to receive as evidence affidavits sworn before the solicitor making the application. There is no reason to apply the rule to the case of an affidavit required by the Bills of Sale Act. So long as the affidavit is made in compliance with the terms of the Act, the Courts will receive it as evidence, in the same way as when the practice of the Courts differed, the Court of Common Pleas would have received as evidence an affidavit not complying with their practice, and sworn in the Court of Queen's Bench. The Act prescribes what must be done to render valid the bill of sale; and to hold that

the affidavit required to be filed with the bill of sale is bad if sworn before the solicitor acting for one of the parties, would be to put a restriction upon the passing of property beyond that imposed by the Act.

Cave (L. Dugdale and Cooper Willis with him), for the execution creditor.—The rules of Court referred to in the argument for the claimant are only extensions of a common law rule that affidavits sworn before a solicitor acting for the parties in the matter to which the affidavit relates are bad. At all events a long course of decisions shews it to have been the constant practice of all the Courts not to receive such affidavits as evidence. *Re Thomas Hogan* (2), *The King v. Wallace* (3), *Batt v. Vaisey* (where the rule is extended to the solicitor's partner) (4), *Ross v. Shearman* (5), *Ex parte Brockhurst* (6), *Turner v. Baker* (7). In *In re Gray* (8) the Court refused to receive the affidavit, although the attorney before whom it was sworn was not the attorney in any action pending. It was a mere application to the Court, and there was no record. See also *Hopkin v. Hopkin* (9), *The Duke of Northumberland v. Todd* (10). The affidavit in the present case comes before the Court as evidence to which the rule can be applied; it is pre-appointed evidence which is to be used on a dispute arising. The affidavit is only *prima facie* evidence of the facts stated in it, and there is nothing in the Bills of Sale Act to prevent the Courts from applying the long-established rule.

Arnold Morley replied.

BRAMWELL, L.J.—I am of opinion that this appeal must be allowed. I think we must hold that a solicitor acting for both parties to the bill of sale is capable of administering the oaths required by the Bills of Sale Act. To hold otherwise

(2) 3 Atk. 812.

(3) 3 Term Rep. 403.

(4) 1 Price, 116.

(5) 2 Coop. 172.

(6) 1 Rose, 145.

(7) 10 Q.B. (at p. 304).

(8) 21 Law J. Rep. Q.B. 380.

(9) 10 Hare, App. 2.

(10) 47 Law J. Rep. Chanc. 343; Law Rep. 7 Ch. D. 777.

(1) 6 Price, 230.

Vernon v. Cooke (App.), C.P.

would be to work great mischief and injustice, because it has been a practice constantly acted upon that he should do so. But I think we are justified in our decision apart from this consideration.

A commissioner, by the statute of Charles 2 (29 Car. 2. c. 5), the words of which are not altered by the later Acts, has power to administer the oaths as to "matters depending or to be depending" in the Courts of King's Bench, Common Pleas and Exchequer. I think this is a matter depending, within the meaning of the statute, in the Queen's Bench Division. That being so, and the commissioner having power to take affidavits, and being a solicitor, is there any rule which prevents him from being capable of administering this particular oath, by reason of his being concerned for both parties to the bill of sale? I think not. Mr. Cave has argued that a solicitor acting in cases where he is concerned for or on behalf of a person making an affidavit is by the common law unable to administer the oath. It is admitted that this argument must go the length of saying that, if the affidavit was false, an indictment for perjury would not lie, because the oath was taken *coram non judice*. That seems to me an impossible contention. The utmost that could result, to my mind, is that the Court in a matter pending before it might refuse to receive the affidavit, because it was made before a person acting as solicitor to the parties in the matter with respect to which the affidavit was made. It is said also that it is the universal practice of the Courts not to receive such an affidavit. I am clearly of opinion that no such practice prevails, and no such common law rule as is alleged. It may be, when a man is being represented by his attorney—a person put in his place to represent him in Court—and an application, supported by an affidavit, is made to the power of the Court, that the Courts will not receive an affidavit sworn before the person who makes the application. But here the person before whom the affidavit was sworn was not the attorney of the claimant in that sense; he was not representing him in Court. The

matter was not before any of the Courts. The debtor executed a bill of sale to Vernon, and both parties obtained the aid of the solicitor. His aid was not obtained, nor was he employed *qua* solicitor to represent separate interests. I therefore think the general rule of the Courts does not apply to the solicitor who took the affidavit, nor to his partner who made it in this case. They were assisting in the preparation of the bill of sale merely, and were not in the plight of attorneys representing a client's interests in a proceeding in any of the Courts. I may add that I doubt extremely whether the general rule could be applied to the affidavit in the case of a bill of sale which requires registration under the Act. If the registration is wrongful, the fault is with the officer of the Court. I doubt whether the registration could be rendered void by applying the rule. To say the truth, I do not see the use of the rule the Courts have made. However, I do not think it can be applied here.

In the result, I come to the conclusion that there was power to administer the oath; that there is no rule by common law to nullify the affidavit by reason of the person taking the oath and the person who administered it being partners acting for both parties to the bill of sale; and that there is no rule or practice of the Courts which would have that effect. On these grounds I am of opinion that the appeal should be allowed.

BAGGALLAY, L.J.—I am of the same opinion. The Bills of Sale Act, 1854, provides that the bill of sale, or a copy of it, shall, together with an affidavit of the time of making it, and a description of the residence and occupation of the maker of it, and of the attesting witness to it, be filed within twenty-one days, in the manner pointed out by the Act. It is not disputed in the present case that the affidavit was filed in form, and in compliance with the terms of the Act, but it is said to be void, because one partner in a firm of solicitors who acted for both parties to the bill of sale was an attesting witness, and the other partner took his affidavit.

Now, all that the Act of Parliament says

Vernon v. Cooke (App.), C.P.

is that the affidavit "shall be filed," &c., and when so filed the right of the grantee under the bill of sale is to accrue. In my opinion, we have no jurisdiction to deprive him of that right. If the Legislature had intended that any such restriction on his right as is here contended for should be imposed, it is fair to presume that the intention would have been expressed in words. I am of opinion that we cannot introduce any such qualification into the Act, and that our judgment should be for the claimant under the bill of sale.

THESIGER, L.J.—I am of the same opinion. The question turns upon the procedure under the Bills of Sale Act, the provisions of which are very stringent, and to some extent interfere with the rights of property. We should be careful to construe the Act so as not to throw additional difficulties in the way of the passing of property.

Mr. Cave contends that, by the common law, an affidavit sworn before the solicitor acting for the parties to a bill of sale is bad. We find in the Act provisions that every bill of sale shall be registered with an affidavit stating certain facts. There is no provision as to the mode in which the affidavit is to be sworn, or as to the person before whom it is to be sworn. We must, therefore, look to the common law, or practice of the Courts, in order to see whether the contention is well warranted. The affidavit here in form is perfectly good; it is sworn by the proper person; the facts required to be stated by the Act are fully stated; and it is sworn before a person properly appointed to take oaths in the High Court of Justice. It lies, therefore, upon those who assert that the affidavit is bad to shew not merely a particular practice of the Courts, but that the affidavit, though it is in compliance with the terms of the Act, is bad by the common law, and that the right of the grantee to the goods under the bill of sale is affected, because the affidavit is sworn before one partner, and witnessed by the other, of a firm of solicitors acting for both parties. Now we find that a practice has grown up gradually in the

Courts that where evidence is taken by affidavit, that affidavit shall not be sworn before the attorney in the cause.

It was not an absolute rule, but a practice of particular Courts, and it appears not to have become universal until 2 Will. 4, when, in order to obtain uniformity of practice, a general rule was laid down for all the Courts. That rule, however, was only in respect of affidavits used in litigious business. In my opinion we cannot introduce the rule into the Bills of Sale Act, and say that affidavits sworn, as the one in the present case was, are bad. I think the judgment should be reversed.

Judgment reversed.

Solicitors — Chester & Co., agents for Cooper & Chawner, Uttoxeter, for plaintiff; H. Tyrrell, agent for E. Tennant & Co., Hanley, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]
1880. } THE QUEEN v. THE JUSTICES OF
May 13. } ESSEX.

Bastardy—Appeal—Absence of Appellant—Order quashed not upon Merits—Second Order—Jurisdiction of Justices.

[For the report of the above case, see 49 Law J. Rep. M.C. 67.]

[IN THE QUEEN'S BENCH DIVISION.]
1880. { GOLDSTRAW (appellant) v.
March 23. { DUCKWORTH AND ANOTHER
(respondents).

Public Health—Highway—Construction of Local Act—Projection "over or upon" Pavement—Oriel Window not interfering with Traffic.

[For the report of the above case, see 49 Law J. Rep. M.C. 73.]

[IN THE HOUSE OF LORDS.]

1880. } THE ECCLESIASTICAL COM-
 May 27, 28, } MISSIONERS FOR ENGLAND
 July 15. } v. ROWE.

Limitations, Statute of (3 & 4 Will. 4. c. 27), ss. 2, 29—Succession of Ecclesiastical Commissioners to Estates of Corporations Sole—3 & 4 Vict. c. 113. s. 57.

By 3 & 4 Vict. c. 113. s. 57 the Ecclesiastical Commissioners are to have, for the purpose of obtaining possession of lands vested in them as successors to ecclesiastical corporations sole, all rights, powers and remedies at law and in equity, which belonged to those to whose estates they succeeded.

In 1854 the Ecclesiastical Commissioners succeeded to the estates of the dean of A., and in 1877 they brought an action to recover part of those estates, which had been possessed adversely to them and their predecessors, the deans, for more than twenty but less than sixty years:—

Held (by LORD SELBORNE, L.C., and LORD WATSON, dissentiente LORD BLACKBURN), that the Ecclesiastical Commissioners had, for the purpose of obtaining possession of the lands transferred to them, the right to bring an action at any time within which an incumbent of the deanery might have brought it if no transfer had taken place. Held (by LORD BLACKBURN), that the words in 3 & 4 Vict. c. 113. s. 57, being merely general, and containing no reference to the Statute of Limitations, do not give the commissioners the right to the extended period for bringing an action allowed to corporations sole.

This was an appeal from a decision of the Court of Appeal, reversing one of Mellor, J. The case is reported in the Courts below, 48 Law J. Rep. Q.B. 152; Law Rep. 4 Q.B. D. 63.

The action was brought by the Ecclesiastical Commissioners to recover a piece of land allotted, provisionally in 1816 and finally by an award made in 1827, in respect of lands held on lease from the dean of St. Asaph. The award was made "to the personal representatives of Robert Morris, . . . in right of the lease of the George and Dragon, and other premises

in St. Asaph under the said dean of St. Asaph."

In 1820 the lease was sold to Hugh Jones, who in the same year surrendered and obtained a new lease from the dean, no mention being made of the allotment. There were several subsequent renewals, in none of which was any notice taken of the allotment.

In 1854 the estates of the deanery became vested in the Ecclesiastical Commissioners, subject as to the tenements in respect of which the allotment was made to a lease which was bought up by the commissioners in 1859. In 1877 this action was brought.

The defendant alleged adverse possession since the year 1821, when a predecessor in title of the defendant was stated to have bought the allotment from the representatives of Robert Morris, without, however, taking any conveyance.

Mellor, J., who tried the case without a jury, found that the defendant had had possession adverse to the title of the plaintiffs for upwards of twenty but for less than sixty years, and held that the Ecclesiastical Commissioners had the same right during the same period of obtaining possession of the allotment which the dean would have had. He accordingly gave judgment for the plaintiffs.

The Court of Appeal reversed this decision.

The plaintiffs appealed.

Southgate and M'Intyre (C. Higgins with them), for the appellants.—The rent of the land here in question was less than twenty shillings, and there was also no hostile receipt of rent. Consequently section 9 of the Statute of Limitations does not apply, and time could only run against the lessor from the determination of the lease—*Chadwick v. Broadwood* (1). But it has been held in *Corpus Christi College v. Rogers* (2) that where no interval of time elapses between the surrender of one lease and the grant of another, the lessor's estate does not by such surrender become an "estate in

(1) 3 Beav. 308; 10 Law J. Rep. Chanc. 242.

(2) *Ante*, Exch. p. 4.

Ecclesiastical Commissioners v. Rowe, H.L.

possession" within sections 3 and 5 so as to cause the statute to run against him. In that case the surrender was by operation of law, as the result of the grant and acceptance of the new lease. Here the new lease recites that the property has been surrendered. But after accepting the surrender the lessor could not refuse to re-grant.

[THE LORD CHANCELLOR.—Equities between lessors and lessee could not affect the adverse possessor.]

Then as to the period of adverse possession necessary to bar the appellants' claim, so long as the estates remained vested in the dean, an action could have been brought within the extended term provided for by section 29—that is, two incumbencies and six years of a third, or sixty years, whichever should be the longest. But by 3 & 4 Vict. c. 113. s. 57 the Ecclesiastical Commissioners have all rights, powers, remedies at law and in equity which belonged or would have belonged to the holders of the deanery. If they are barred by twenty years' possession, that period had already elapsed and barred their right when the estates of the deanery vested in them in 1854, although the corporation sole to which they succeeded had not been barred, and would not have been for a long time. It is material to observe that the case falls within section 34 of the Statute of Limitations. At the end of the period not merely can the remedy not be enforced, but the right of property is altogether gone.

[THE LORD CHANCELLOR.—What is to be the limit in the case of the suppressed canonries, prebends, &c., to which 3 & 4 Vict. c. 113. s. 57 applies?]

As there would be no incumbencies by which to reckon, probably the period of sixty years should be taken. But if not, then, as the Statute of Limitations is a disabling statute, it only applies to cases which come within its provisions, and if they are inapplicable the right remains as at common law.

The true meaning of 3 & 4 Vict. c. 113. s. 57 is that the Ecclesiastical Commissioners are to be subject to the same provisions in the Statute of Limitations as those to whose estate they succeed.

But if not, they at any rate succeed to all the rights of the dean, which must include a right to bring ejectment, and the latter right once vested in them would not be lost till twenty years after the transfer.

Doubt has been thrown on the title of the commissioners, because in the Enclosure Act of 1808, under which the allotment was made, it was not expressly made subject to subsisting rights and uses, &c. But there are plenty of indications that it was intended to be so subject, e.g. in section 17; and the general law would be sufficient without special provisions in the Act. In the analogous case of encroachments it is so laid down in *The Earl of Lisburne v. Davies* (3).

The Solicitor-General (Sir F. Herschell) and *Morgan Lloyd*, for the respondent. —This case is distinguishable from *Corpus Christi College v. Rogers* (2), because there is here a surrender recited in the renewal, which at law must be taken to be prior in time, and there would, therefore, be an interval in which the lessor is entitled to an estate in possession.

[LORD BLACKBURN.—If *Corpus Christi College v. Rogers* (2) is well decided it appears to govern the present case; for there is no surrender, except by accepting the new lease.]

The appellants would be estopped from denying that there had been a surrender.

[LORD BLACKBURN.—No deed is recited. In practice is there ever such a deed?]

It is contended generally that a lessor cannot by his own act extend the time at which his right is barred, and that *Corpus Christi College v. Rogers* (2) is bad law.

It is contended, further, that the question as to renewals does not arise here, because the allotment was not comprised in the leases. It is not mentioned in the leases after the award, and, even if it could pass as appurtenant, the land in respect of which it was allotted was divided into two in 1828 and let in two separate leases. No possession by either lessee is shewn.

3 & 4 Vict. c. 113. s. 57 is perfectly general in its terms. It contains no reference to the Statute of Limitations,

(3) 35 Law J. Rep. C.P. 193; Law Rep. 1 C.P. 259.

Ecclesiastical Commissioners v. Rowe, H.L.

and was only intended to give to the Ecclesiastical Commissioners the ordinary rights of property, not to put them in an exceptional position with regard to the Statute of Limitations. Probably the Statute of Limitations was not in the minds of those who framed the section; but it is to be observed that the period of limitation for corporations sole was intended to prevent a successor from suffering by the *laches* of his predecessor. It may well have been thought that such a provision was unnecessary after the transfer to the Ecclesiastical Commissioners. The construction contended for by the appellants, besides being inapplicable to suppressed canonries, would give the right to the lengthened period not only where the statute had begun to run at the time of the transfer, but in all cases.

With regard to the title of the lessors, the land was allotted to the leaseholders; and the General Enclosure Act then in force (41 Geo. 3. c. 109) contained no provision like that in 8 & 9 Vict. c. 118. s. 16; while even that directs the allotment to be made to the lessor, where the rent is two-thirds of the yearly value and the term does not exceed fourteen years. Otherwise it is submitted there would still be an allotment to the tenant in fee in respect of his leasehold interest, and another to the landlord in respect of his reversion. So it would be under the old Act in all cases in which land was in lease. Here the dean may have had an allotment, but if not it must have been because he made no claim; in which case his right would have been barred.

[THE LORD CHANCELLOR.—Is such a thing ever done as to make two allotments in respect of the same land? If not, in equity the tenant would hold on the terms of his lease.]

It was held under the old law that land allotted in respect of copyhold was freehold, but that, it is right to state, was on the ground that copyhold cannot now be created—*Doe d. Lowes v. Davidson* (4).

[THE LORD CHANCELLOR.—Here the allotment was to the personal representatives of a deceased lessee.]

That is to A., B. & C., in whom the lease was then vested.

[THE LORD CHANCELLOR.—They must have taken in their representative capacity. Under section 7 of the General Act the commissioners were not to go into the title at all, assuming that the law would settle that.]

If no claim is made the right to an allotment is barred.

[THE LORD CHANCELLOR.—If no allotment is made. But if an allotment is made to the tenant it enures to the benefit of the reversioner.]

McIntyre, in reply.—The property in respect of which the allotment was made, though divided in 1820, was reunited in 1828. When the division took place, one part was let to the assignee, and the other to the trustees of the lessee of 1812. It must be taken as against the lessor that the whole which was subject to the lease of 1812 was included in the two leases of 1820.

[He was stopped from arguing the question of the lessor's title under the award.]

Cur. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE).—The question in this case relates to a small parcel of land in Flintshire, which by an award under an Enclosure Act, completed in 1827, was allotted to the representatives of a then deceased lessee named Morris, who held under the dean of St. Asaph, in right of his lease. The right to the leasehold property called the "George and Dragon," in respect of which this allotment was made, had previously (namely, in 1820) become vested, by assignment from the representatives of Morris, in one Hugh Jones; and I entertain no doubt that the title under the award became vested by virtue of the Enclosure Acts in Hugh Jones for the term of his lease, with a reversion in fee to the dean of St. Asaph in his corporate character.

The lease had been renewed by the dean to Hugh Jones in 1820 for twenty-one years from the 2nd of November, 1819. In 1828 it was again renewed to an assignee of Hugh Jones by Dr. Luxmoore, then dean, for another like term;

Ecclesiastical Commissioners v. Rowe, H.L.

and there were further successive renewals, by the same dean, in 1834, 1842, and 1848. Each of these renewals was expressed to be granted in consideration of the surrender of the former lease.

By the Act passed in 1840 for the better regulation of cathedral and collegiate churches and their revenues (3 & 4 Vict. c. 113), all the separate estates held by deans in right of their deaneries were (subject to the interests of the then existing deans) transferred to the Ecclesiastical Commissioners. Dean Luxmoore died in 1854, and all the separate estates of the deanery of St. Asaph then vested absolutely (subject to any subsisting leases) in the commissioners.

The parcel of land in question does not appear to have been in the possession of the dean or of any of his lessees, or of anyone claiming by underlease or otherwise from or through him or them, at any time after the date of the award in 1827. The respondent, who was in possession of it when the action was brought out of which this appeal has arisen, derived his title from one Sarah Moulton, by whose devisees in trust it was conveyed to a person through whom he claims in 1854; it being recited in that deed of conveyance that Sarah Moulton purchased this land from the representatives of Morris in 1821, but took from them no conveyance; and that she remained in the undisturbed possession of it up to the time of her death in January, 1854. The representatives of Morris had no right, in 1821 or afterwards, to sell or convey it, and Sarah Moulton's possession must, upon the evidence before your Lordships, be regarded as having been from the first without any title.

The commissioners brought no action till August, 1877. They had in December, 1859, bought up the lease of the "George and Dragon," and thus became entitled in fee-simple in possession to all the premises included in the lease of 1848. The action was tried before Mr. Justice Mellor in March, 1878, without a jury; the only question which it is now material to consider being, whether the title of the commissioners was, or was not, barred by the Statute of Limitations (3 & 4 Will. 4. c. 27). The learned Judge

found that the defendant had possession, adverse to the title of the plaintiffs, for upwards of twenty years, but not for sixty years; and being of opinion that the commissioners had, under 3 & 4 Vict. c. 113. s. 57, "the same right, during the same period, of obtaining possession which the holder of the deanery of St. Asaph would have had in respect of the same," he found his verdict and gave judgment for the plaintiffs. That judgment was reversed on appeal, and the present appeal to your Lordships is from the judgment of reversal.

In the argument at your Lordships' bar, it was insisted that no right of action had accrued to the Ecclesiastical Commissioners, or to any person through whom they claim, for more than twenty years before the action was brought. I will, therefore, first consider how the case would stand if not affected by the 57th section of 3 & 4 Vict. c. 113.

By section 2 of the Statute of Limitations (3 & 4 Will. 4. c. 27), the right of any person to bring an action to recover land is barred by the lapse of twenty years next after the time at which the right to bring it shall have first accrued "to some person through whom he claims," or if such right shall not have accrued to any person through whom he claims, then within twenty years after the time when such right shall have first accrued to the person bringing the action. Under the definitions of the preceding section the word "person" extends to a body politic, corporate or collegiate, and therefore to the Ecclesiastical Commissioners, unless a later section (the 29th, which provides specially for the case of spiritual and eleemosynary corporations sole) can be shewn to be applicable. The 3rd section of the same Act provides that the right to bring an action to recover an estate or interest which was reversionary at the time when the possession sought to be displaced began, "shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession;" and the 5th section, providing further as to such reversionary estates, adds the words, "when the same shall have become an estate or interest in possession, by the determination of any

Ecclesiastical Commissioners v. Rowe, H.L.

estate or estates, in respect of which such land shall have been held, or the profits thereof shall have been received."

The Ecclesiastical Commissioners have now the same title which was formerly vested in the dean, by virtue of the transfer made to them by 3 & 4 Vict. c. 113, and I did not understand it to be disputed at the bar that they claim through the dean within the meaning of those words as used in the Statute of Limitations. If no right of action had accrued to the dean before 1854, when Dean Luxmoore died, the appellants ought to succeed, for the lease which was current in 1854 was not surrendered till 1859, and the action was brought within twenty years from that time. But I am of opinion that a right of action did, before 1854, accrue to the dean, and that this right accrued not later than the earliest grant of a lease by way of renewal which was made by the dean after the commencement of the possession of Sarah Moulton. The evidence before the House shews that, although no strict proof was given of the time when that possession first began, there was no real controversy upon the subject; and looking to the state of that evidence, and to the verdict found by the learned Judge who tried the case, I think your Lordships will not do wrong if you assume, for this purpose, that the recitals in the deed of conveyance from Sarah Moulton's representatives, dated the 30th of September, 1854, were taken between the parties as correct.

If so, her possession commenced during the currency of the lease granted by the dean to Hugh Jones on the 2nd of May, 1820, which lease continued to subsist until the 18th of June, 1828, when it was surrendered contemporaneously with and in consideration of the grant of the new lease of that date. On that surrender, a right of action to recover the premises of which Sarah Moulton was then in possession accrued to the dean, and all the new leasehold interests then and on each subsequent renewal created were, in my opinion, derived from and out of the estate in possession, which then became vested in the dean. That surrender, although not effected by a separate instrument, must, in my opinion, be deemed

to have preceded the new grant; and I cannot assent to the argument addressed to your Lordships by the appellants' counsel, that the effect of a renewal contemporaneous with a surrender is to prevent the accrual of a right of action to the lessor by the surrender of the former lease against a disseisor or trespasser—an argument which seems to me inconsistent with the provisions as to reversionary estates contained in the 3rd and 5th sections of the Statute of Limitations, and which, if well founded, would prevent that statute from ever running in favour of any length of possession whatever against a title to church leaseholds renewed from time to time in the manner which was formerly customary, and of which an example is found in this case.

The result, it is to be observed, would be practically the same, if Sarah Moulton's possession had commenced during the currency of any of the other leases prior to the last surrender and renewal on the 11th of April, 1848.

The case of *Corpus Christi College v. Rogers* (2), recently decided by the Court of Appeal (then composed of Lord Coleridge and Lords Justices Bramwell and Brett), was relied upon at the bar as an authority for the proposition that in a case of this kind, when there is either a surrender by operation of law on the acceptance of a new lease, or a surrender and the grant of a new lease by one and the same deed, a right of action does not accrue for want of an "appreciable moment of time between the grant and the surrender." I am not sure that I entirely understand the view which was taken on the occasion by Lord Justice Bramwell; but the judgment of Lord Coleridge appears to me to have proceeded upon the particular facts of that case, which were altogether different from the present. The Statute of Limitations was then set up against the college, the superior landlord, not by a trespasser or disseisor, but by an under-tenant of the lessee, to whom the land in question had been let by the lessee of 1818 under a written agreement for a yearly tenancy at 7s. 6d. a year. This under-tenant regularly paid his rent to the lessee till 1853, and the lease, which was current when

Ecclesiastical Commissioners v. Rowe, H.L.

the rent was last paid, was renewed by the college to the lessee in 1857, four years afterwards. By the statute 4 Geo. 2. c. 28. s. 6, it is provided that on a surrender by a lessee, and grant of a new lease, the under-lessees shall hold and enjoy as if the original leases out of which the respective under-leases are derived had been still kept on foot and continued. When this renewal in 1857 took place nothing had been done, notwithstanding the four years' arrear of rent, to put an end to the tenancy of the under-lessee by notice to quit or otherwise; and the college, whose tenant he was not, and to whom his possession was not adverse, had (as I conceive) no right of action against him. The lease which was surrendered on the renewal of 1857 would have continued (if there had been no renewal) till 1870; the renewed lease itself continued till 1877, and the college brought its action in 1878. The section of the Statute of Limitations which the under-tenant relied upon was not, as in this case, the 2nd read in connection with the 3rd and 5th, but was the 8th, namely, that applicable to tenancies from year to year, when the rent has for twenty years remained unpaid. The case, therefore, of *Corpus Christi College v. Rogers* (2) is, in my opinion, no authority for the proposition which it was cited to establish.

It remains to consider the effect of the 57th section of the Act 3 & 4 Vict. c. 113. On this point I was disposed, during the argument, to concur in the view of the Court of Appeal, but further consideration has now brought me to an opposite conclusion.

By the 29th section of the Statute of Limitations, the time allowed to an ecclesiastical corporation sole to recover land is "the period" (commencing from the time when the right to bring an action first accrued) "during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years, taken together, shall amount to the full period of sixty years; and if such times, taken together, shall not amount to the

full period of sixty years, then during such further number of years, in addition to such six years, as will, with the time of the holding of such two persons, and such six years, make up the full period of sixty years."

By the 57th section of the 3 & 4 Vict. c. 113, it is provided that the Ecclesiastical Commissioners "shall, for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes or other hereditaments vested in or accruing to them" (under the Act), "and of recovering the rents and profits thereof, have and enjoy all rights, powers, and remedies, at law and in equity, which belonged or belong, or would belong or have belonged, to the holder of the deanery, canonry, prebend, dignity or office, or the rector of the rectory, in respect of which such profits and emoluments, lands, tithes, and other hereditaments and endowments respectively, are by or under the provisions of this Act to be paid to and be vested in the commissioners." The question is, whether the effect of that section is to make the 29th and not the 2nd section of the Statute of Limitations applicable, under the circumstances of this case, in favour of the commissioners.

The Court of Appeal thought that "a decision on this point, in favour of the plaintiffs, would lead to this result, that the commissioners could always bring an action to recover land vested in them under the 3 & 4 Vict. c. 113. s. 50, even that of which they at one time had possession, at any time within sixty years from the time when the right to do so first accrued." I do not think that a decision in favour of the plaintiffs would lead to any such result; such a consequence is certainly not, in my opinion, deducible from the language of the 57th section of the 3 & 4 Vict. c. 113; and it cannot reasonably be supposed to have been within the contemplation of the Legislature.

The principle of the 29th section of the Statute of Limitations was to prevent the negligence of one or two particular incumbents, each of whom would be in substance a mere tenant for life, from becoming a bar to the rights of their

Ecclesiastical Commissioners v. Rowe, H.L.

successors. That principle could have no permanent application after the transfer of the title to a corporation aggregate, in which there is no such succession, and to which the Legislature has thought fit in all other cases to apply the shorter term of limitation. To measure the period of limitation for all time by reference to the succession of incumbents in an office, the incumbent of which had ceased to have any title to or interest in the property in question, would be (to say the least) arbitrary and capricious; and the literal application of any such rule of succession to some of the cases comprehended within the general terms of the 57th section of the 3 & 4 Vict. c. 113—*e.g.*, to the canonries suspended and the sinecure rectories suppressed under the 4th, 8th, 9th, 10th, 11th, 14th, 19th, 48th, 49th, and 54th sections of that Act—would be impossible; though I am not satisfied that such cases might not, if time had begun to run against the last canon or rector; be treated as falling within the sixty years limit, applicable when the times of two incumbencies, and six years added, do not amount to the full period of sixty years. The expressed object of the section was to effectuate the transfer by establishing a legal continuity between the rights, powers and remedies of the commissioners and those of the former corporation sole, not to regulate the manner in which the commissioners should enjoy them, after they had obtained the full benefit of the transfer.

If, therefore, the question had been as to the time allowed to the Ecclesiastical Commissioners to recover lands, formerly the separate estate of a dean, of which they had once obtained possession subsequently to the vesting of their title under 3 & 4 Vict. c. 113, and had been afterwards dispossessed, I should have been of opinion that the case was governed by the 2nd section of the Statute of Limitations, and that the action must be brought within twenty years. The right of action would, in that case, have first accrued not to their predecessor in title, but to the commissioners themselves. It would not have been a right of action transferred to them by the statute.

But the present case is different. The

right of action now in question first accrued not to the commissioners, but to the ecclesiastical corporation sole through whom they claim; and if my view of the facts is correct, it had accrued more than twenty years before the title, transferred to the commissioners by 3 & 4 Vict. c. 113, became vested in possession. The action was brought to obtain that possession, "for the purpose of obtaining" which the 57th section of that statute said they should "have and enjoy all rights, powers and remedies, at law and in equity, which belonged, or would belong, or have belonged, to the holder of the deanery." The right of action which then belonged to the dean, and the remedy founded upon it, which the dean would have had, were, for this purpose, expressly transferred by the statute to the commissioners, who were to have and enjoy them as they would have been had and enjoyed by the dean. How can this be possible, if a right and a remedy which were not barred, and would not have been barred, as against the dean, are held to have become barred, under the Statute of Limitations, by the mere fact of the transfer? The decision of the Court of Appeal seems to me to contradict and nullify the express words and the manifest intent of the 57th section. The section says, "All rights and remedies;" the decision says (not in words, but in effect), "All rights and remedies except those which would have been barred by any Statute of Limitations if, at the time when any right of action first accrued, the land had been vested in the commissioners and not in the dean."

On the other hand, complete effect is given to the words and also (as it seems to me) to the intent of the section, by holding with Mr. Justice Mellor that the right and remedy which the dean would otherwise have had were, by that section, preserved and kept alive for the purpose of enabling the commissioners to obtain possession of the land transferred to them, and that, until such possession was obtained, such right and remedy could not be barred against the commissioners by any lapse of time which would not have barred them against the dean. Until that time the transferred right of action would

Ecclesiastical Commissioners v. Rowe, H.L.

have continued to belong to the dean if there had been no transfer, and the 57th section says, "All rights," &c., "which belonged, or would belong, or have belonged" to the dean.

This conclusion is also in accordance with the reason and principle of the 29th section of the Statute of Limitations, which is as much applicable to the succession of the commissioners to a dean, during whose life-incumbency the statute had begun to run, as it would have been to the succession of dean to dean. No special provision being made for the case of the succession of the commissioners at the end of the first rather than of the second incumbency after the right of action accrued, the rule must, in both these cases, be the same; and that rule can be applied, without practical difficulty, when the succession of the corporation sole continues, though it has ceased to be entitled to the property in question. The Legislature might, of course, have provided that, in such a case, the time allowed to the commissioners to bring an action should not exceed twenty years from the date at which their own title became vested in possession. But it has not done so; and, if it had done so, the right would not have been barred in this case. It is only when "such right shall not have accrued to any person through whom he claims" that the second section of the Statute of Limitations authorises the computation to be made from the time at which the right shall have first accrued to the person bringing the action.

I am, for these reasons, of opinion that the judgment under appeal is erroneous, and ought to be reversed.

With regard to costs, it will follow, as a matter of course, that the judgment of Mr. Justice Mellor will be restored, and that the respondent will be ordered to pay the cost of the appeal to the Court of Appeal. But, looking to the nature of the case, and to the larger question which the commissioners were more anxious to have settled in their favour, and on which your Lordships have been unable to adopt their view, and also looking to the position and character of the commissioners as a public body, I think your Lordships will do right if, in the exercise of your

discretion, you give no costs of the appeal to this House.

LORD BLACKBURN.—I also think that before the passing of the 3 & 4 Vict. c. 113, the dean of St. Asaph had a right of action to recover this land, which first accrued on the determination of the lease current at the time when the allotment was made. I so completely agree with the view of the facts and the reasons of the Lord Chancellor on this part of the case, and in his observations on the case of *Corpus Christi College v. Rogers* (2), that I shall say no more about them. It may be doubtful whether the allotment was made during the currency of the lease of 1812, which was surrendered and renewed in 1820; or during the currency of the lease of 1820, which was surrendered and renewed in 1828; but it is not material which was the date, for this action was commenced in 1877, and the earliest of those dates is less than sixty years, and the latest is more than twenty years before 1877.

But the question which on this view of the facts has to be decided is one of great difficulty. It depends upon the construction of the 57th section of the Act 3 & 4 Vict. c. 113. The language used is such as irresistibly to lead me to the conclusion that the draftsman who framed the section did not, at the moment, recollect that a longer period was needed to be a bar to the right of action of an ecclesiastical corporation sole than would be a bar to the right of action of a corporation aggregate, such as of the Ecclesiastical Commissioners, or he would have used words plainly applicable to the case. He seems to have had in his mind the very artificial doctrine illustrated by *Webb v. Russell* (5), and to have used language adapted to meet the difficulties which might arise on that account.

But though I agree with Lord Justice Cotton that probably the attention of Parliament was never directed to the point, and that there was in one sense no intention either way, yet we must determine what is the intention indicated, following the usual rules of construction,

Ecclesiastical Commissioners v. Rowe, H.L.

by the words used. The mere statement of the question to be decided shews it to be one of difficulty. When I add that Mr. Justice Mellor thought that the effect of section 57 was that the Ecclesiastical Commissioners have the same right, during the same period, of obtaining possession which the holder of the deanery would have had in respect of the same, and that the Court of Appeal thought that the question was whether there was enough to prevent an action by the Ecclesiastical Commissioners being barred by the limitation contained in section 2 of the 3 & 4 Will. 4. c. 27, and that there was not enough; and that at the close of the argument I believe all the noble and learned Lords who heard the arguments were disposed to concur in that view, though on further consideration the Lord Chancellor has changed his opinion, I think I may say it is one of great difficulty.

At the close of the argument I was something more than disposed to affirm the judgment. I was influenced, in part, by thinking that the construction of the 57th section, for which the appellants contend, would necessarily produce effects which it was impossible the Legislature could have intended. The reasoning of the Lord Chancellor has shaken that view very much, and the consequence is, that what was then a decided opinion that the judgment below was right, is now an opinion that on a very difficult question the balance of argument is in favour of the view taken by the Court of Appeal.

I do not think anything turns on the precise words of the Statute of Limitations. I think that had the 49th section of the 3 & 4 Vict. c. 113, by which all the estates and interest of the dean were, without any conveyance or assurance in the law other than the provisions of this Act, to "accrue to and be vested absolutely in the Ecclesiastical Commissioners," stood alone, it would have been clear that the Ecclesiastical Commissioners, having the estate vested in them, had the right of action to recover it; and also that they were persons claiming by, through or under the ecclesiastical corporation sole whose interest was vested in them, and that consequently their right

of action must in this case be deemed to have accrued more than twenty years before the commencement of this action. And as the Ecclesiastical Commissioners are persons within the definition of the Statute of Limitations, the 2nd section of that Act would be a bar to that action. But section 29 is in effect an exception from section 2, and gives an ecclesiastical corporation sole a larger period—that during which two persons in succession shall have held the benefice and six years, or sixty years, whichever is the longer period.

I think it could not be successfully maintained that the Ecclesiastical Commissioners, who are not an ecclesiastical corporation sole, could, merely because they claim through an ecclesiastical corporation sole, bring themselves within either the letter or the spirit of that section. And if, therefore, section 49 of 3 & 4 Vict. c. 113 had stood alone, the consequence would have been that the respondent who had, just before the passing of the 3 & 4 Vict. c. 113, an estate by wrong, which required some years after the death of the successor of Dean Luxmoore (the dean in whose time the cause of action accrued) to become indefeasible, would on his death have, by an unintended effect of the statute, become entitled to an indefeasible estate.

And, if this had been thought of, it would have been very just to enact that when a right of action to recover lands had first accrued during the time when the ecclesiastical corporation sole was entitled to the lands, the Ecclesiastical Commissioners should have had some specific—I do not say what—period after the lands vested in them, during which to bring their action. But this is not said in terms in section 57. No such words as "when the right of action has first accrued in the time of the ecclesiastical corporation sole" are to be found in the 57th section; and the reasoning of the Court of Appeal was, in part, founded on this, that if the general words in section 57, all rights, &c., "which belonged or belong, or would belong or have belonged" to the ecclesiastical corporation sole, meant the same rights for the same period, it would necessarily follow that

Ecclesiastical Commissioners v. Rowe, H.L.

the Ecclesiastical Commissioners would have this extended period of sixty years, even though the right of action had accrued after the lands had vested in the Ecclesiastical Commissioners. And this, as I understood the argument of counsel, was what the Ecclesiastical Commissioners contended, and what they brought the appeal to establish.

The value of this small allotment was not such as to have been worth appealing about; and now that forty years have elapsed since the 3 & 4 Vict. c. 113, the value of the property, which would be affected by a decision in their favour on the more limited ground now put forward, cannot be very large. But a decision that they should have for all time, in respect of all lands which had been the property of an ecclesiastical corporation sole, the same period within which to bring their actions as that within which the ecclesiastical corporation sole, if it had continued proprietor of the lands, might have brought this action, would have been of great value. I then thought if their argument was well founded, that if the words relied on were sufficient to enable them to recover this allotment (the right of action as to which accrued in Dean Luxmoore's time), it must follow that they could recover lands formerly belonging to the deanery at any time within two incumbencies and six years, or sixty years, after the right of action accrued, whenever that right of action accrued. And being convinced that such a result could never have been contemplated by the Legislature, and that there was no machinery for working out such a result in several cases, I thought this a *reductio ad absurdum*. And thinking this, I was much confirmed in thinking that the Court of Appeal put a right construction on the statute.

The Lord Chancellor has pointed out what had escaped my notice, that the words "for the purpose of obtaining possession of such lands" override the whole of section 57, and that the effect of those words may be to prevent the result from following which, as I understand, he thinks (as well as I) would be a *reductio ad absurdum*. I think there is great force in this observation, and consequently I

am by no means so confident on the construction of the statute as I was. But I still think that the Lords Justices of Appeal were right in thinking that the combined effect of section 50 of 3 & 4 Vict. c. 113 and the 2nd section of the 3 & 4 Will. 4. c. 27 would be to bar the appellants, and that the question is, whether there is enough in the 57th section to prevent the action being barred. I have already said that I think that the point cannot have been thought of when the clause was framed, and that consequently the question is, whether the language used is such as to express that the action should not be barred, as it otherwise would have been.

The words are that the appellants, for the purpose of obtaining possession of all the lands formerly vested in the dean and transferred to them by the Act, "shall have and enjoy all rights, powers and remedies, at law and in equity, which belonged or belong, or would belong or have belonged to the holder of the deanery." I cannot bring myself to the conclusion that these are equivalent in effect to the words that they should have the same rights and the same period within which to exercise these rights; and, as it seems to me, words to that effect were required to prevent the Ecclesiastical Commissioners being barred by section 2 of 3 & 4 Will. 4. c. 27. I cannot, therefore, agree that the decision of the Court of Appeal is either counter to the manifest intent or the express words of the statute, and, though with more doubt than I had entertained at the close of the argument, I still think that the judgment should be affirmed.

I agree with the Lord Chancellor that, if reversed, it is a case in which there should be no costs of the appeal in this House.

LORD WATSON.—I agree with your Lordships in holding that a right of action for recovery of the parcel of land in dispute accrued to Dr. Luxmoore, the late dean of St. Asaph, less than sixty, but more than twenty, years before the institution of the present suit in 1877.

The second question in this case—the question whether the limitation pleadable

Ecclesiastical Commissioners v. Rowe, H.L.

by the respondent in bar of the appellants' right of action is that established by section 2, or that established by section 29, of the Statute of Limitations—has all along appeared to me to be attended with great difficulty. It depends for its solution upon the construction of section 57 of the Act 3 & 4 Vict. c. 113, which is the basis of the appellants' contention, that the action at their instance is not barred by the lapse of twenty years after the accrual of the right of recovery.

In the argument addressed to us from the bar upon the import and effect of section 57, the only alternatives suggested were these, that in suits relative to ecclesiastical property vested in them by the Act 3 & 4 Vict. c. 113, the commissioners were to have the benefit of section 29 of the Statute of Limitations either in perpetuity or not at all.

It appears to me that the favourable limitation established by section 29 was an inherent quality of the right of recovery which belonged to the holding of the deanery; and I should be of opinion that the language of section 57 of the Act of 3 & 4 Vict. was sufficient to transfer the right, with that quality in perpetuity, to the commissioners, were it not that there are various considerations arising from the character of the limitation, and from the context of the statute, which render it very improbable that such can have been the intention of the Legislature. But I had difficulty in giving their due weight to these considerations, because I was satisfied that it was the intention of the Legislature to transfer to the commissioners the whole ecclesiastical property which the late dean either had in possession or was entitled to recover. I could not conceive that it was the intention of the Legislature, because it was making a transfer to statutory commissioners, to make a gift of any portion of that property to trespassers, who would not have been in a position to plead the Statute of Limitations against the dean or his successor. And I hesitate to adopt the view that an oversight has been committed by its framers which would have the effect of frustrating in some, if not in many cases, one of the leading purposes of the Act.

I have now had an opportunity of perusing and considering the opinion of the noble and learned Lord on the wool-sack, and I agree with it in every point. It affords a satisfactory solution of the difficulties which I experienced in considering this case; and I shall not detract from the force of the noble Lord's reasoning by adding any argument of mine.

*Judgment appealed from reversed.
Judgment of Mr. Justice Mellor restored; respondents to pay the costs of the appeal to the Court of Appeal.
No costs of the Appeal to this House.*

Solicitors—Jennings, White & Buckston, for appellants; Field, Roscoe & Co., agents for James Rowe, Liverpool, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1880. }
May 14. } THE ALLIANCE BANK OF SIMLA
Aug. 7. } v. CAREY.

Lex fori—Statute of Limitations—Specialty Debt contracted in India.

Specialty debts have in India no higher value than simple contract debts, and the same period of limitation, namely, three years, applies. But the right to sue on a specialty debt in England cannot be barred by a less period than twenty years, although the debt was contracted in India, and the right to recover was barred in India by the shorter period of limitation.

Further consideration.

The action was brought upon a bond to secure the repayment of 14,000 rupees and interest, executed in India by one Seagrini as principal, and by the defendant and others as sureties. The defendant pleaded, *inter alia*, that there was no distinction between specialty debts and simple contract debts in India, and that the debt must therefore be treated as a simple contract debt, and was barred by the Statute of Limitations, which in India limited the time for recovery to three years. The cause was tried in London before Lopes, J., on the 18th of March,

Alliance Bank of Simla v. Carey, C.P.

and adjourned for further consideration. It was argued on the 14th of May, and the Judge subsequently delivered a written judgment.

Cave and Shortt, for the plaintiffs.

Finlay and Mead, for the defendant.

LOPES, J. (on August 7), having referred to the facts, as above stated, proceeded as follows: It was contended for the defendant that the plaintiffs' remedy was barred by the Statute of Limitations, default having been made in payment of instalments under the bond more than six years before the commencement of this action.

Specialty debts in India, where this bond was executed, have no higher value nor greater efficacy than simple contract debts, and the same period of limitation applies to them as to simple contracts. If this action had been brought upon this bond in India, the plea of the Statute of Limitations as pleaded would have been a good answer. The action is brought in this country. We treat a document to which the parties had appended their seals as one of a more solemn character than one to which a seal has not been attached, and give them an effect different from what they do in India. Our course of procedure with regard to them is different, and a different period of limitation applies.

The question is one of procedure, and as such must be determined by the law of the country where the action is brought. The document is under seal. An English Court cannot ignore this, and must give to it the effect that in this country belongs to it. I must hold, therefore, that the remedy under the bond cannot be barred except after the lapse of twenty years.

There will be judgment for the plaintiffs for 1,650*l.*, and interest from the 5th of November, with costs.

Judgment accordingly.

Solicitors—*Lattay & Hart*, for plaintiffs; *Mead & Son*, for defendant.

[IN THE COURT OF APPEAL]

1880.

May 31.

June 1, 2, 3, 7.]

THE DUKE OF NORFOLK v.
ARBUTHNOT.*

Church—Private Chapel annexed to Church—Acts of Ownership—Right to Light—Prescription Act (2 & 3 Will. 4. c. 71), ss. 3, 4.

The parish church of *St. Nicolas, Arundel*, regarded as one building is a cruciform church with a central tower; the portion east of this tower is called the *Fitzalan Chapel*, and occupies the place commonly filled by the chancel. The plaintiff claimed this portion of the building as his private property, and built a wall across the west end of it so as to separate it structurally from the rest of the church. The defendant pulled down part of this wall, alleging that the chapel known as the *Fitzalan Chapel* was the chancel of the parish church, and even if it were not, still that the parishioners were entitled either by prescription at common law, or by virtue of a lost grant or under the *Prescription Act (2 & 3 Will. 4. c. 71)*, to light from this chapel.

Evidence was given of numerous acts of exclusive ownership by the plaintiff and his ancestors for more than 300 years; documentary evidence of title to the same effect was produced, and at the trial before *Lord Coleridge, C.J.*, without a jury, judgment was given for the plaintiff:—

Held, by the Court of Appeal, that the evidence shewed that the disputed building was not the chancel of the parish church, but had always been the property of the plaintiff and his predecessors in title, and that the claim to light could not be maintained on any of the grounds set up by the defendant.

Appeal of the defendant from a decision of *Lord Coleridge, C.J.*, who, after trial without a jury, gave judgment in favour of the plaintiff. The case is reported, 48 *Law J. Rep. C.P.* 737, where the facts will be found fully set out, and the documentary evidence referred to at length in the judgment of *Lord Coleridge, C.J.*

* *Coram Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.*

Duke of Norfolk v. Arbuthnot (App.), C.P.

The plaintiff brought an action of trespass against the defendant, the vicar of the parish of Arundel, for breaking down a wall which the plaintiff had built between the nave of the church of Arundel and a building which formed part of the same architectural building, and which the defendant alleged was the great chancel of the parish church, but which the plaintiff claimed as his private chapel. The defendant also claimed to have a right to light and air through the arch which the plaintiff had closed by the wall. The defendant claimed this right under 2 & 3 Will. 4. c. 71, or by prescription at common law, or by virtue of a lost grant.

Lord Coleridge, C.J., found that the disputed building was the private property of the plaintiff, and not the parochial chancel, and gave judgment for the plaintiff.

The defendant appealed.

Charles and Jeune (with them V. Gibbs), for the appellant, contended that the building in dispute was the great chancel and an integral portion of the parish church, that it was in no sense a private chapel of the Dukes of Norfolk, and that even if it were a private chapel, still that there was an immemorial and statutory right to light and air; that the right was not lost, for that there had not been acquiescence or submission on the part of the defendant for more than a year. They cited—*Chapman v. Jones* (1), *Churton v. Frewen* (2), *Clifford v. Wicks* (3), *The Queen v. Twiss* (4), *Glover v. Coleman* (5), *Warrick v. The Queen's College* (6), *Bright v. Walker* (7), *Jenkins v. Harvey* (8), *Bennison v. Cartwright* (9), *Griffin v. Dighton* (10).

(1) 38 Law J. Rep. Exch. 169; Law Rep. 4 Exch. 273.

(2) 35 Law J. Rep. Chanc. 692; Law Rep. 2 Eq. 634.

(3) 1 B. & Ald. 498.

(4) 38 Law J. Rep. Q.B. 228; Law Rep. 4 Q.B. 407.

(5) 44 Law J. Rep. C.P. 66; Law Rep. 10 C.P. 108.

(6) 40 Law J. Rep. Chanc. 780; Law Rep. 10 Eq. 105.

(7) 1 Cr. M. & R. 211.

(8) Ibid. 877; 5 Law J. Rep. Exch. 17.

(9) 5 B. & S. 1; 33 Law J. Rep. Q.B. 137.

(10) 5 B. & S. 93;

Sir J. Holker and W. G. F. Phillimore were not called on to argue.

BRAMWELL, L.J.—I am of opinion that we can at once give judgment on the point raised as to the right to light and air. I think that the judgment of Lord Coleridge is right and ought to be affirmed. I have some doubt whether this church is a building within the Act of Will. 4 at all (11), and I also doubt whether there can be, and has been, in fact, an enjoyment of light through such an aperture as has been described; but these doubts are not important, for it is clear that there has been submission on the part of the appellant to an interruption with the alleged right for more than a year. I do not think that the claim of the appellant on the ground of immemorial prescription can be sustained at common law, for we know that the church was built within the time of legal memory. I decline also to find that there ever was a grant which has since been lost, for I am sure there never was, therefore the claim to light and air entirely fails.

BAGGALLAY, L.J.—I am of the same opinion.

BRETT, L.J.—I have come to the same conclusion. This building has been built within legal memory, the date of its erection is known, so that the claim of immemorial prescription must fail; it is clear that there has been a submission to and acquiescence in the interference with the alleged right for more than a year, so that no claim can be established under 2 & 3 Will. 4. c. 71, and this case does not resemble the cases of *Bennison v. Cartwright* (9) or *Glover v. Coleman* (5). With regard to the question of a lost grant, one must observe that the whole question was raised in *Angus v. Dalton* (12), which is now before the House of Lords on appeal from this Court. It is difficult, therefore, to discuss that question; but I may observe that I maintain the opinion I expressed there, that the question is one of fact which must be

(11) 2 & 3 Will. 4. c. 71. s. 3.

(12) 48 Law J. Rep. Q.B. 225; Law Rep. 4 Q.B. D. 162.

Duke of Norfolk v. Arbutnot (App.), C.P.

considered in each case when such a claim is put forward. That being so, we should be obliged to find the existence of a lost grant as a fact; it is impossible to do so in this case, and the appeal from this part of Lord Coleridge's judgment must fail.

PER CURIAM.—We will consider whether we wish to hear the counsel for the plaintiff on any other part of the case.

BRAMWELL, L.J. (on June 7).—We do not require to hear any argument on behalf of the respondent, and will now give judgment. I am of opinion that this judgment must be affirmed. Of course it ought to be affirmed, unless we are reasonably satisfied that Lord Coleridge was wrong. I am not satisfied that he was wrong; and I feel very much inclined to say nothing more, for I cannot help thinking that a case of this description, after the elaborate manner in which it was argued before him, might reasonably have stopped and have gone no further. However, the parties have brought it before us, and, I suppose, are entitled to a more full expression of opinion than I have yet given as to the reasons and grounds of our judgment.

The view which ought to be taken of this case seems to me to be this: There is at Arundel a building which, except that a part is now out of repair, has to the eye the appearance of being a simple structure, built at one time, and probably with a view to its use as a whole. Without pretending to any knowledge upon the subject, I may say that it is an ordinary cruciform church, a church with a nave and aisles, with transepts, and with a chancel; and I suppose that if anyone had looked at the church before the process of decay had commenced, he would have been of opinion that it was one building; and if he had been told that a part of it was a parish church, he would have said that the whole of it was a parish church. That seems to me the conclusion that anyone would have drawn from the appearance of the building, from its character, and the nature of the structure. I think also that if anyone had read the various documents of grant and endowment (with one exception to which I will

presently advert), he would have thought that they were speaking of one church, of one building, and not of a building which from its origin was divided into two in point of right and in point of use, or at least in point of the power of user: the documents (with the exception which I have mentioned) would rather lead any person to the conclusion that the building was intended to be what it has the appearance of being, namely, one building used for one purpose; and consequently, that if part of it was a parish church, the whole of it was a parish church. But the questions with which we have to deal are not limited to the mere appearance of the building nor to the documents relating to its foundation. On the contrary, a great deal of convincing evidence is to be found in the circumstance, that from the time of the dissolution of the college, and of the surrender to King Henry 8, down to the present time, the process of decay and desolation has been going on for centuries. This was conceded by the defendant's counsel. From the time of the cesser of the college and its surrender, the so-called chancel has been shut up, and has been disused except for the purpose of the occasional burials of those connected with the plaintiff's family, or with those whom he has succeeded. There has been an entire discontinuance of user of that building by everyone except the plaintiff and his predecessors. The plaintiff has not used it much; he has allowed it to go into decay, and no one has repaired it or sought to repair it; but so far as it could be put to any use—for instance, for the purpose of storing scaffold-poles and other things—it is the plaintiff who has used it. Now what possible explanation can there be of this condition of things, except that the plaintiff is the owner of the church? If this was truly a part of the parish church, how could the parishioners have permitted this state of decay to go on? It appears to me that I might almost stop here and say that these circumstances can be explained in only one way, and that the explanation is that the chancel never formed part of the parish church, although the whole structure is but one in its character. I may say at once that if I had thought that the chancel

Duke of Norfolk v. Arbutnot (App.), C.P.

at one time had formed part of the parish church, it would do so still, and the plaintiff would have no right to it; because no evidence has been given to shew that that which once formed part of the parish church has ceased to be so. But it is unintelligible to my mind that 300 or 350 years ago the chancel could have formed part of the parish church, and yet that the parishioners should have permitted it to be dealt with in the way in which it has been. I do not think that in the many thousands of parishes in England one instance can be cited, in which such a state of things can be suggested as having existed. What other considerations present themselves in this case? We find that there was a college, and it is manifest from the structure, as well as from the statutes, that the members of that college were to perform certain duties, functions and ceremonies, and to offer certain prayers. No doubt they were to perform these offices in the chancel; there were, therefore, two different sets of persons interested in the church, namely, the parishioners and the college; and there was nothing to prevent any pious or benevolent person from rebuilding the church in such a manner that it should be architecturally and structurally one building, yet that a portion of the building should be the parish church in substitution for the old parish church, and perhaps occupying its very site, and that the other part should be the peculiar and special property of the college. He might think reasonably enough, that it would be convenient that the place where the members of this college should perform their services should not be where the chaplains live; that it would be convenient that that place should adjoin the parish church, but that it should be their special property, and that they should be under no obligations to keep it open as a parish church, and that it should not be part of the parish church. There is no reason in point of law why such a scheme should not be carried out: none has been suggested by the defendant's counsel, and no authority has been produced. It has been alleged that a bishop would be unwilling to consecrate a church of such a kind as I have mentioned; but

I think it a bold thing to contend that a bishop might not have done so some centuries ago; there is no antecedent improbability of fact that it might be done. I am confirmed in this view by the character of the grille. When the grille is closed, the chancel is as completely separate from the nave, the aisles and the transepts, as though a wall had intervened between them, except that the grille, as its very name indicates, is not closed entirely, but there is a sort of network, so that there are spaces through which one building may be seen from the other. The peculiarity is such, that the owners of the chancel, if they were different from the parishioners, might hold it as a separate property from that to which the latter were entitled; for the owners of the chancel could shut it off from the rest of the church as completely as if a wall had been there built. There is, moreover, an antecedent cause for the existence of that state of things which the plaintiff contends did exist; if there were not two buildings, but two portions of one building severally owned, the members of the college for the more solemn and dignified mode of performing the services might have permitted the building belonging to them to be used as the chancel of the church; so that the high altar would be at the eastern end of this chancel, the choir would sit in the seats appropriated to them, and the congregation would sit in the nave. This hypothesis accounts for the condition of things which we know has happened. For several centuries this chancel has been wholly disused by the parishioners, and so far as it has been used at all, it has been used by the plaintiff and his predecessors, and those who claimed through them. I will now mention the award made in 1511. The award does undoubtedly speak of the building as one, but it shews that there was a place which was commonly called the parochial chancel; this would almost of itself convince me that although the chapel of the college might have been popularly called the chancel, although to the eye it was a chancel or choir, although it was from time to time used as it would have been if it had been the chancel, it was then commonly believed not to be the

Duke of Norfolk v. Arbutnot (App.), C.P.

chancel of the church, and it was generally thought that the parochial chancel was elsewhere. This alone is a strong piece of evidence for the plaintiff; but when I consider this in conjunction with the other circumstances of the case, I am left without a doubt that this apparently one building was in truth two.

I have not forgotten a piece of evidence as to user, which, I confess, is favourable to the defendant's contention, and that is the burials of members of the family of the Dukes of Norfolk in the chancel with the rites of the Church of England. I own that it is difficult to understand how that has happened. Lord Coleridge in his judgment (13) says the Church of England service is not objected to by the old Roman Catholic families. Nevertheless, it seems to me a little strange, because, although Roman Catholics may not object to the burial service of the Church of England, they would naturally prefer to use their own ceremonies. I cannot help thinking that the practice may have had its origin in some notion on the part of the plaintiff's predecessors in title that, without the assent in some form or another of the vicar of the parish, they could not lawfully have claimed a right to be buried in the chancel. However this may be, it is a small circumstance compared with other matters, and when I review the other circumstance which I have mentioned, I come to the conclusion, with a very great deal of confidence, that the so-called chancel was never part of the parish church, but has been always the separate property of the college and of the king to whom the college surrendered it, and of the predecessors in title of the plaintiff who claim under the king's grant, and that consequently the plaintiff is entitled to recover, and that the judgment of Lord Coleridge should be affirmed.

BAGGALLAY, L.J.—I am of the same opinion. I do not propose to discuss the circumstances of the case in any detail, for the documentary evidence has been carefully examined, and the undisputed facts have been fully considered by Lord

Coleridge, and I agree in substance with his criticism. I desire, however, to express the general ground upon which I have come to the conclusion that this appeal should be dismissed. At the end of the 14th century, in the reign of King Richard 2, an ecclesiastical building was erected in the town of Arundel. Regarded from an architectural point of view, it was a cruciform church, with nave, aisles, a central tower, transepts and chancel; it had an altar at the east end of the chancel, other altars in different parts of the building, including one on the east side of the south transept, a lady-chapel on the north side of the chancel, and a rood-loft across the chancel arch. With one exception, to which I will presently allude, this building is, in general arrangements, a complete church, and well adapted for the performance of the several sacred offices which, at the period of its erection, were usually performed in a parish church. It, moreover, stood wholly or in part upon the site of a previously existing church dedicated to St. Nicolas, and which is recognised or referred to as the parish church of St. Nicolas, Arundel, in the ancient document, which has been the subject of comment by the counsel for the appellant. There is, however, no evidence as to the precise boundaries of such previously existing church. I may here mention that shortly after the Norman Conquest a priory of monks of the Benedictine order was established in Arundel, and acquired the rectory of the parish, and the rights incident thereto; and some time previously to the erection of the church, but at what time in particular does not appear, a vicarage had been erected, of which the priory was the patron. The question which we have to determine on the present appeal, is whether the chancel of the church, which was so erected in the reign of Richard 2, became part of the parish church of Arundel.

The appellant, who is the vicar of Arundel, contends that it was part of the parish church at the time of the construction, and has ever since continued to be so. On the other hand, the Duke of Norfolk, who is the respondent, insists that the building in question was not at

(13) 48 Law J. Rep. C.P. at p. 745.

Duke of Norfolk v. Arbutnot (App.), C.P.

any time part of the parish church, but has at all times been the property of himself and his predecessors in title. As a matter of convenience, I shall refer to the church so erected as the "church," and to the building in dispute as the "chancel." In considering the general question thus submitted to us, the first enquiry which suggests itself is, In what manner has this chancel been treated and used since the time of its construction? Have the sacred offices been performed in it, which for the time being were usually performed in a parish church? Have the vicars for the time being exercised any authority or control over it? Has it been kept in repair by those who for the time being would be by law bound to repair it, if it was the chancel of a parish church? All these, and other questions of a similar nature, have been fully and carefully considered by Lord Coleridge in his judgment, and I do not propose to refer to them further than to say that they must, in my opinion, be answered in the negative, and for the reasons assigned by him. The conclusion to be drawn from these questions being so answered is very adverse to the view put forward by the appellant. On the other hand, there is the strongest evidence of acts of apparent ownership on the part of the predecessors of the present respondent. At the same time I fully assent to the argument pressed upon us by the appellant's counsel—that if it is established that the chancel ever formed part of the parish church, in the sense contended for by him, the mere fact of its disuse during four or five centuries would not be sufficient to deprive it of its ecclesiastical character, or the vicar of his rights as such to minister within it.

To return, however, to the period of the erection of the church; one portion of it was admittedly constructed in a manner very unusual in churches built at this or indeed at any other period: across the chancel arch there was an iron lattice or grille separating the nave from the chancel, which lattice or grille, when the gates in it were closed, prevented the access from the nave to the chancel, or *vice versa*. No instance has been brought to our attention of a similar grille having

formed part of the original construction of any other church, and the fact of its being introduced into the church at Arundel is at least suggestive of an intention, on the part of those under whose direction the church was built, to secure the means of effecting for some purpose, whatever that purpose might be, a separation between the two portions of the apparently one church.

About the same time that this church was built, a college, consisting of a master, or custos, and twelve chaplains, was founded under licence from the king, by the then Earl of Arundel; the then existing Benedictine priory, to which I have referred, was suppressed or dissolved, and all its property was by the like licence of the king vested in the college. Amongst the property so vested in the college was a building which had at one time been the rectory of the parish church, but which had been made over as a residence for the prior and monks shortly after their establishment in Arundel. Now this college was founded for the performance of certain specified sacred offices—offices which were perfectly distinct from those which the vicar of the parish, as such, would be bound to perform in the parish church. The master and chaplains of the college, upon whom was imposed the duty of performing these sacred offices, were bound by their statutes to reside in the building so vested in them; and a chapel, either within or external to the parish church, was essential to the due performance of these offices.

Bearing in mind that the Earl of Arundel, at whose cost the church was built, also founded the college, and, within the limits of the king's licence, imposed upon it its duties, I can see nothing *prima facie* unreasonable in attributing to him the intention that that which, architecturally considered, was the chancel of an entire church, and might be spoken of as the chancel or choir of such church, should, nevertheless, in fact be the chapel of the college, and should be used for the performance of the duties imposed upon the college, as fully and completely in all respects as if it had been a building separate and apart from the parish church, and that the remaining portion of the

Duke of Norfolk v. Arbutnot (App.), C.P.

church should replace the previously existing parish church. If such an intention existed it would explain the introduction into the newly erected church of the lattice or grille, as a means of securing the separation of the chancel from the rest of the church, with the view to the performance within it of those offices which it was the special duty of the college to perform. Nor would the occasional, or even the frequent, use of the college chapel for services in which the parishioners could participate, be inconsistent with such an intention as that which I have suggested. I need hardly say that the existence of any such intention might be negatived by the facts as established by evidence.

But is there any such evidence in the case we are considering? I think not. On the contrary, whilst much of the evidence appears to me to be quite inconsistent with the views put forward on behalf of the appellant, there is nothing proved which, in my opinion, is inconsistent with the view that it was never intended that the disputed building should form part, and that it never did form part, of the parish church.

Now it is somewhat singular that, neither in the licence of Richard 2, nor in the permission and inquisition by which it was preceded, is there any mention made of a new church having been recently built, or of such a church being in process of building, or as being about to be built, nor indeed of there being any necessity for the erection of a new church. The old church is spoken of as being deprived of its proper services by reason of the desertion or absence of the Benedictine monks by whom they ought to be performed, but no suggestion is made of its having gone to decay, or its being out of repair.

From this it appears probable that the erection of the new church had not been commenced at the date of the licence of 1380, and that possibly it was not even in contemplation. The foundation of the college was apparently, at that time, the paramount object of all parties. It is quite true that, eight years later, when the college was founded, and its statutes were promulgated, allusion is made in

the eighth chapter of the latter to the celebration of high mass *in magno altari*, and of mass in honour of the Virgin, "*ad summum altare*," until a special altar shall have been provided for that purpose, and also that daily, after the celebration of high mass "*in cancello*," a service shall be said by the chaplains, standing in equal numbers on either side of the choir; but I do not gather from this that any more of the new building than "the chancel" had been then completed. The provisions in the statutes appear to be well adapted to regulate the performance of the prescribed sacred offices in a chapel belonging to the college, but there is no suggestion as to the performance of the offices usually performed in a parish church. It is quite possible, and, in my opinion, it is the more probable view, that the completion of the edifice was by way of adjunct to the already constructed chapel, and that such completion was either not in contemplation at the time when the statutes were framed, or that, if it was in contemplation, it had not been then commenced. But, however this may be, the events subsequent to the promulgation of the statutes appear to me to negative the contention that the chancel in question ever formed part of the parish church.

I do not attach much importance to the direction in the will, dated in 1415, of Thomas, Earl of Arundel, that he should be buried "in our college of Arundel before the high altar." On the one hand, it is said that it indicated the view of the testator that the building now in dispute was then a part of the possessions of the college; and on the other, that he laid no claim to any part of the church, but only to the college. In my opinion the two views are not necessarily inconsistent. The wishes, however, of the earl were complied with, and his tomb is the earliest in date of those which have been constructed in the chancel.

But about one hundred years later a very important transaction took place. I refer to the dispute which then arose between the college, who were the rectors of the parish of St. Nicholas on the one part, and the mayor and parishioners of Arundel on the other, and to the award in the matter of such dispute made in 1511 by

Duke of Norfolk v. Arbutnot (App.), C.P.

the then Earl of Arundel and the Bishop of Chichester. It appears from this document that the dispute had reference to the repair and maintenance 'Illarum partium ecclesiae ibidem quae vulgariter dicuntur ye crosse-partes ducentes ab austro per medium inter chorum et navem ecclesiae usque ad boream;' the appellant relies upon this description of the "crosse-partes" as showing that at the date of the award the building now in dispute was recognised as the chancel of Arundel Church; that the whole building was then regarded as one church. That the portion in dispute was commonly spoken of as the chancel of that church would undoubtedly be suggested by the words I have quoted if read by themselves; but it further appears from the same document that the south transept in which, as I have already mentioned, there was an altar, was commonly spoken of as the parish chancel, and the circumstance of the college being directed by the award to bear the costs of repairing and maintaining this transept, leads me to the conclusion that it was not only commonly called the parish chancel, but was actually used as such, and that the building now in dispute, though it might properly be called the chancel of the entire church, was not at the date of the award used or recognised as the chancel of the parish church. How long the transept had been used as the parish chancel does not appear; but, having regard to the comparatively short period of time which had elapsed since the building of the church, and to the absence of any evidence that the chancel of the church had ever been treated as the chancel of the parish church, I am of opinion that the award, taken by itself, affords very strong evidence in support of the view that it never was so treated; and taking this evidence in connection with that to which I have previously referred, I have come to the conclusion that the building in dispute never did become, and that it was never intended that it should be, a portion of the parish church.

I have not omitted to bear in mind the argument addressed to us upon the language of the document connected with

the foundation of the college, and particularly those based upon the expression of an intention to found a chantry or college "in ecclesia parochiali Sancti Nicolai;" but having regard to the uncertain character of the language in which these documents are expressed, and bearing in mind the circumstances which undoubtedly existed previously to and at the time when the licence of the king was given for the foundation of the college, I am of opinion that these expressions cannot be treated as implying that the chantry or college was to be founded or established within the actual boundaries of the parish church, and that they point to no more than an intention to found and establish it in connection with the parish of Arundel, the advowson of the vicarage of which, as well as that of the rectory, it was intended to vest in the college.

BRETT, L.J.—This case has been ably argued on behalf of the defendant; nevertheless I do not feel any doubt that the judgment of Lord Coleridge was right.

The act, which is the subject-matter of the dispute, was an act done by the defendant, the vicar of the parish, whilst the plaintiff was admitted to be in possession of the disputed building, and that act of the vicar was *prima facie* an act of trespass, and the vicar could only justify that act as against the possession of the duke by shewing that he was justified in law in committing that act. The burden of proof lies upon the vicar. Unless he can shew that he had a right to deal with the building in dispute, he was guilty of a trespass. It was contended that the question to be determined by us took the form of a dilemma, namely, that the building in dispute was either the private chapel of the Duke of Norfolk or the great chancel of the parish church. I do not think that this dilemma exists. If the disputed building is not the great chancel of the parish church, it signifies not under what right it belongs to the Duke of Norfolk; further, unless the chancel belongs to the parishioners, it signifies not whether he has any right against some other person. The possession alone is sufficient title as against this act

Duke of Norfolk v. Arbutnot (App.), C.P.

of the defendant, unless he can shew that at some time this building was the great chancel of the parish church in the possession of the parish church as such. I agree that if ever it was in that condition, the rights of the parishioners could not be defeated by anything which has been done; but it is not the decisive question whether this building is the private chapel of the Duke of Norfolk.

Upon considering the evidence it seems to me that every action of the duke's predecessors was probable and natural if the building was their property, and that every act of the long succession of vicars until the present one was improbable and unnatural if the building was the great chancel of the parish church. I accede to the view that no one act on either side has been proved which is inconsistent with the alleged right of the other side. If any one act on either side could have been proved which was really inconsistent with the right proposed by the other side, that act must have decided the case. Where many acts are consistent with either view, if one could be found inconsistent with one view, that would decide the case notwithstanding all the other indecisive acts. But here no act was absolutely inconsistent with either view. The question, therefore, is upon which side the evidence predominates. Now, it seems to me that the evidence may be classed in the following manner. From the time when the church was built until now, only the undisputed part of it has been used as a parish church; the disputed building has never been used as part of the parish church. Since the Reformation the communion table has never been placed in this building, which is said to be the great chancel of the parish church, but it has always been placed in the undisputed portion. The returns of the vicars, which were made at visitation, have most certainly treated the undisputed portion of the building as the parish church, and treated that part as being the whole of the parish church, which is quite contrary to any view of the disputed building being the great chancel of the parish church. The answers were quite wrong if it were so, because these answers state that the com-

munion table was in the proper place, that the Commandments were put up in the proper place, and if this was the great chancel of the church it is obvious the answers were wrong. This is not inconsistent with its being the great chancel of the parish church; but it is very improbable that a long succession of vicars and churchwardens should have made erroneous answers, which should have been accepted without dispute if this were the great chancel of the parish church.

There have been burials in the disputed part, but they have been burials of the families of the Dukes of Norfolk or of their predecessors. It is quite true that with regard to some of them the vicar of the parish has performed the service at the grave. Lord Coleridge has said that Roman Catholic families do not object to the burial service of the Church of England, and this appears to me to be correct; the reason why they do not object is perhaps to be explained by the consideration that in the Roman Catholic ritual there is no service at the grave, and therefore that the service which is performed by the Protestant clergyman is not inconsistent with their ceremonies. There is another series of burials which does seem to my mind to be more improbable, if the vicars before the present vicar ever claimed any right to this chancel, and that is, burials of the members of the Norfolk family without any interference of the vicar, without any leave asked, without any fees paid: I may particularly mention the burial of the domestic chaplain of the Duke of Norfolk. This was alleged to be a surreptitious burial—that is, a burial purposely concealed from the vicar; but I can find no ground for the suggestion. Such a circumstance as this seems to me not indeed quite inconsistent with the defendant's case, but it is wholly improbable that such a series of burials should have happened without any remonstrance or objection on the part of the vicars unless they were persuaded that this building was no part of the parish church. Moreover, vaults have been excavated within this building without any leave asked of anybody, contrary to what would be the

Duke of Norfolk v. Arbutnot (App.), C.P.

ecclesiastical law if this building were part of a parish church. There were even disinterments without any leave asked of the vicar or any faculty obtained from any body. There is, moreover, the fact of the building having been allowed to go into decay. I confess that this circumstance does not strike me in the same way as it did Lord Coleridge. He seems to have looked on it as one of the greatest proofs of ownership in the plaintiff; perhaps it is so when it is considered in this light: it is almost impossible to suppose that the Dukes of Norfolk would have been allowed to suffer this building to go into the decay in which it is without any remonstrance from the vicars or churchwardens of the parish, unless they had been persuaded that it was no part of the parish church. Assume that it was the chancel of the parish church, but that the Dukes of Norfolk had peculiar rights over it; if that be so, they would have been bound to repair it; and there cannot be a doubt that the parishioners would have claimed from him that it should be repaired. Therefore, from the time when the grant of the church, whatever that might mean, was made by the king in the largest possible terms to the predecessor of the plaintiff, the great preponderance of the evidence is in favour of the view that this disputed building was the property of the Duke of Norfolk, or at all events was no part of the parish church.

But it has been contended that the evidence before the time of that grant is wholly inconsistent with the view that this was not a part of the parish church; and the facts relied upon are the documents and the statements therein contained. It is said that the king could only grant what had been surrendered by the college. That is very true. I accede to the view that in point of structure there is but one church, and that the disputed building is the great chancel of that church; and I agree that the documents shew that until the college came to an end it was used as the chancel of the church, and that the only high altar was in that chancel. It was said that these circumstances were conclusive for several reasons. One reason was that certain

ceremonies of the Roman Catholic Church could only be performed at a high altar—I mean such ceremonies as high mass; but upon enquiry I find that these ceremonies might be performed at the altar which is in the south transept, and that marriages likewise might be there celebrated. The argument which was rested upon the mode of celebrating the Roman Catholic ritual seems to me inconclusive. Reliance was also placed upon the language of the documents; but the language is not always grammatical or correct, and too much stress cannot be placed upon it: it seems to me inconclusive. Then the award seems to me to be, when added to all the other facts, fatal to the contention of the defendant. The fact of such a dispute arising shews that the condition of the whole church was abnormal. If it had been clearly admitted to be a parish church and nothing else, no such dispute as existed could have arisen. And, as it seems to me, the assumption made in the submission could not have been acceded to by the college, or would have been put forward by the parish. It may be that assuming the whole church to be the parish church, it would have been assumed that the college should repair the chancel, but it could not have been assumed that the college should repair the Lady Chapel. In an ordinary parish church that would beyond question be a part of the church to be repaired by the parish. The award with the admission and disputes recited in it is almost inconsistent with the contention of the defendant. At least it is most weighty evidence against it.

It is as well to take a view of some of the facts of the case. It seems to me that the size and nature of the church were extraordinary if it was built merely as a parish church. I think it cannot be doubted that there was a parish church there before. If the present church had been built upon the foundations of the old church, we should have had some notice of them. It seems to me that the size of the parish, as contrasted with the size of the church and the fact of none of the foundations of the old church being visible, are strong to show that this is a

Duke of Norfolk v. Arluthnot (App.), C.P.

much larger church than the old one. I infer myself that it was a much larger church than was necessary for the parish. It was obvious that the church was built by the Earls of Arundel at their own cost, and that it was not built by the parishioners. They were great Roman Catholic nobles, and they intended to build the church for the sake of the college of secular priests and not merely for the sake of the parishioners. The statutes prescribe with great minuteness the mode in which the members of the college were to perform the services in the church: they shew that the members of the college were to be considered to be the rectors of the parish; and the rectors appointed a vicar, who was to perform the services of the church. It was said that as they were ecclesiastical rectors of the parish, they could prevent the vicar whom they appointed from performing the services of the church and could perform them themselves. I think that an incorrect view. They were not the ecclesiastical superiors of the vicar. They could not give him orders at their pleasure, and he as vicar would have a right to perform the proper parochial services. If the chancel was part of the church, the statutes ought to have provided in what cases the vicar should perform services at the altar in this chancel. But it is obvious that they did not contemplate that the vicar should perform any services at this altar, and there is no evidence that any vicar has ever performed any service at this altar except the service at the burials of those connected with the Dukes of Norfolk. It seems to me that the statutes and muniments shew that this church never did belong to the parish, but that it was built for and given to the college; and that inasmuch as it was built partly upon the site of the old parish church the parishioners had some rights over the church, although it did belong to the college, and that the vicar had the right to perform upon their behalf all the necessary Roman Catholic services. There was one church which belonged to the college, in which the college was entitled to perform in every part of the church all Roman Catholic services; the vicar, on

the contrary, on behalf of the parishioners, was entitled to perform the services only in part of the church, and that part was originally the south transept. It was argued that this state of things could not exist, that no such division of one church could be supposed; but Lord Coleridge has pointed out certain instances in which it has actually happened, both in Roman Catholic times and since. I may mention the chapel of Eton College, the Lady chapel of Ely Cathedral, Carlisle Cathedral, Durham Cathedral, and Merton College, Oxford. In all these cases the church or cathedral has not belonged to the parishioners but to other persons, and the parishioners merely had a right to perform services there. I come, therefore, to the conclusion that all the acts before the grant by the king to the Duke of Norfolk are consistent with the view that this church belonged to the college and not to the parishioners, but that the parishioners had the right to perform all the services of the Roman Catholic Church in the south transept. But the parishioners have obtained by lapse of time against the Dukes of Norfolk an absolute right to the whole of the church except the building in dispute, and perhaps the Lady chapel. This seems to me to be the true result of this case. It follows, therefore, that the judgment of Lord Coleridge was right.

Judgment affirmed.

Solicitors—Few & Co., for plaintiff; Brooks, Jenkins & Co., for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } HORDER (*appellant*) v. SCOTT
May 4. } (*respondent*).

Sale of Food and Drugs Act, 1875, ss. 6, 12, 13—Adulterated Article—Purchaser—Inspector acting by Deputy—Information.

[For the report of the above case, see 49 Law J. Rep. M.C. 78.]

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1880. }
 June 16, 17. } FLETCHER v. HUDSON.*

Local Board—Member acting after Disqualification—Action for Penalty—Plaintiff—Consent of Attorney-General, whether necessary—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 253, and sched. II. rule 70.

Section 253 of the Public Health Act, 1875, enacts that "proceedings for the recovery of any penalty under the Act shall not, except as in this Act is expressly provided," be taken by any person other than by a party aggrieved, or by the local authority of the district, without the consent in writing of the Attorney-General.

By rule 70 of sched. II. (which by section 317 is to be read as part of the Act) any person who acts as member of a local board, after disqualification, shall be liable to a penalty of 50l., "which may be recovered by any person" by action of debt. In an action to recover a penalty under rule 70, it was,—

Held (affirming the judgment of the Exchequer Division), that the exception in section 253 applied to "any person" suing for a penalty under rule 70, and therefore that the plaintiff could bring his action without the consent of the Attorney-General.

Appeal from a judgment of the Exchequer Division, reported *ante*, p. 697, where the facts are fully stated.

Action to recover a penalty for an offence under rule 70 of schedule II. of the Public Health Act, 1875.

Bowen, J., in chambers, ordered a stay of proceedings in the action, on the ground that the plaintiff was not a "party aggrieved," within the meaning of section 253 of the Act, nor had obtained the consent of the Attorney-General to bring the action, as required by that section.

The Exchequer Division set aside the order of Bowen, J., and the defendant appealed.

W. G. Harrison and Orompton, for the defendant.—The plaintiff ought to have

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

VOL. 49.—Q.B., C.P. & EXCH.

obtained the consent of the Attorney-General, as a condition precedent to his right to bring this action. Reading section 253 of the Public Health Act, 1875, with rule 70 of schedule II., the true construction is that the words "any person," by whom an action may be brought under rule 70, mean "any person with the consent of the Attorney-General." *Smith v. Fieldhouse* (1) expressly decides that the Attorney-General's consent is necessary before bringing an action for penalties under rule 70 of schedule II., and in *Rochfort v. Atherley* (2) the same point was also inferentially raised and decided. The words of the exception in section 253, "except as in this Act is expressly provided," point to some express provision dispensing with the consent of the Attorney-General. The exception is, perhaps, satisfied by express provisions such as are to be found in section 68, with respect to proceedings for the recovery of penalties for polluting water, but it is not satisfied by rule 70, where the words "by any person" must be treated as surplusage, and not as an express provision that the Attorney-General's consent is unnecessary. Section 133 of the Public Health Act, 1848, contains substantially the same provisions as section 253 of the Act of 1875, only there is no exception in section 133 as there is here. The decisions under the earlier Act shew that the consent of the Attorney-General was necessary—*Boyce v. Higgins* (3), *Hollis v. Marshall* (4).

The policy of the Legislature in passing both Acts was to require the consent of the Attorney-General in all actions by common informers. The penalty here being recoverable by action of debt there is no power to reduce the amount, and that affords a special reason for requiring the consent of the Attorney-General to the action. The exception in section 253 of the Act of 1875 may refer to cases in which a special person is pointed out by the Act as prosecutor, as in cases of pro-

(1) 35 Law Times Rep. N.S. 602.

(2) Law Rep. 1 Ex. D. 511.

(3) 14 Com. B. Rep. 1; 23 Law J. Rep. C.P. 5.

(4) 2 Hurl. & N. 755; 27 Law J. Rep. Exch. 235.

Fletcher v. Hudson (App.), Exch.

ceedings taken under sections 48, 60, and 96.

A. Charles (A. Cock with him), for the plaintiff.—The judgment in *Hollis v. Marshall* (4) is not expressly against the plaintiff's contention on the question whether or not the consent of the Attorney-General was necessary. The decision was that the plaintiff having framed his declaration under section 133 of the Public Health Act, 1848, could not maintain a *qui tam* action. But possibly the words "except as in this Act is expressly provided" were introduced into section 253 of the Act of 1875 for the purpose of meeting the decisions in *Boyce v. Higgins* (3), and *Hollis v. Marshall* (4). The only direct authority in the defendant's favour is the decision in *Smith v. Fieldhouse* (1); but the judgment there was only given upon motion for a rule *nisi*, so that the question was not fully argued. It is submitted that the decision was wrong, and should be overruled. The exception in section 253 refers to the person who is to sue, and not to the consent of the Attorney-General. This appears clearly if the words of the section are transposed. The Legislature intended that the action might be brought by anyone without the consent of the Attorney-General, in all cases where the offence was by a member or officer of the board. Thus cases within sections 192 and 193 are within the exception. If the defendant's contention is right, the words "except as in this Act is expressly provided" are void of meaning, because in all the instances mentioned in the argument for the defendant the person who is to take proceedings is a "party aggrieved;" so that, apart from the exception, the consent of the Attorney-General would not be necessary.

Further, this is not a penalty within the meaning of section 253, which was intended to apply only to penalties recoverable under section 251, in a summary manner. Rule 70 gives a different remedy by action of debt.

Crompton replied.

[*Boyce v. Higgins* (3) and *Hollis v. Marshall* (4) were cited in the arguments, as to whether the plaintiff was a "party aggrieved" within the meaning of section 253; but as no judgment was given on

this point, it is unnecessary to set forth the arguments.]

BRAMWELL, L.J.—I think this judgment should be affirmed, but I come to that conclusion with the greatest doubt and hesitation. There are two ways of reading section 253. One is to say that the words "except as in this Act is expressly provided" means "except where in this Act it is expressly provided that the consent of the Attorney-General shall not be necessary." The other way of reading the section is that no proceedings shall be had and taken by any person "except as in this Act is expressly provided"—that is to say, unless the proceedings are taken either by the party aggrieved, the local authority, by some person who has obtained the consent of the Attorney-General, or where expressly provided for by "any person" without his consent; in other words, that the exception refers to the *person* who may take proceedings. On first reading the section I certainly thought the exception referred to an express provision in the Act that the consent of the Attorney-General was not required. The difficulty in adopting that construction is that the clause becomes positively unmeaning, because nowhere in the Act is it said that the consent of the Attorney-General shall not be necessary. That being so, I am of opinion that the rule of construction—not always a reasonable one perhaps—ought to be applied, that you must give, where it is possible, a meaning to all the words of the enactment you are construing. I am not sure that the result here is a reasonable one, because the exception in question may have only been placed in section 253 *ex abundanti cautela*. But still the exception is there, and must be construed according to the ordinary rules.

In my opinion, one must put the meaning upon the exception that it refers to the person who may sue—that is to say, "no person except as in this Act is expressly provided" shall bring the action, &c. The effect of the section would then be that proceedings may be taken by a party aggrieved—by the local authority—in all cases where the consent of

Fletcher v. Hudson (App.), Exch.

the Attorney-General has been obtained, and, where expressly mentioned in the Act, by any person otherwise. One comes to this conclusion the more readily that the only other construction is an impossible one; because, whereas there are many cases in which it is enacted that penalties shall be incurred without saying who is to recover them, they can only in those cases be recovered by the party aggrieved—the local authority—or with the consent of the Attorney-General. There are three cases, and no more, in which the penalty may be recovered by “any person,” namely, under sections 192 and 193 and rule 70. The other sections which impose penalties either give them to the party aggrieved or make no mention of who is to recover them. In the present case, under rule 70, the penalties may be recovered by “any person.” I think, therefore, the exception in section 252 is satisfied, and that the consent of the Attorney-General is not necessary. I may add, too, that the three cases above enumerated, in which “any person” may sue, are the only instances in the Act in which the penalty is recoverable as a debt. The construction I am putting on the Act is, perhaps, a technical one, and, as I said, I have the greatest doubt whether those words, “except as in this Act is expressly provided,” have not crept into the section without any intention whatever on the part of the Legislature to dispense with the consent of the Attorney-General. It seems to me not unreasonable to say that the words “by any person” might have been left out of rule 70 altogether, unless put in with some such intention as I have indicated. Perhaps also it tells in favour of the plaintiff's case that sections 192 and 193 and rule 70 deal with offences by members of the local board or their officers and servants. It may be that the Legislature intended that for such offences the consent of the Attorney-General was not necessary. There are no other cases in which an action of debt is maintainable “by any person” except in the case of offences committed by the board or their officers. As to authority, we have the opinion of Lord Coleridge and Baron Pollock in *Smith v. Fieldhouse* (1) against

our present view. On the other hand, we have the opinion of Mr. Justice Bowen and Justices Huddleston and Stephen, in the Exchequer Division, in favour of it. I cannot say that they were wrong. I think that the principles and rules of construction upon which Courts are accustomed to act, justify us in saying that this appeal should be dismissed. I may add that possibly the meaning of the Act may have been that a party aggrieved may sue in all cases; so may the local authority; but when the local authority can sue and does not, an action by a common informer is looked upon with suspicion, and the consent of the Attorney-General is made necessary; but when the local authority themselves are the offenders, the general rule is not to prevail, and proceedings may be taken without consent. Another thing is noticeable, that in this Act the words “except as in this Act is expressly provided” have been inserted, not having been in the corresponding provision in the former Act.

BAGGALLAY, L.J. — I agree that the judgment of the Exchequer Division should be affirmed. A large number of penalties are created and imposed by this Act for offences which may be committed either by persons other than members of the local authority or their servants, or by the local authority or their servants. There is, in my view, a distinction drawn in the Act between the one case and the other. In the former case no provision is made specifying the person by whom proceedings are to be taken, except in sections 60 and 68. In the first class of cases either the party aggrieved, or the local authority, or a person with the consent of the Attorney-General, may sue. The only other cases are the three mentioned in sections 192 and 193, and in rule 70, which deals with the case of members of the board acting without a proper qualification. In these cases the penalty may be recovered by “any person” in an action of debt. It appears to me that the distinction drawn in the Act between the one class of cases and the other is both with regard to the nature of the person who is

Fletcher v. Hudson (App.), Excu.

to sue and the mode in which the penalty is to be enforced. I think that the words, "except as in this Act is expressly provided," in section 253, must be construed according to their place and collocation in the section. A restriction is placed upon the general power to sue, and an exception is made from that restriction. The collocation of the words forming that exception shews that the exception is satisfied by the three cases of offences by the board or their servants, of which rule 70 is one. Those are clearly cases in which a penalty may be recovered by action in a particular manner by any person. I think this is a reasonable provision, and where the offence is by the board or their servants, the Legislature might well intend for the public benefit to give a more extended power of proceeding.

BRETT, L.J.—In this case I am sorry to say that I cannot dissent from the view expressed by the other members of the Court. For my own part I am unable to read the section grammatically, and I can hardly read it so as to put a sensible meaning on the words. I cannot help thinking that the section was drawn with the intention of putting a bridle on common informers, but that somebody out of excessive caution has inserted an exception to which no meaning can be given except that given by Lord Justice Bramwell. I feel compelled to give effect to the words we find in the section, according to the known rules of construction.

Judgment affirmed.

Solicitors—Iliffe, Russell, Iliffe & Cardale, agents for Laycock & Co., Huddersfield, for plaintiff; J. & E. Scott, agents for G. Gatey, Ambleside, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880.

April 24.

{ CHAPLEO AND WIFE v. THE
BRUNSWICK BENEFIT BUILD-
ING SOCIETY AND OTHERS.

Principal and Agent—Unincorporated Building Society—Loan—Payment to Treasurer—Liability of Society and Directors—Certified Rules, contravention of.

By the certified rules of an unincorporated building society the directors were empowered to borrow money up to a prescribed limit. The course of business was for the treasurer of the society to receive the loan and give the lender a receipt, together with an undertaking on behalf of the directors to give a promissory note of the directors for the amount, and these notes were subsequently exchanged for the receipt and undertakings. The plaintiffs advanced 100l. to the society, paying the amount to the treasurer and receiving from him a receipt and undertaking. This sum was never paid over to the society, but was appropriated by the treasurer to his own use; and no promissory note for the amount was procured for the plaintiffs. At the time of this loan the society had borrowed in excess of the limit prescribed by the rules. The plaintiffs having sued the society and the directors to recover the amount,—Held, that the society and the directors might and did hold out the treasurer as having authority to act for them in the way he did, and that they were both liable, notwithstanding that the amount of the plaintiffs' loan was in excess of the limit prescribed by the rules of the society.

Further consideration.

The facts and arguments are sufficiently stated in the judgment.

Charles Russell, Taylor and C. A. Russell, for the plaintiffs.

Heywood (Herschell with him), for the defendant society.

Pope and Crompton, for the defendant directors.

LORD COLERIDGE, C.J. (on April 24).—This case was tried before me and a special jury at Manchester in February last; certain points arising on the findings of

Chapleo v. Brunswick Building Society, C.P.

the jury were argued before me at Westminster on the 13th and 20th of March; and I now proceed to give judgment.

The action was brought against the Brunswick Building Society, and the directors of the society, to recover a considerable sum of money lent by the plaintiffs to the society under circumstances which I will presently detail. The whole of the sum in dispute, with interest, has been paid by the defendants, except a sum of 100*l.* But as the defence to this sum of 100*l.* is one, upon the validity or invalidity of which the liability to pay many thousands of pounds depends, it is thought worth while, and no doubt is worth while, to resist payment of it.

The defendant society was established in January, 1871. Its rules were certified pursuant to the Act then in force in March, 1871, and certain amendments to the rules were certified in March, 1873. Its object is defined by the first rule, which is as follows:—

“1. This society shall be denominated the ‘Brunswick Permanent Benefit Building Society.’ Its object is to enable its members to receive the amount or value of a share or shares to purchase or erect freehold or leasehold property. Payments to be made fortnightly in such sums as are hereinafter specified and defined; each share to be of the value of 10*l.* Members may subscribe for any number of shares.”

The sixth rule prescribes that the directors shall at any meeting elect a treasurer from amongst themselves and the other members at such remuneration as may be deemed proper.

The tenth rule is this: “Messrs. Keighley, Lea, Son & Co., shall be the secretaries to the society.”

The twelfth rule, upon which much of the argument before me turned, is as follows:—

“The directors may at any time, as may be necessary for the purposes of the society, borrow money at interest from any banker with whom the funds of the society shall be deposited, or from any other source, to procure which the directors may give such security as they may think proper; but the total amount of money to be so borrowed shall not at any one time exceed *two-thirds* of the amount for

the time being secured by the mortgages to the society.”

It is admitted that when the 100*l.* in dispute in this action was paid by the plaintiffs, the total amount of money borrowed by the society exceeded (in fact it very largely exceeded) the amount secured by mortgage within the terms of this twelfth rule. The question is, whether the society and the directors of the society are nevertheless liable to repay it under the circumstances which I now proceed to state.

The money was not paid to the society itself assembled at a general meeting, nor even to one or more of the directors at any board meeting. It was paid to a Mr. Keighley Lea; and his connection with the society and with the directors was this: His firm were made secretaries by the tenth rule. They kept all the business and cash books belonging to the society. One of them attended the meetings of the directors and kept the minutes. Mr. George Lea had been treasurer, and after his death Keighley Lea acted as treasurer, and received all the money paid to the society; and if he was not treasurer there was none. A question was made as to the exact meaning of certain minutes referring to the appointment of treasurer—a question which, after the statement of fact just made, and made in the uncontradicted words of one of the witnesses, I do not think it material to discuss.

The office of Keighley Lea was the only office of the defendant society; there only the society met whenever it did meet; there only the meetings (generally once a fortnight) of the directors were held. Keighley Lea was, as one of the directors who was a witness at the trial called him, “the *factotum* of the society.” The society borrowed money largely; and the mode in which the borrowing was conducted was, without any exception, from the very beginning of the society, the mode pursued in this case. The lender brought the money to Keighley Lea; a receipt and an undertaking on behalf of the directors to give a promissory note of the directors was given him in the form used in this case on behalf of the society and the directors, either by Keighley Lea or by one of his clerks; promissory notes

Chapleo v. Brunswick Building Society, C.P.

for the amount of the sum lent were then signed by the directors at their next meeting and exchanged for the receipt and undertaking through Keighley Lea; and on the sums so borrowed and so secured interest was paid. Except as to the 100*l.* now in dispute this course was followed with respect to the plaintiffs: all the sums lent to the society were secured by the promissory notes of the directors, and these notes have been paid. In the case of this 100*l.* the money was received and the receipt and undertaking was given, but no promissory note was ever procured. The money was paid to Keighley Lea on the 29th of October, 1878, and in December, 1878, or in January, 1879, Keighley Lea absconded, a large sum of money belonging to the society and paid to him having never been paid over to them by him. On application to the directors by the plaintiffs they refused either to pay interest on the 100*l.* or to give their promissory note for it; they repudiated all liability for themselves or for the society; and the question is, Are either or both liable?

At the trial the evidence was substantially all one way; and I left two questions to the jury: first, Did the defendant society hold out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received? second, Did the defendant directors? The jury answered both questions in the affirmative; and, if they could so find in point of law, I am of opinion that there was abundant evidence to warrant them so finding in point of fact. It is said, however, that they could not; and this has now to be considered.

The case is not quite the same as it affects the society and as it affects the directors, and I will deal with the liability of each separately; and first as to the society itself.

It is true that though it has been incorporated under the provisions of 37 & 38 Vict. c. 42, it had not been so incorporated, and was not a corporation, at the time of the lending of this 100*l.* But the society as a body, just as any other co-partnership as a body, might know, and so act upon their knowledge, as to sanction

the proceedings of Keighley Lea. Of this knowledge and of their so acting upon it, there has been abundant evidence given against the society. If it was not so in point of fact it might have been denied. If the members of the society or any of them were really ignorant of what Keighley Lea was habitually doing, and if knowing it they did not sanction it, they might have been called to say so. No one was called to say so, probably for the best reason, that no one could be. The case comes, therefore, under a well-settled principle. The society have put their agent in his place to do the very acts for them which he did, and they must be answerable for the manner in which he has conducted himself in doing those acts. If authority be necessary for this proposition it is to be found in the cases of *Barwick v. The English Joint-Stock Bank* (1) and *Mackay v. The Commercial Bank of New Brunswick* (2). The dicta of Lord Cranworth and Lord Chelmsford in the case of *Addie v. The Western Bank of Scotland* (3), which have been supposed to conflict with these cases, are clearly explained and reconciled by Sir Montague Smith at p. 413 of the report of the case in the Privy Council.

It has been argued that, in order to ascertain whether the society have put their agent in his place to do for them the acts he did, the constitution of the society itself must be borne in mind. I make no doubt at all that this is true; and if it should turn out that the society could not authorise an agent to do the act, because it was an act they could not do themselves, they would not be liable for what he did. The argument addressed to me on this point was as follows: This is a society which exists only for certain purposes: it does not exist for the purpose of borrowing beyond the limit ascertained by the twelfth rule; it could not itself borrow; it could not ratify the acts of its directors in so borrowing; any such borrowing, therefore, by an agent, as there was in this case, cannot be authorised in point of

(1) 36 Law J. Rep. Exch. 147; Law Rep. 2 Exch. 259.

(2) 43 Law J. Rep. P.C. 31; Law Rep. 5 P.C. 394.

(3) Law Rep. 1 H.L. Cas. Sc. App. 146.

Chapleo v. Brunswick Building Society, C.P.

fact, because there is no power to authorise it in point of law. And the judgment of the House of Lords in *The Ashbury Railway Carriage Company v. Riche* (4) was cited as establishing conclusively the proposition contended for. I think it establishes nothing of the kind. The company in that case was an incorporated company, with a memorandum and articles of association. The contract on which the action against the company was brought was a contract which, in the opinion of all the Judges (they differed upon other points, but agreed on this), was inconsistent with the memorandum of association; and on this ground the House of Lords decided the case. But in the case before me there is no memorandum and no articles of association; and if it be said, as with some reason it may be, that the first rule is analogous to the memorandum, and the remaining rules to the articles, then there is the authority of *Laing v. Reed* (5) to shew that the existence in such a society as this of such a rule as rule twelve is neither illegal in itself nor inconsistent with a rule exactly like rule one in the present case. I may observe in passing that the authority of *Laing v. Reed* (5) is expressly recognised, and in no way diminished by the later case of *In re The National Permanent Benefit Building Society ex parte Williamson* (6). These cases, it is true, establish only that such a society as this may borrow; they do not ascertain that if it borrows beyond the limit prescribed by the rules it may nevertheless be liable. But both were cases in which this point did not and could not arise; for they were cases in which the plaintiffs were themselves members of the company; and it may well be as between members of the company and the directors, such a rule as rule twelve may in certain circumstances protect the company or certain members of it. But this case is not like those. Rule twelve applies in terms to the directors only. In this case the society, for a purpose in

itself legal, have authorised Keighley Lea to take this 100*l.* for them from the plaintiffs. I am of opinion they are liable to repay it.

So much as to the society. As to the directors it seems to me quite plain that they might, if they pleased, hold out Keighley Lea to the plaintiffs as authorised to undertake for them that they would give their promissory note on the receipt of money paid as this 100*l.* was paid. It seems to me equally plain that there is overwhelming evidence, quite uncontradicted, that they did in fact so hold him out. It follows, I think, that they are bound by his undertaking; and that they must either give their promissory note, or, in the events which have happened, pay the money. Indeed, if the action had been against them alone their very able counsel felt that unless he could get rid of the verdict he could not resist this consequence. But he contended that as the action had been brought against the society as well as the directors the claims were inconsistent, and that if I held the society liable I could not at the same time hold the directors liable. The claims do not seem to me, however, to be inconsistent. I have said that I think the society might and did hold out Keighley Lea as having authority to do what he did and to receive this money for them. I also think that the directors might well, and did in fact, hold him out as having authority from them to undertake for them that they should give their promissory note. He did undertake for them, and they are bound by his undertaking.

I, therefore, give judgment for the plaintiffs against both sets of defendants and with costs.

Judgment for plaintiffs.

Solicitors—E. W. Le Riche, agent for Cobbett & Co., Manchester, for plaintiffs; Ebenezer Le Riche, agent for R. W. Stead, Manchester, for defendant society; Worthington, agent for Sale & Co., Manchester, for defendant directors.

(4) 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & Ir. App. 606/53.

(5) 39 Law J. Rep. Chanc. 1; Law Rep. 5 Chanc. App. 4.

(6) Law Rep. 5 Chanc. App. 309.

[IN THE DIVISIONAL COURT FOR THE
Q.B., C.P. AND EXCH. DIVISIONS.]

1880. }
Aug. 2. } ASQUITH v. MOLINEAUX.

Practice—Time for giving Notice of Trial—Rules of Court, 1875, Order XXXVI. rule 3.

By Order XXXVI. rule 3, a plaintiff is entitled as of right to give notice of trial with his reply, even though the reply may not formally close the pleadings.

This was an appeal from Lopes, J., sitting at chambers, who had refused to set aside a notice of trial given by the plaintiff with his reply. As a matter of fact, the reply did not close the pleadings. In order to join issue, a formal rejoinder was necessary on the part of the defendant, which had not been delivered when the summons was before Lopes, J., at chambers, but had been delivered before the appeal came on for argument here.

Clay, for the defendant.—The intention of Order XXXVI. rule 3 is, that notice of trial can be given with the reply only when the reply actually closes the proceedings. Stephen, J., has adopted this interpretation of the rule in his judgment in *The Metropolitan and Inner Circle Completion Railway Company v. The Metropolitan Railway Company* (1).

[HAWKINS, J.—That case was one of irregularity in entering an action for trial, not in giving notice of trial.]

Smart (of the Chancery bar), for the plaintiff, was not called upon.

COCKBURN, C.J.—The plaintiff is clearly within the terms of the rule, which says that he may "with his reply" give notice of trial. This he has done, and it was his strict right to do so. The alternative words, "or at any time after the close of the pleadings," have no application to such a case as the present. The defendant here could not be prejudiced, as all that remained to be done was the mere formality of joining issue.

HAWKINS, J.—The rule gives the plain-

tiff the option of giving notice of trial either with his reply or at a subsequent stage. It does not say, "with his reply, if the reply closes the pleadings." The alternative words, "or at any time after the close of the pleadings," are not superfluous, but apply to different circumstances from the present.

Appeal dismissed. Plaintiff's costs in the cause.

Solicitors—Parkers, agents for Greaves & Taylor, Bradford, for plaintiff; Crowder, Anstie & Vizard, agents for C. Whiteley, Leeds, for defendant.

[IN THE DIVISIONAL COURT FOR THE
Q.B., C.P. AND EXCH. DIVISIONS.]

1880. }
July 29. } GRANT v. HOLLAND.

Practice—Time for moving for New Trial—Rules of Court, 1875, Order XXXIX. rule 1a.

According to the proper interpretation of Order XXXIX, rule 1a, as amended by the rules of March, 1879, a party applying for a new trial has the whole of four days within which to move; and if no Divisional Court sits upon the fourth day, his time is then extended to the next sitting of a Divisional Court.

The trial of this action had taken place in London, and a verdict had been given for the defendant, and judgment entered accordingly, on Thursday, the 1st of July, 1880. A Divisional Court to hear motions sat on Monday, the 5th of July. The next sitting of a Divisional Court was on Thursday, the 8th of July, when the plaintiff obtained a rule nisi for a new trial. Subsequently, the defendant obtained a rule nisi calling upon the plaintiff to shew cause why his rule for a new trial should not be set aside, on the ground of irregularity, and also because it was obtained out of time.

The ground of irregularity was removed by a personal explanation of

(1) *Ante*, p. 505; *Law Rep.* 5 Ex. D. 196.

Grant v. Holland, Q.B.

counsel; and the second point—as to time—now came on for hearing.

The practice as to the time for moving for a new trial is regulated by Order XXXIX. rule 1a, as amended by the rules of March, 1879. The rule now runs as follows:—

“An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court to which the application may be made shall have actually sat to hear motions.”

Candy, for the plaintiff, showed cause against the second rule *nisi*.—The plaintiff was not bound to move the Court which sat on the 5th of July. He had the whole of four days after the trial within which to make up his mind whether to move or not. The 5th of July was only the third day, deducting the intervening Sunday, which does not count. He was, therefore, within his strict right in moving on the 8th of July, which was the first subsequent day on which a Divisional Court sat.

Pollard, for the defendant, in support of the rule.—A Court actually sat within the four days, to which the plaintiff ought to have made his motion for a new trial. If he did not make his motion then, he ought at least to have applied for an extension of time. *Stirling v. Du Barry* (1), which was decided by the Court of Appeal on a cognate rule, is an express authority for this.

COCKBURN, C.J.—The language of the rule is clear and unmistakable, and differs materially from the language of Order LIV. rule 6, under which *Stirling v. Du Barry* (1) was decided. That was the case of an appeal from chambers; this relates to the time of moving for a new trial. The former practice gave to a party proposing to apply for a new trial four days, as of right, within which to make up his mind. In other words, he had up to the end of the fourth day. By the new rule it was never intended to

restrict that right, or to compel him to come for an extension of time. He still has four days absolutely; but if no Court is sitting on the fourth day, he has now the option given him of coming upon the next day on which a Divisional Court sits, which is thus substituted for his fourth day.

HAWKINS, J.—I am of the same opinion.

Rule discharged with costs.

Solicitors—John Nicholls, for plaintiff; C. C. Ellis, Munday & Co., for defendant.

[IN THE EXCHEQUER DIVISION.]

1880.	}	ALDERSON v. MADDISON.
May 18.		
June 2.		

Contract—Promise to leave Realty by Will—Statute of Frauds.

In an action for the title-deeds of a farm, the jury found that the defendant was induced to serve the plaintiff's predecessor in title for many years as his housekeeper without wages, and to give up other prospects by the promise made by him to her to make a will leaving her a life estate in the farm:—Held, that the facts found amounted to a contract to leave the farm by will to the defendant, and that the defendant having served as stipulated was entitled to judgment, although the contract was not in writing.

Further consideration before Stephen, J.

The facts proved at the trial and the arguments adduced on the further consideration, appear from the written judgment of the learned Judge.

Bagshawe, Gainsford Bruce and Ridley, for the plaintiff.

H. F. Bristowe, Waddy, and J. Edge, for the defendant.

STEPHEN, J. (on June 2).—This case was tried before me at the Durham Summer Assizes in 1879, and was reserved by me for further consideration.

5 K

(1) Law Rep. 5 Q.B. D. 65.

VOL. 49.—Q.B., C.P. & EXCH.

Alderson v. Maddison, Exch.

The statement of claim alleged that the plaintiff was brother and heir-at-law of Thomas Alderson, deceased, who died intestate on the 15th of December, 1877, and in whose service the defendant, Elizabeth Maddison, had lived as house-keeper for many years before his death. Thomas Alderson, at the time of his death, was owner in fee of an estate called Manor House Farm, and on his death his property descended to the plaintiff as his heir-at-law. The defendant took possession on Thomas Alderson's death of the title-deeds of the property. The plaintiff claimed the restitution of the title-deeds and damages for their detention.

The statement of defence admitted in substance the allegations of the statement of claim, but stated in some detail that Thomas Alderson becoming indebted to the defendant for wages, and wishing her to remain in his service, made an agreement with her to the effect that if she would forbear to press him for the arrears of wages due to her, and would serve him for the rest of his life without wages, he would at his death leave her a life interest in the Manor House Farm. Paragraph 7 of the statement of defence stated that Thomas Alderson, meaning to carry out his promises, made a will by which he left the property in question (subject to a small annuity) to the defendant for her life.

By way of counter-claim the defendant repeated the statements above mentioned, and added that the will referred to, though signed by Thomas Alderson, was not properly attested, whereby he had failed to fulfil his engagements to her. She claimed a declaration that she was entitled to a life estate in the Manor House Farm, or to such life estate as the draft will purported to devise to her, and that she was entitled to retain the deeds for her life. In the alternative she claimed to be entitled to retain the deeds till she had been paid all wages due to her, or fair remuneration for her services.

The counter-claim originally contained an alternative claim to have the real and personal estate of Thomas Alderson administered, and that she might be declared to be a simple contract creditor

for the amount of her wages at a fair payment for her services; but in the amended statement of defence this was struck out, so that the only questions before the Court are, whether the defendant is entitled to a life estate in the property, and whether she is entitled to a lien on the deeds.

At the trial it was proved that Thomas Alderson had made the will referred to, and that it had not been properly attested, so that as a will it was void.

[After stating the evidence at length the judgment proceeded:]

I asked the jury at the suggestion of the learned counsel on both sides this question :—

Whether the defendant was induced to serve Thomas Alderson as his house-keeper without wages for many years, and to give up other prospects of establishment in life by a promise made by him to her to make a will leaving her a life estate in Manor House Farm if and when it became his property. The jury replied, Yes. I reserved for further consideration the effect of this finding and evidence, and the case was argued before me on the 18th of May.

The substantial question in this case appears to me to arise upon the defendant's counter-claim. Has she a right to the declaration for which she asks that she is entitled to a life estate in possession in the property, and to the custody of the deeds for life? If not, I do not see how she can be entitled to a lien upon the deeds for any amount of wages which may be due to her. Indeed it was hardly contended in argument that she was so entitled.

The defendant's case is put in two ways. First, it is said that Thomas Alderson made representations to her which influenced her conduct, and which his heir is bound to make good. Next, it is said that what took place between them amounted to a contract that in consideration of her serving him for his life he would leave her by will a life interest in the farm if it became his property during his life and if she survived him. I think that if this was so she is entitled to what is equivalent to specific performance of the contract.

Alderson v. Maddison, Exca.

The law upon the subject is, I think, clear and consistent when all the decisions are considered, but I am led to believe that an impression exists that there may be such a thing as a representation which, though neither a contract nor part of a contract, may have the effect of binding the person who makes it as if it were a contract. I do not agree with this view, and I think it desirable to state fully the way in which the matter presents itself to me. It seems to me that every representation, false when made or falsified by the event, must operate in one of three ways if it is to produce any legal consequences. First, it may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable, or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. Secondly, it may operate as an estoppel preventing the person making the representation from denying its truth as against persons whose conduct has been influenced by it. Thirdly, it may amount to a criminal offence. The common case of a warranty is an instance of a representation forming part of a contract. *Pickard v. Sears* (1) and many other well-known cases are instances of representations amounting to an estoppel. A false pretence by which money is obtained is an instance of a representation amounting to a crime.

Besides these there is a class of false representations which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it.

(1) 6 Ad. & E. 469.

It will, I think, be found that all the difficulties of the subject may be solved by keeping in mind this classification of the different classes of false representations. Nothing need be said here of criminal false representations, nor need I on the present occasion say more of false representations amounting to estoppels than that it does not appear to me that the law upon that subject has anything to do with this case. Thomas Alderson neither did nor said anything that could estop either him or his heir from denying any state of facts whatever. He promised to leave his housekeeper a life estate in the Manor House Farm. He intended to do so, and had a will prepared which purported to do so. He signed that will in the presence of two witnesses, but unfortunately they were not both present at once, and accordingly the will was void. What relation can estoppels by consent or by statements have to such a case as this? To say that Alderson's heir-at-law is estopped by Alderson's conduct from denying the validity of the irregularly attested will would be to repeal the Statute of Wills, but I do not see what other estoppel would affect the case. Who is to be estopped? What assertion is he estopped from?

The question, therefore, comes to be this: Were the representations made to the defendant terms in a contract, or were they merely voluntary revocable promises which were not in fact carried out? In other words, Did Thomas Alderson contract with his housekeeper that he would leave her a life interest in the Manor House Farm if she would serve him for his life, and if the farm became his property, and if she survived him; or did he induce her so to serve him by making promises not intended to be legally binding? Did she make a bargain, or did she take her chance of his keeping his word?

Before examining the facts of this particular case it will, I think, be well to refer to the decisions which have led me to state the question in this form. I do so because some of the language used in them may seem to countenance the notion that there may be a binding representation which is neither a contract nor an

Alderson v. Maddison, Exch.

estoppel. I think, however, that when the matter is considered it will be found that whenever representations have been held to be binding, the circumstances were such as to shew that all the conditions of a valid contract had been fulfilled, and that in all the cases in which representations have been held not to be binding one or more of those conditions were absent.

I understand by a contract an agreement which the law will enforce, and I apprehend that, speaking generally, the law will enforce all agreements made upon good consideration or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal. It may seem trivial to mention such obvious matters, but attention to them appears to me to clear up many decisions which are not otherwise very readily explained.

I now proceed to examine the cases referred to, taking first those in which representations were held to be binding, and next those in which they were held not to be binding.

The first case is *Hammersley v. De Biel* (2). The facts were that the brothers of a lady engaged to be married, wrote by her father's authority a memorandum, part of which was as follows: "Mr. Thomson proposes for the present to allow his daughter 200*l.* per annum for her private use, subject to a possibility of a reduction in that sum in case political or other circumstances should diminish his income; and also intends to leave a further sum of 10,000*l.* in his will to Miss Thomson to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangements proposed, subject, of course, to revision; but they will be sufficient for Baron de Biel to act upon." The paper also contained a condition that Baron de Biel was to settle 500*l.* a year on his wife for life. The marriage took place. Baron de Biel made the settlement which he had engaged to make, but the sum referred to

was not left in the will, and it was held that it must be settled for the benefit of a child of the daughter.

Lord Cottenham, in delivering judgment as Lord Chancellor on appeal from the Master of the Rolls, said (3), "I propose, first, to consider whether there was any such agreement previous to the marriage as . . . was binding on the late Mr. Thomson to give an additional 10,000*l.* as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum or in the other evidence in the cause proof of any such contract, and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to, it will be found that no such formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realising such representation.

This language was adopted by Lord Campbell, in delivering judgment in the House of Lords, and by Vice-Chancellor Stuart, in the case of *Loffus v. Maw* (4). I am inclined to think that it has been misunderstood, and has been supposed to lay down the rule that in cases of this kind, a representation not amounting to a contract may be binding on the person who makes it. I do not understand Lord Cottenham to have said anything of the sort. His words appear to me to mean only that contracts of this nature may be made like other contracts by informal documents, or partly by documents and partly by conduct. That this is so is clear from other cases. In *Luders v. Anstey* (5) it was held that a letter making a suggestion as to a settlement followed by marriage, under such circumstances as to imply the acceptance of the suggestion, may be a contract for a settlement. *Hammersley v. De Biel* (2) has been

(3) 12 Cl. & F. 61, n.

(4) 3 Giff. 592; 32 Law J. Rep. Chanc. 49.

(5) 4 Ves. 501.

(2) 12 Cl. & F. 45.

Alderson v. Maddison, Exch.

followed by several other cases. *Prole v. Soady* (6) was in principle similar to *Hammersley v. De Biel* (2), and Vice-Chancellor Stuart decided it on the authority of that case, of which he said, "There was no more than the expression of an intention to leave this sum" (10,000*l.*) "by a revocable instrument. But inasmuch as the expression of that intention on such an occasion had an influence on the conduct of the contracting parties, and was an inducement to the contract, the House of Lords . . . compelled the executors of him who had made the representation to pay the money, and to fulfil that which was expressed as a mere intention. This doctrine which gives all the force of a binding contract to the mere expression of an intention to do something by an instrument revocable in its nature is too firmly established to be shaken." This appears to me to be equivalent to saying that the cases establish that an agreement to make a will in a particular way may be a binding contract, that it need not be made in any particular form, and that if binding it may be enforced against the representatives of the party making the agreement.

Loffus v. Maw (4) is the next case. Its facts are almost precisely the same as those of the case now before me. Gunnell being old and infirm promised Loffus that if she would continue in his service till his death, he would leave her the rents of two houses for her life. He shewed her a codicil to his will which he had made for this purpose; but he afterwards revoked it by a further codicil. It was held by Vice-Chancellor Stuart that the trusts in favour of the plaintiff in the codicil which had been revoked should be performed.

The judgment quotes part of the passage already quoted from Lord Cottenham's judgment in *Hammersley v. De Biel* (2), and also refers to the well-known case of *Pickard v. Sears* (1), as an authority to shew that a man may be bound by a representation made to another person for the purpose of influencing his conduct. For the reasons already given, it

seems to me to be simpler and more distinct to say that the case was one of a contract by mutual promises—"If you will serve me I will leave you the rents of two houses." If it is objected that a will is in its nature revocable, the answer is that the cases of *Hammersley v. De Biel* (2) and *Prole v. Soady* (6) shew that that is no reason why a promise for valuable consideration to make a will should not be a binding contract. This language is I think simpler than that which turns upon representations. If the promise had been, "If you will serve me for a year, I will pay you 20*l.*," the promise to pay the 20*l.* would hardly have been described as a representation which the promisor was bound to make good. I do not know why such terms should be applied to a promise to make a will.

Loffus v. Maw (4) is approved of in *Coles v. Pilkington* (7), which, however, relates to a different subject. *Coverdale v. Eastwood* (8) is a case similar in principle to *Loffus v. Maw* (4). The father of a woman about to be married wrote letters to the mother of the intended husband, in which he said, "V. being my only child, of course she will come into possession of what belongs to me at my decease." "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property on my daughter absolutely." These and similar expressions, followed by marriage, were held by Vice-Chancellor Bacon to constitute a contract. His words are: "That representations of this kind will constitute a contract is shewn beyond the possibility of question by every case which has been referred to, as well by those in which the contract has been enforced as by those in which the Court has found it impossible to establish the contract." The result of all these cases appears to me to be that a contract to make a particular disposition of property by will is not invalid merely because

(7) 44 Law J. Rep. Chanc. 381; Law Rep. 19 Eq. 175.

(8) 42 Law J. Rep. Chanc. 118; *ibid.* 15 Eq. 121.

(6) 2 Giff. 1.

Alderson v. Maddison, Excu.

a will is revocable, that such a contract need not be made in any particular form (though the provisions of the Statute of Frauds may apply to it), and that the validity of such a contract must be tested by the rules which govern the validity of other contracts.

I now pass to the cases in which representations of intention, whether as to wills or other dispositions of property, have been held not to be binding. All of these are cases in which the language used was considered to amount to nothing more than a declaration of what the parties influenced by it knew, or ought to have known, to be no more than a present revocable intention. Such declarations, no doubt, in many cases raised natural expectations, which induced the parties to whom they were made, to take irrevocable steps; but in each case the decision turned on the question whether the declaration made was intended to form part of a contract, or only to announce a present revocable intention, or (which is the same thing) to make a promise for which there was no consideration.

The first of these cases is *Jorden v. Money* (9). This was a case in which the facts were hard to be ascertained, and were open to various constructions, Lord Cranworth and Lord Brougham differing from Lord St. Leonards in their view of them. When Mr. Money was about to be married, a question arose as to his means, and in particular as to 1,200*l.* which he owed to Mrs. Jorden, as joint obligor on a bond, which, in Mrs. Jorden's opinion, had been obtained from him unfairly by a brother of hers, whose personal representative she was. She used language on various occasions which, to say the least, expressed a strong intention not to sue upon the bond, which she said she had abandoned, and Mr. Money was induced to marry by what she said. Afterwards a decree was made by the Master of the Rolls and affirmed by the Lords Justices, that Mr. Money should be released from the bond. It was argued that she had made a representation leading Mr. Money to marry, which she was

bound to make good. On appeal to the House of Lords, Lord Cranworth and Lord Brougham were both of opinion that her language amounted at most to a promise not to sue on the bond. Such a promise made in consideration of Mr. Money's marriage would have been good as a contract if the Statute of Frauds had been complied with. The Statute of Frauds not having been complied with, the promise was not binding as a contract, and if regarded as a mere representation, it could not even be said to be false, for it truly represented the state of her mind when she made it. Each judgment, in short, appears to me to proceed upon the principle already stated, that a representation must operate either as a contract or as an estoppel.

Lord St. Leonards took a different view both of the facts and of the law of the case, and part of the language used by him may seem at first sight to imply that a representation not amounting to a contract may have the effect of a contract. According to the view which he took of the facts, Mr. Money's father had certain claims against Mrs. Jorden, which he forbore to urge in consideration of her giving up her claim on his son. This, he said (10), their Lordships were "not driven to treat as a contract in the proper sense of the word. It is, however, a representation by one party of an intention" [the word "not" appears to be here omitted] "to do an act which he refrains from doing in consideration of another party giving up a right to something else, and refraining from doing another act; and I will shew your Lordships that that is perfectly good in law, and can be enforced without any legal contract at all." He afterwards says, "He (Mr. Money, the father) says, 'I will not enforce the right against you, which I know I have, if you will not enforce your right against my son.' That is a representation which your Lordships will presently see the effect of in point of law; but it is a representation that does not depend upon contract; it is not buying and selling, but dealing in representation between parties, a part of the *res gestæ* of the case up to

(9) 5 H.L. Cas. 185; 23 Law J. Rep. Chanc. 865.

(10) 5 H.L. Cas. 240.

Alderson v. Maddison, Exch.

the time of the marriage." This language does not I think mean more than that the agreement in question was not one of those contracts which have well-known legal names and incidents like the contract of bargain and sale, but, as Lord St. Leonards states the matter, it was an agreement made upon good consideration and enforceable by law. Such an agreement I should regard as a contract—I know indeed of no definition of a contract which would exclude it.

In a later part of his judgment Lord St. Leonards states that he differs from his colleagues as to the sort of representation which may operate as an estoppel. He supposes them to lay down that (11) "it must be a misrepresentation of the facts, and not a declaration of what you intend to do, or intend to omit to do." The principle, he observes, is that a person is not to be induced to act by deception, whence he infers that "it is utterly immaterial whether it is a misrepresentation of fact as it actually existed, or a misrepresentation of an intention to do or to abstain from doing." If this view were adopted in its entirety, every promise on which a person acted, even if there were no consideration, would be binding by way of estoppel, and such a doctrine would alter the present law by giving legal force to that class of representations which at present are only morally binding. The difference between the classes of misrepresentation which do and do not bind seems to me plain. To say "I have cancelled this bond," when you have not, is to tell an untruth. To say "I intend to cancel this bond," is to make a statement as to a present revocable intention. If a person chooses to act on such a representation without having it reduced to the form of a binding contract, he knows, or ought to know, that he takes his chance of the promisor changing his mind, and therefore he is in no worse position if the statement is false when it is made—i.e. if that intention is not really entertained—than if it is true when it is made—i.e. if the intention exists and the person making the statement intends to revoke it if he pleases. I

have examined this case at length, because I think that the language I have have referred to has contributed to the confusion which has been introduced into the subject, but that when the whole case is fully considered it is an authority for the view which I have expressed.

There are several other cases which support the same view. In *Maunsell v. Hedges* (12) Mr. Eyre, the uncle of Mr. Maunsell, who was engaged to be married, wrote Mr. Maunsell a letter, in which he said, "I have made my will and left you my property in the county of Tipperary, which is considerable." He repeated this statement in another letter, and added, "My county of Tipperary estate will come to you at my death unless some unforeseen occurrence should take place." He refused, however, to make any settlement. In a settlement made by Mr. Maunsell it was recited that he had expectations from Mr. Eyre, and he consented to settle any property which he might receive under his will. The property was afterwards devised to others. It was held in this case that as there was no contract by Mr. Eyre to settle the property, the trustees of the will could not be compelled to convey it to Mr. Maunsell. Lord Cranworth, in his judgment, says (13), "Where a man engages to do a particular thing he must do it: that is a contract; but where there are no direct words of contract the question must be, What has he done? He has made a contract or he has not. In the former case he must fulfil his contract; in the latter there is nothing that he is bound to fulfil. . . . Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act upon it, equity will bind him by such representation, treating it as a contract." He says elsewhere (14), "There is no middle term, no *tertium quid*, between a representation so made as to be effective for such a purpose and being

(12) 4 H.L. Cas. 1039.

(13) *Ibid.* 1055.

(14) *Ibid.* 1056.

(11) 5 H.L. Cas. 248.

Alderson v. Maddison, Exon.

effective for it, and a contract: they are identical." He adds, in reference to *Hammersley v. De Biel* (2), "Though you see the word 'representation' used as it is in the speech of Lord Cottenham, I cannot think that it was meant to bear the construction now attributed to it, and to raise any such distinction as is now relied on. That word is no part of the judgment. I must say that I do not think it is a word very happily employed. The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another." He adds, "The circumstances there" (in *Hammersley v. De Biel* (2)) "gave to the words used the character of a contract which equity was bound to enforce." The judgment of Lord St. Leonards is to the same effect. He is reported to have said expressly in the course of the argument (15) that *Hammersley v. De Biel* (2) was a case of contract. Both Lord Cranworth and Lord St. Leonards point out that in *Mauwsell v. Hedges* (12) there was no contract at all, and they decide the case on that basis. The cases of *Caton v. Caton* (16) and *Dashwood v. Jermyn* (17) are illustrations of the same principle. Each is a case in which a promise to make a will not amounting to a contract was held to confer no rights upon the promisee after the death of the promisor.

Such being my view of the law, I now come to the question whether in this case there was a contract between the parties. The answer to that question put to the jury certainly does not in plain and direct words affirm such a contract, and it is no doubt to be regretted that the question was not so framed as to give them an opportunity to do so. This is to be attributed to the view taken by the counsel, who were no doubt guided by the case of *Loffus v. Maw* (4), and were desirous of bringing this case within the terms of the principle laid down in that case by Vice-Chancellor Stuart. In substance, however, I think the finding of the jury, especially when it is taken in connection with the

evidence of the defendant, is equivalent to a finding that there was a contract. It must be taken that the defendant was induced by a positive promise or series of promises to forego the wages to which she would otherwise have been entitled, and to give up a prospect of being married. It is to me inconceivable that she should have done this had she not understood the promises so made to be legally binding. The making of the will to her satisfaction, and the fact that Alderson shewed it to her to see if she was satisfied, are to my mind the strongest possible evidence that such was the character of the transaction. If it had been intended that she was to be at his mercy, he would not have shewn her the will.

It was urged that there was no mutuality, that she might have left his service at any moment, and that he would have had no remedy, and that as every contract implies mutuality there was thus no contract. Upon full consideration I do not agree with this view. Whether he would have had any remedy against her if she had left his service may be a question, but there are many cases in which the consideration on one side must be wholly executed before any obligation arises on the other, and in which the party who gives the first consideration is never under any obligation to give it. In such cases it is impossible that more than one party to the contract should ever sue upon it. Cases in which a reward is offered for information are an illustration. The person who promises the reward can never sue anyone for not giving the information, but when the information has been given the promisee can sue for the reward. The doctrine that the solemnity of sealing dispenses with consideration is connected with such obligations as these. A bond is usually given in respect of an executed consideration, which, if there were no bond, would often impose an obligation on the obligor, though he may never have had any right of action against the obligee.

Upon the whole I am of opinion that there was a contract between Thomas Alderson and the defendant to the effect already stated. As it was a contract relating to land it falls within the 4th sec-

(15) 4 H.L. Cas. 1051, and see p. 1060.

(16) 36 Law J. Rep. Chanc. 886; Law Rep. 2 H.L. Cas. 127.

(17) Law Rep. 12 Ch. D. 776.

Alderson v. Maddison, Excm.

tion of the Statute of Frauds, but as it was completely performed on the part of the defendant, according to the well-known doctrine of equity, the application of the statute is barred.

There will be a declaration as prayed in the counter-claim, but as the case is certainly one of difficulty, and one in which the heir could hardly be expected to concede at once the claim made by the defendant, I think that the costs ought to come out of the estate.

Judgment for defendant.

Solicitors—Ridsdale, Craddock & Ridsdale, for W. W. & W. J. Watson, Barnard Castle, for plaintiff; Rogerson & Ford, for Proud, Bishop Auckland, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1880. } MANCHESTER BONDING WARE-
May 12. } HOUSE COMPANY v. CARR.
June 16. } (RENDELL, third party.)

Landlord and Tenant—Lease of Floors in a Warehouse—Fall of Building through Overloading—Covenant by Lessees to keep Inside in Repair—By Lessor to keep Outside in Repair—Suspension of Rent.

The plaintiffs by lease demised to the defendant certain floors in a warehouse for seven years at a yearly rent, the defendant covenanting to repair, maintain and keep the inside of the demised premises in good and tenantable repair and condition, and to deliver them up at the end of the term, damage by fire, storm or tempest, or other inevitable accident and reasonable wear and tear, only excepted; and the plaintiffs covenanting to keep the walls, roof and main timbers of the premises in good and substantial repair and condition. The lease also contained a proviso for the suspension of the rent in the event of the premises being burnt down or damaged by fire, storm or tempest, and a clause against assigning or underletting without the written consent of the plaintiffs. The defendant sublet some of the floors without the written consent of the plaintiffs; the sub-lessees overloaded one of the upper stories, in consequence of which the whole building fell.

VOL. 49.—Q.B., C.P., & EXCH.

The plaintiffs rebuilt the warehouse and claimed rent since the fall of the building, and damages occasioned by the fall:—Held, that the proviso for suspension of rent did not include the cause which led to the fall of the building, and that the defendant was consequently liable to pay rent as if it had never fallen:—

That the plaintiffs were not liable to damages by reason of any implied warranty or covenant by them that the building was fit for the purposes for which it was to be used, nor by reason of their express covenant to keep the walls, roof and main timbers of the building in repair, though they would be liable for any unreasonable delay in the rebuilding:—

That the defendant was not liable for the fall of the building, provided he could shew it was used in a reasonable manner, having regard to its character and the purposes for which it was intended to be used. (Saner v. Bilton, 47 Law J. Rep. Chanc. 267; Law Rep. 7 Ch. D. 815; followed):—

That the defendant was liable under his express covenant to make good the cost of putting the inside of the floors demised to him and the fixtures therein in good and tenantable repair.

Action to recover from the defendant damages occasioned by the fall of a warehouse leased by the plaintiffs to the defendant and since rebuilt by the plaintiffs, and rent since the fall of the building, during the time it was unoccupied. The action came on for trial at Manchester before Lord Coleridge, C.J., and was adjourned to Westminster for the determination of several questions of law which the parties desired to have decided before any disputed facts were gone into.

The undisputed facts were as follow: By a lease made in December, 1875, the plaintiffs demised to the defendant certain floors in a warehouse for seven years, at a rent of 450*l.* By that lease the lessee covenantanted to repair, maintain, and keep the inside of the demised premises in good and tenantable repair and condition, and to deliver them up at the end of the term, damage by fire, storm or tempest, or other inevitable accident and reasonable wear and tear, only excepted.

5 L

Manchester Bonding Warehouse Co. v. Carr, C.P.

The lessors, on the other hand, covenanted to keep the walls, roof and main timbers of the premises in good and substantial repair and condition. The lease also contained a provision for the suspension of the rent in the event of the premises being burnt down or damaged by fire, storm or tempest. There was also a clause against assigning or underletting without the written consent of the lessors. The defendant sublet some of the floors without the written consent of the plaintiffs. Some or one of these underlessees put a quantity of flour into one of the upper stories let to the defendant, and in fact overloaded it, in consequence of which the whole building fell. The plaintiffs rebuilt it, and claimed against the defendant: First, rent since the fall of the building during the time it was unoccupied; second, damages occasioned by the fall—i.e. either the whole cost of reconstruction, or at least the cost of reconstructing the interior of the demised floors as distinguished from the walls, roof and main timbers thereof. The defendant denied his liability to pay the rent sued for, or any damages; and claimed damages from the plaintiffs for a breach by them of their covenant to repair the walls and main buildings of the warehouse, and upon an implied warranty by the plaintiffs that the premises were in a fit condition for the purposes for which they were let. At the trial it was arranged that the various questions of law raised by these conflicting views should be determined, and that the facts in dispute, if there then should be any, should be afterwards investigated.

Accordingly the case was adjourned to London, and came on for argument on May 12, when—

Crompton (with him *The Solicitor-General, Sir H. Giffard*), appeared for the plaintiffs.

Charles Russell, Ambrose and Samuel Taylor, for defendant.

Gully and R. Henn Collins, for the underlessee, *Rendell*, who was made a third party to the action. The arguments and authorities cited sufficiently appear in the judgment.

Cur. adv. vult.

June 16.—The judgment of the Court (1) was proposed by

LINDLEY, J. (2)—[After stating the facts of the case as above set out the judgment proceeded:] First, we are of opinion that, notwithstanding the fall of the building, the defendant is liable to pay rent for it as if it had never fallen. His covenant to pay rent is qualified, but the proviso qualifying it does not include such a case as has actually happened. As applied to the facts of this case, the defendant's covenant to pay rent is express and without qualification, and he must pay rent accordingly—see *Saner v. Bilton* (3), and the cases there cited.

Secondly, we are of opinion that the plaintiffs are not liable to damages by reason of any implied warranty or covenant by them that the building was fit for the purposes for which it was to be used. No authority has been found which decides that there is any such warranty; what authority there is on the point is against its existence—*Hart v. Windsor* (4) and *Sutton v. Temple* (5); and we are of opinion that no such warranty can be implied. There are, it is true, some cases relating to furnished apartments and houses which tend to show that a person who lets them impliedly warrants that they are fit for residential purposes—*Smith v. Marrable* (6) and *Wilson v. Finch Hatton* (7); but we are not prepared to extend these decisions to ordinary leases of lands, houses or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied warranty or covenant.

Thirdly, we are of opinion that the plaintiffs are not liable to pay any damages to the defendant by reason of

(1) Lord Coleridge, C.J.; Grove, J.; and Lindley, J.

(2) Read by Lord Coleridge, C.J.

(3) 47 Law J. Rep. Chanc. 267; Law Rep. 7 Ch. D. 815.

(4) 12 Mee. & W. 68; 13 Law J. Rep. Exch. 129.

(5) 12 Mee. & W. 52; 13 Law J. Rep. Exch. 17.

(6) 11 Mee. & W. 5; 12 Law J. Rep. Exch. 223.

(7) 46 Law J. Rep. Exch. 489; Law Rep. 2 Ex. D. 336.

Manchester Bonding Warehouse Co. v. Carr, C.P.

the express covenant binding the plaintiffs to keep the walls, roof and main timbers of the building in repair. Before the building fell, the plaintiffs had no notice of any danger or want of repair, and such notice is essential to render them liable to be sued on their covenant—*Makin v. Walkinson* (8), approved and followed in *The London and South Western Railway Company v. Flower* (9). After the building fell the plaintiffs, as we understand, rebuilt it with all reasonable diligence. If we are correct in this respect, it will follow that neither before nor after the fall of the building was there any breach by the plaintiffs of their express covenant to keep the walls, &c. in repair. If, indeed, the defendant can show unreasonable delay in the rebuilding by the plaintiffs he will be entitled to such damages (if any) as such delay may have caused him; and if the case is retried this point will be open to him.

Fourthly, we have to consider whether the defendant is liable for the fall of the building. His covenant to repair the inside of the demised premises clearly is not extensive enough to render him liable to rebuild the whole warehouse; but as it was contended that as he or his under-tenants in fact overloaded the building and caused its fall, he is liable to rebuild it, although there may be no express covenant on his part binding him so to do. It was contended that he was liable for waste or destruction, and it was argued that whenever a tenant actually destroys the property demised he must restore it or compensate his landlord for its loss, unless, of course, in cases where destruction is contemplated, as in cases of mines and quarries. We have no doubt that this contention is well founded where the destruction is wilful or negligent; but there is no authority to show that it applies to destruction by using the property demised in what was apparently a reasonable and proper manner, having regard to its character and to the purposes for which it was intended to be used. On the other hand, this very question had to

be considered by Mr. Justice Fry in *Saner v. Bilton* (3), and he came to the conclusion that in such a case the tenant was not guilty of waste or was not liable for a destruction of the property. The question in these cases is, whether it is the tenant's duty to ascertain what he can do with safety to the property, or whether he is not entitled to assume that it is fit to be used for the purposes for which it is let, and for which it is apparently fit. We are of opinion that the latter is the true view, and that in the absence of an express agreement to that effect a tenant is not liable for the destruction of the property let to him, if such destruction is, in fact, due to nothing more than a reasonable use of the property; and any use of it is, in our opinion, reasonable, provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user were apparently proper, having regard to the nature of the property and to what the tenant knew of it, and to what, as an ordinary business man, he ought to have known of it. To hold the tenant liable for the destruction of property by its reasonable use, as above explained, would be to hold him liable for latent faults and defects in the property demised. We are of opinion that he is not liable for such faults and defects in the absence of some express agreement on his part imposing such liability upon him. We are, however, of opinion that *prima facie* a tenant is bound to restore the property demised to him, and that if such property is destroyed by the acts of himself or his under-tenants the presumption is against him, and he must, in order to exonerate himself, show that the destruction was owing to causes for which he was not responsible. If, therefore, this case should go back for trial, the jury should be directed in accordance with the above principles and should be asked whether the loading of the warehouse in this case was reasonable or unreasonable, and the jury should be told that this question cannot be decided simply by the fact that the warehouses fell from overloading, but that they must enquire further and see whether there was before the overloading occurred any reason for sup-

(8) 40 Law J. Rep. Exch. 33; Law Rep. 6 Exch. 26.

(9) 45 Law J. Rep. C.P. 54; Law Rep. 1 C.P. D. 77.

Manchester Bonding Warehouse Co. v. Carr, C.P.

posing that the goods put into the warehouses were too heavy in kind or quantity for its apparent strength, or for its strength as known to the defendant, or as he ought as a business man to have known it.

Fifthly, and lastly, we have to consider what liability (if any) the defendant is under by virtue of his express covenant to repair the inside of those parts of the warehouse which were demised to him. The inside does not in this case include the walls, roof or main timbers, for these are to be kept in repair by the landlord. The defendant's covenant, however, extends to the rest of the inside of the floors demised to him; but this covenant is, we think, subject to the exception in case of damage by fire, storm or tempest, or other inevitable accident and reasonable wear and tear. Fire, storm and tempest are out of the question; and we agree with Mr. Justice Fry in thinking that inevitable accident means some accident *ejusdem generis*, and does not extend to use of the property by the tenant—see *Saner v. Bilton* (3). It only remains to consider whether reasonable wear and tear can include destruction by reasonable use. These words, no doubt, include destruction to some extent, destruction of surfaces by ordinary friction, but we do not think they include total destruction by a catastrophe which was never contemplated by either party. It follows that the defendant is liable under his express covenant to make good the cost of putting the inside of the floors demised to him and the fixtures therein in good and tenantable repair. We were told that there were no main timbers as distinguished from iron beams. Whether this is so or not we are of opinion that iron beams are main timbers within the meaning of the lessor's covenant to repair, and that the tenant is not bound under his covenant to replace them. This, we believe, disposes of all the legal questions raised before us, and the case must now go back to be tried if the parties cannot agree about the facts, if any are still in dispute, or as to the measure of the defendant's liability under his express covenant.

LORD COLERIDGE, C.J.—I wish to add

for myself that it is in deference to the opinion of Mr. Justice Fry, in *Saner v. Bilton* (3), and on the authority of that case, that I assent.

GROVE, J.—I agree to the judgment with one small exception; and that is, that I doubt whether, under the circumstances, the lessee is bound to pay for the inside repairs.

Judgment accordingly.

Solicitors—G. W. Worthington, agent for Sale, Seddon & Co., of Manchester, for plaintiff; R. W. Marland, agent for Addleshaw & Warburton, of Manchester, for defendant; Pritchard, Englefield & Co., agents for J. Leigh, of Manchester, for Rendell.

[IN THE COURT OF APPEAL]

1880. } THE PROTECTOR ENDOWMENT
June 22. } SOCIETY v. GRICE.*

Bond—Conditions—Payment of Debt by Instalments—Proviso for immediate Payment on single Default—Penalty.

Plaintiffs having advanced 50l. to A., took from A. and the defendant their joint and several bond conditioned for the payment for five years of quarterly instalments of 3l. 10s., with a stipulation that if default should be made in payment of any instalment the whole amount of the unpaid instalments should be paid immediately. Default having been made, the plaintiffs sued for the whole amount:—Held (reversing the judgment of BOWEN, J.), that the stipulation was not by way of penalty, and, therefore, that the plaintiffs were entitled to recover.

Appeal from a judgment for the defendant of Bowen, J., after further consideration.

The judgment of Bowen, J., is reported *ante*, p. 247, where the facts are fully stated.

Sir F. Herschell (Solicitor-General) and Fooks (Archibald with them), for the plaintiffs.—The stipulation in the bond,

* *Coram* Cockburn, C.J.; Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

Protector Endowment Society v. Grice (App.), Q.B.

that on default in payment of one of the quarterly instalments the whole amount of instalments should become payable, is not a stipulation for a penalty. Whether it is so or not depends upon the intention of the parties, to be ascertained by looking into the instrument—*Peachey v. The Duke of Somerset* (1); *Sloman v. Walter* (2). Here the intention is evident, that if one instalment is not paid the risk of the lender is to continue no longer. The utmost that can be said is that the obligees are called upon to pay something which they would not be bound to pay in the event of the borrower dying before the end of the five years, and that contingency has not happened. A mere high rate of interest will not make the obligation penal. *Sterne v. Beck* (3) is directly in favour of the plaintiffs' contention. Under the mortgage deed in that case the debt was payable by instalments, calculated so as to cover principal and interest, with a stipulation for payment of the whole sum due on default in payment of any instalment, and the Court held that the stipulation was binding and not a penalty. Here the contract is not that in certain events the amount payable shall be increased, but only that the time of payment shall be accelerated, and in such cases equity has never interfered. The Court cannot go outside the contract and dissect the quarterly payments, which are the consideration for the loan, in order to ascertain how those payments are made up.

Bompas and Forrest Fulton, for the defendant.—The stipulation as to payment of the whole sum on default in payment of an instalment imposes a penalty against which the Court will give relief. Equity interferes wherever there is an obligation to pay on a particular day, and a stipulation that on default a greater sum than the principal and interest of the debt shall be paid. The true test whether a provision of this nature is a penalty is stated by Mellish, L.J., in his judgment in *In re the Dagenham Thames*

Dock Company; Hulse's Claim (4). It must be seen whether the forfeiture to be incurred was exactly the same, whatever the extent of the injury, and, if so, the provision is to be treated as in the nature of a penalty. Here, in the event of the borrower dying before the end of the five years, the defendant would escape further liability to pay instalments under the bond, and if the plaintiffs can insist on the stipulation being strictly fulfilled, he loses that chance. *Sterne v. Beck* (3) and *Thompson v. Hudson* (5) may be distinguished from the present case upon the ground that there were antecedent existing debts, and a subsequent agreement as to how they were to be paid.

COCKBURN, C.J.—I think there has been a misapplication of the rule that the Court cannot enforce that which is a penalty having for its object only the securing of the primary obligation of the contract. In the present case that which is sought to be treated as a penalty is really an essential part of the contract which both parties intended should be performed. There is a purchase of quarterly payments extending over a period of five years and amounting to a given sum, with a condition that if (amongst other contingencies) an instalment is not paid, the whole agreed amount of quarterly instalments shall be payable at once. I take it as clear, that if a given sum is advanced, to be paid by instalments, with a stipulation that if one instalment is not paid the whole sum is to become payable, that stipulation is part of the contract and not within the rule as to penalties. The distinction between such a stipulation and a penalty is this: if the sum mentioned in the instrument is obviously only mentioned for the purpose of enforcing morally, but not legally, the principal and primary obligation of the contract—if it is intended to be minatory merely—then it is a penalty which cannot be enforced. That rule has grown up in our law by a strange anomaly. I do not know how it has grown up, but

(1) 2 Tudor's Leading Cases, 3rd ed. 979; 1 Str. 447.

(2) Ibid. 991; 1 Bro. C.C. 418.

(3) 11 W.R. 87; 32 Law J. Rep. Chanc. 682.

(4) 43 Law J. Rep. Chanc. 264; Law Rep. 8 Chanc. (App.) 1025.

(5) 38 Law J. Rep. Chanc. 431; Law Rep. H.L. 1.

Protector Endowment Society v. Grice (App.), Q.B.

the effect of it is to make contracts for the parties which they certainly did not intend to make for themselves. Here there is no doubt that both parties to the contract intended that it should enure to the benefit of both, according to its strict terms. The creditor says, "I advanced the money to you upon the faith of your solvency. The non-payment of an instalment shews me that you are insolvent, and I intend to insist on the strict terms of the contract and enforce present payment of the whole sum." The stipulation is not a penalty, but an alternative right on the part of the lender to enforce payment of the amount at once, the payment of which, if there had been no failure to pay the instalment, would have been spread over the agreed period. I am, therefore, of opinion that the learned Judge's decision cannot be upheld.

BAGGALLAY, L.J.—The principle of the rule as to penalties is enunciated by Lord Macclesfield in the case of *Peachey v. The Duke of Somerset* (1). He puts it thus: "The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired." Thus, in the case of forfeitures under mortgage deeds, and of forfeitures for non-payment of rent or of copyhold fines, where the true intent of the deed is that the forfeiture shall be not absolute, but a means only of securing payment of the sum advanced or the rent or fines, the Court will relieve. Where the intent is not patent upon a fair construction of the instrument, the Court will not interfere. No doubt the intent is presumed in some cases from the relation of the parties. It is so presumed in the cases of a money bond and forfeitures for non-payment of rent. In other cases it must depend upon the terms of the contract. In the present contract it was perfectly competent to the lender to stipulate that the whole of the quarterly payments should become payable immediately in the event of non-payment of one of them. One can imagine cases in which such a stipulation would be to the convenience of the borrower. The fact that the bond

is to be void if the instalments are paid regularly up to the death of the debtor in case he should die before the 1st of November, 1882, does not, to my mind, make any difference.

To hold the stipulation a penalty, so that the lenders could only recover instalments actually due, would be a manifest injustice to them. The 50*l.* was advanced upon the consideration that the whole amount of the instalments should be payable if default was made in the regular payment of them. I cannot quite understand the judgment of Mr. Justice Bowen consistently with the statement in his judgment that the plaintiffs would be entitled to succeed if all that was sought to be recovered was principal and expenses, together with the arrears of the overdue instalments. I think that is what is sought to be recovered under the agreement.

BRAMWELL, L.J.—I have the very greatest difficulty in seeing upon what possible principle a stipulation like this can be made into a penalty. Presumably the parties mean what they say. No doubt it is not so in the cases of common money bonds or mortgage deeds or leases with a proviso for re-entry on non-payment of rent. In all these cases a long-established and arbitrary meaning has become attached to certain words, quite different from their ordinary meaning. But apart from these cases, how can one judge of people's meaning except by the language they use? How can you say they meant something else than what they have said? Equity has arrived at the conclusion that certain engagements to pay money shall not be carried out because they are penalties. Would it make any difference if the parties to a bond put in it, "We really do mean this sum to be paid"? I believe not. I believe equity would say, "You have entered into an unconscientious bargain, and it cannot be enforced." I have been trying to frame a definition of the rule as to penalties. I think it is this: Where the sum payable is a punishment; where it is something more than a security, and the payment of it would more than compensate the creditor—then it is a penalty; but

Protector Endowment Society v. Grice (App.), Q.B.

where it is a reasonable provision for the creditor's security, and for getting that which he is entitled to, or its equivalent, then equity would not interfere. This is the law which we must act upon. To my mind the stipulation for payment here is not a penalty, but a proper provision for securing in certain events payment of the debt and expenses at once.

BRETT, L.J.—I think this stipulation ought not to be treated as a penalty. The contract is that for certain consideration—as to the extent or meaning of which I do not enquire—the defendant and others will pay an agreed sum of 70*l*. There is no other debt and no agreement to pay any other sum. The agreement is to pay that sum by two different methods according to certain events. The sum is to be paid by quarterly instalments adjusted to cover a certain period if those instalments are regularly paid. If there is a failure to pay instalments neither more nor less than 70*l*. is to be paid at once. Under these circumstances I think the sum cannot be treated as a penalty. If the agreement had been to pay an agreed sum by instalments, but that if there was a failure to pay one instalment, a larger sum than 70*l*. could be recovered, then, according to the decisions in the Court of Chancery, the stipulation as to the payment of the larger sum would be a penalty, and that sum could not be recovered. The judgments in *Sterne v. Beck* (3) and *Thompson v. Hudson* (5) are clear to this extent, that where there is but one sum to be paid by instalments, and the stipulation only affects the time of payment, and makes the whole sum payable at an earlier date, it is no penalty; whereas if, upon a failure to pay an instalment, a larger sum is to be paid than would have been if there had been no default, then the larger sum is a penalty. I am, therefore, of opinion that the judgment appealed from is wrong.

Judgment reversed.

Solicitors—T. H. Devonshire, for plaintiffs;
Cronin & Rivolta, for defendant.

[IN THE COURT OF APPEAL]

1880. }
Feb. 19. } SULLIVAN v. MITCALFE AND
June 30. } OTHERS.*

Company — Prospectus — Promoter — Concealment of Contracts—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38.

All contracts which might reasonably affect the mind of a person in determining him to take or not to take shares in a company, are contracts which ought to be specified in the prospectus of the company, within the meaning of section 38 of the Companies Act, 1867.

A statement of claim alleged that the plaintiff was a shareholder in a company, formed for the purpose (amongst others) of buying the patent rights in a certain manufacture; that he was induced to take his shares on the faith of a prospectus issued on the formation of the company by the defendants, who were promoters; that the prospectus was fraudulent as against the plaintiff within the meaning of section 38 of the Companies Act, 1867, by reason of the defendants having knowingly omitted to specify certain contracts entered into by the promoters before the formation of the company, by which contracts a small part only of the purchase-money of the patent rights was to be paid to the vendor, and the remainder was to be divided among the promoters; and the plaintiff claimed the amount paid for his shares. On demurrer, it was,—

Held (by BAGGALLAY, L.J., and THESIGER, L.J., BRAMWELL, L.J., dissenting), that the contracts were such as ought to have been disclosed in the prospectus, within section 38, and therefore that the statement of claim was good.

Per BRAMWELL, L.J.—Section 38 requires such contracts only to be disclosed in the prospectus as bind or, if adopted, may bind, the company when formed.

These were appeals from the judgment of Grove, J., overruling the demurrers of two defendants, Peele and Brown, to a statement of claim.

The facts of the case, and the argu-

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

Sullivan v. Mitalcfe (App.), C.P.

ments of counsel, are sufficiently stated in the judgments (*post*).

W. G. Harrison and *B. M. Bray*, appeared for the defendant *Peele*; *Talfourd Salter*, for the defendant *Brown*; and *A. J. H. Collins* and *Seward Bryce*, for the plaintiff.

Our. adv. vult.

The following judgments were read on June 30:—

BRAMWELL, L.J.—The opinion I expressed in *Twycross v. Grant* (1) I retain. I do so for the reasons on which I formed it. It is, therefore, not necessary to repeat them in detail. They may be summarised thus: The general words of section 38 of the Companies Act, 1867 (2), must have some restriction. In my opinion, the language and reason of the thing shew that the contracts therein mentioned must be limited to those which bind the company, or which may be adopted or assumed by the company, and which may affect it when formed. If it was intended that intending shareholders should be guided by information given in the prospectus, as to the previous history of the company, its promoters, and the subject of its intended operations, no reason can be given why contracts only were to be stated. To ascertain what is the intention and meaning of the section it must be critically examined. It is as idle to attempt to put a meaning on it without doing this as it would be to try to construe it without opening the book which contains it. Without such examination it is easy to talk of broad views on the

one hand, and of narrow on the other; to denounce promoters and their schemes; and when they are fraudulent and dishonest to express indignant opinions, well deserved, but which might tell most harshly and unjustly on men against whom there was not the slightest ground of complaint that they had failed either in honesty or care for the interests of the intended future shareholders of the company. If this examination is hair-splitting, hairs must be split, otherwise injustice will be done. And this certainly is to be said in favour of the construction I contend for, that it is what the framers of the Act meant, as is well known. The doubt that has arisen as to the meaning of section 38 has so arisen from the addition of some words and the withdrawal of others, not intended to alter the enactment on the matter in question, but which, having been added and taken away without noticing the combined effects of so doing, have raised the question to be answered.

But there are some arguments and judgments on the matter which I must examine. The last delivered is that of Lord Chief Justice Cockburn in *Twycross v. Grant* (1). His Lordship speaks of the practices against which the section is directed, and the persons who resort to them, as sapping the funds through clandestine contracts with contractors who are subtle and insidious, and by whose insidious contrivances the exorbitant price is concealed; of "clandestine arrangement," "positive evil," &c. His Lordship thinks these are to be dealt with on broad grounds with a beneficial application of the statute, no hair-splitting or minute verbal criticism. Now, no doubt this is the popular view; but however much one may be inclined to take it, one must take care not to be led away by one's just indignation, or injustice may be done, and the law misinterpreted. We must refer to the statute. To quote his Lordship, he says (3), "The question whether these contracts are within the 38th section is one of greater difficulty. It becomes necessary to consider the words of the enactment." So I thought, and so I

(1) 46 Law J. Rep. C.P. 636; Law Rep. 2 C.P. D. 469.

(2) Section 38 enacts, "That every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

(3) 46 Law J. Rep. C.P. 664.

Sullivan v. Mitcalfe (App.), C.P.

did; I cannot find that his Lordship has. Absolutely there is not a word of comment or criticism. He sets out the section, indeed, but so far from discussing it, he says (4), "If such a case as the present is not within the enactment, all I can say is that it ought to be." Really that is all he does say about the section. For he proceeds: "And I cannot allow myself to be led into splitting hairs or entering into minute verbal criticism on what I believe to be beneficial legislation." From which one would infer that it was necessary to consider the words without a verbal criticism, at least without a minute one. I might dismiss the further consideration of this judgment with the remark that what, with all respect to his Lordship's reason, I must call the governing error, is the not distinguishing between contracts which affect, or are to affect, the company, and those which do not and will not. Those which do not and will not are unimportant. If a builder is to build a house for me, the price he is to pay for bricks, wood, labour, &c., is to me immaterial. If such contracts are within the statute then every contract made by Clarke & Co. in the Lisbon Tramway case ought to have been mentioned in the prospectus. But there are these passages in his Lordship's judgment which I must notice. He says (5), "We may with perfect safety assume that the section is intended to apply to contracts relating to such companies alone. But when we have to deal with a contract undoubtedly having reference to a company, why are we to put any further restriction on the operation of the statute?" Further restriction than what? That it relates or refers to the company. What is the meaning of a contract relating or referring to a company? But the reason for the restriction is the language of the section, and those considerations which he does not deal with. It is asked, What would a man say if he was told the owner of the concern which this intended company was to purchase was to be chairman, and only to be paid by his buyer if he could

get a contract from the board, which was to be procured by the promoter, who was to get a large sum of money for getting it, which, however, he was sure to do from the chairman and other directors, the first being interested to get his price, and the last knowing nothing about the business except what these interested parties thought fit to tell them. Certainly the last consideration would deter any man from having anything to do with any concern with such directors; but that is not in question here. As to the rest it depends on the persons. Suppose the Duke of Devonshire had a mine; suppose Messrs. Baring promoted a company to take it, and that such a man as the late Mr. Brassey was the contractor, and all the other circumstances existed as above put, would anyone be deterred? But the question is, What says the statute? The other passage is (I cannot understand it) (6), "Mr. Grant cannot in any sense be said to have been a purchaser from the duke or a vendor to the company, and he carefully avoided assuming that relation." This is right. His Lordship proceeds: "His position was, though not ostensibly, yet actually, that of a promoter." This also seems right, except that I should have thought he was ostensibly a promoter. But this is immaterial. Now follows what I cannot understand: "Fully admitting that a person who sells to a company is no more bound to disclose how or upon what terms he acquired the subject-matter of sale than an ordinary vendor to an ordinary purchaser, it seems to me that when the vendor adopts the character of a promoter, the matter assumes a very different aspect. If he proposes to derive advantage by selling to them at a profit, any contracts by which effect has been given to such purposes come within this protective enactment." Very likely; but if Grant was not a vendor, how did this apply to him? Of course I notice this to retain the advantage of the opinion expressed by Lord Justice James in *Gover's Case* (7). I proceed to consider the judgment of Lord Coleridge in *Twycross v. Grant* (1). His

(4) 46 Law J. Rep. C.P. 666.

(5) *Ibid.* p. 665.

VOL. 49.—Q.B., C.P. & EXCH.

(6) 46 Law J. Rep. C.P. 670.

(7) 45 Law J. Rep. Chanc. 83; Law Rep. 1 Ch. D. 182.

Sullivan v. Mitcalfe (App.), C.P.

Lordship says, "It is immaterial to an ordinary purchaser to know what the vendor will do with the purchase-money when he gets it; the purchaser has no further interest. But an applicant for shares in a company is in a different position. His money becomes part of the capital of the company, and to him it is all important to know what sort of persons are to have the control of his money when he has paid it, and how the money is to be applied—whether upon the enterprise itself or in remunerating those who brought it into existence." With great respect, I say No; as to the future of the company, if 10,000*l.* are paid for a mine it matters not to the company where the 10,000*l.* go. No doubt if it was known that the mine owner was only to get 1,000*l.* it would influence intending shareholders, because it would shew what he thought was the real value. But the statute does not require his opinion to be stated, but only contracts. If it had been intended that things calculated to influence intending shareholders should be stated, it should have said so. What could have been more important than that a mine or patent had been worked for years without profit? Yet that need not be stated. If it should be said that we know that the section is the result of mistakes, and we know what was intended, so be it. Such contracts as these are not included. If the section is to be construed as though what was said was meant, then I contend the same conclusion must be come to. His Lordship says most forcibly (8), "A statute passed to prevent fraud, couched in general language, ought to be construed so as to defeat all the frauds which are within the mischief sought to be remedied." True, but the language of the statute must be looked to. It must be borne in mind that not all important things but contracts only are to be stated, and it must be remembered that if all a promoter's agreements are to be stated, then if a contractor is a promoter, and has entered into provisional contracts for materials and labour, they must all be stated. My brother Brett, in *Gover's Case* (9), after

shewing that before the statute other frauds or wrongs were provided for, says, "But for a mere non-disclosure, fraudulent or otherwise, there was no remedy, either in law or equity, for the invited subscriber if he became a shareholder." He proceeds: "One would expect a remedial enactment passed under such circumstances to cover the unprotected danger; that is to say, to insist on the disclosure of everything which might reasonably have an effect on the mind of an invited subscriber." This is logical and forcible. But if so, why did not the Legislature say so? It has not said that everything should be stated, only that certain contracts should be. And it has not said that all contracts which would so affect the mind of the invited subscriber should be stated, only those entered into by the company or promoters, directors and trustees thereof, whether subject to adoption or otherwise, as the Lord Justice says. He then says that the statute extends to every contract made by a promoter before the issue of the prospectus, the knowledge of which might have an effect upon a reasonable subscriber for shares, whether such contracts were made before the promoter was a promoter or not. But, with submission, there is no such limitation in the section as "contract, the knowledge of which might have an effect on a reasonable subscriber." It is clear that if the company had entered into a beneficial contract for the performance of works, and it was not stated, the prospectus would be fraudulent within the statute. The truth is, my brother Brett reads the statute with no limitation except one not merely not in it (for none is), but for which there is no justification in it. I wish particularly to call attention to what Lord Justice Mellish said in *Gover's Case* (10): "I think that the section ought to be held to extend to every contract made with a person who afterwards becomes a promoter or director, provided the company have become entitled to the benefit of the contract, or liable to perform its provisions before the prospectus was issued." That is my opinion. I now proceed to deal with

(8) 46 Law J. Rep. C.P. 641.

(9) 45 Law J. Rep. Chanc. 93.

(10) 45 Law J. Rep. Chanc. 91.

Sullivan v. Mitcalfe (App.), C.P.

some arguments that have been used. It is said that it is material that contracts should be made known to persons invited to take shares, in order to enable them to form a judgment as to the policy of so doing. And certainly in *Twyross v. Grant* (1) it was left to the jury, and they found that the contracts there were material for this purpose. But, with all submission, their materiality is immaterial. The statute uses no such word and has no such intention. Immaterial contracts must be stated as much as those material if they are within the section, and their materiality or immateriality has no bearing on the question of whether they are. The statute is not to "insure" full information as to all the material circumstances attending the formation of the company antecedently to the issue of the prospectus. It is to insure something which may or may not be material, while other things very material need not be mentioned. I agree, if all the circumstances in this case, including the contracts in question, had been stated, reasonable people would have been deterred from taking shares. So they would if they knew that the directors received their qualification from a vendor to a company, not a promoter, for it would be seen that such directors were risking nothing of their own, had been under no necessity to form an opinion as to the success of a scheme by which they might gain and could not lose, and were under a bias favourable to the vendor. Yet this need not be stated, though positively fraudulent, and exposing the directors to a liability to the company for the value of the qualification. It is asked why, it being to the interest of the shareholders that such arrangements should not be kept secret, they are not within the section. The question is, Why are they? And the answer is, Because they are not. As would be seen by reading it, it might be very good legislation to say they should be. It is a mistake to say shareholders are affected by any such contracts as the present. Intending shareholders might be influenced to consider whether they would become so, but the company is not affected thereby, and so not the shareholders. It is a mistake to say that such

contracts involve the fortune of the future company, or the crippling of its resources, or the sapping of its funds. The mine and its plant are offered in working order at a fixed price. What in the name of common sense does it matter to the company when formed (not to the intending shareholder) how that is to be divided, among whom and on what considerations by him who receives it? If the bargain is a good one for the company—if what they get is worth the money they give for it—how are they crippled, or sapped or anything else by the way the vendors got at the figures asked, and what they do with the money? Suppose in the Lisbon Tramway case the sums to Saldanha and Larmangat were fair, that Grant had charged 50% only, that there had been no rigging of the market, &c., and that the same price had been paid by the company as was paid—the contractor's profit being so much the more—would there have been any crippling or sapping? Would it have been possible to talk of the adequacy or inadequacies of the capital? Here is the thing for you—privilege, tramway, locomotives, carriages, everything at such a price. Take it or leave it alone. If after paying that price they have not capital left enough to work the line, it shews that their entire capital was too small at the outset. How is the company sapped or crippled by these arrangements any more than they are by a contract made by the contractor with a carriage builder for the building at a certain price of the carriages he is to supply for the lump sum? I should be sorry to have it supposed that I was saying a word in favour of what took place in the Lisbon Tramway Company. I retain my opinion that the transaction was "nefarious." But I say that the question for a company or any other buyer where a thing is offered at a price is, Is it worth that price?—and that it matters not how the vendor has arrived at that price, and that the vendee is no more crippled and sapped when that price has been arrived at by one process than by another. No doubt directors might be liable if they gave an improper price, and no doubt intending shareholders, if they knew the process by which it was arrived at, might be influenced as

Sullivan v. Mitcalfe (App.), C.P.

to purchasing. The mistake is in confounding that which would reasonably influence an intending shareholder with that which would affect the future prosperity of the company. It is said that if this restriction is to be put upon the statute the Legislature might have put it. The obvious answer to which is, that the Legislature might have put any and has put none; therefore, if this is right, none must be put. But it is admitted some must be.

It is no answer to the argument that, if these contracts are to be stated, then all sub-contracts by a promoter or contractor must be, to say that the shareholder must, to have any claim, take his shares on the faith of the prospectus. He does so take them. He does not take them on the faith that there is no sub-contract, but he takes on the faith of the prospectus. That is made fraudulent by the statute if it does not mention the contracts the statute says shall be mentioned (11). The result is this: the shareholders take on the faith of the prospectus. The promoter has with perfect honesty omitted a contract which, according to the statute, should have been inserted in it—a contract wholly immaterial, or even one which might have induced the shareholder to take shares, *e.g.* an advantageous contract with a respectable man for executing the works; the statute makes the prospectus fraudulent, and the shareholder has a cause of action. It is no answer to say that the contract omitted is immaterial to the formation of an opinion as to the prospects of the company. It is, if I may be pardoned the word, ingeniously suggested by Lord Justice Thesiger that a limitation or qualification must be put on the words, "Take on the faith of the prospectus," and that they must be read, "Take on the faith that there was no contract which, if set out, would have deterred him from taking." That would improve the statute and make the construction the plaintiff contends for more reasonable, but it would not be the statute as it is, but the statute as amended. On these considerations I have formed and retained

the opinion above expressed. It remains to deal with the particular case before us. Leaving out the abusive part of the statement of facts in the claim, such as "scheme," "device," which is immaterial to the question we have to answer, the facts and contracts set forth are as follows: First, Baxter was possessed of patents. Second, he assigned to Clare a half share of the patent for 600*l.*, which Clare, however, did not pay. Third, Baxter and Clare agreed with Millward that Millward should join in promoting a company, and for that purpose mortgaged the patent to Millward, and by a subsequent indenture gave him licence to use the patent. Millward, however, was paid off out of Baxter and Clare's share of the purchase-money from the company, and a release given. But it is said the indentures of mortgage and licence to Millward, not being cancelled, remained an incumbrance on the company, which is very ingenious, but unfounded. Fourth, Baxter, Clare and Millward arranged with the defendant Mitcalfe and four other persons that the company should be formed to acquire the patents. Fifth, then it was agreed between Baxter on the one hand, and Mitcalfe and the four others on the other, that Baxter and Clare, as vendors, should be nominees of Mitcalfe and the two of the four others, and that the consideration paid to Baxter and Clare should, except a small sum, be paid to the defendants—that is, all four, "particularly Mitcalfe" and the two of the four persons; that is to say, that the vendor should receive only a small part of the purchase-money, and the rest be divided among promoters and directors, including the four defendants. Sixth, another agreement between Baxter and Clare on the one part, and Mitcalfe and two of the four on the other, whereby, reciting the former agreement, they pretended to make arrangements as to the application and division of the purchase-money to be paid by the company. Seventh, this last agreement was a sham, the real agreement being one between "the said several persons" (whoever they may be), that out of the 15,000*l.* cash and 8,200*l.* paid-up shares Baxter and Clare should receive only 2,000*l.* cash, 3,900*l.* should be paid to

(11) *Per* COCKBURN, C.J., 46 Law J. Rep. C.P. 667.

Sullivan v. Mitcalfe (App.), C.P.

Mitcalfe, 5,000*l.* to a person named Parry, who is one of the two of the four, and the remainder of the sum of 15,000*l.* among the others of the "said persons," whoever they may be, whether the four and the directors or not does not appear. Eighth, then the formation of the company is mentioned, and the agreement of purchase between Baxter and Clare and Price, who is one of the other two of the four, as trustee for the company, for the purchase of the patent to be taken and adopted by the Diamond Company for 56,000*l.*, 15,000*l.* in cash and the rest in paid-up shares. The statement of claim then sets forth the registering of the company, its objects, and the issuing by the defendants of a prospectus mentioning none of these contracts except the last between Baxter and Clare and Price; that the defendants therefore issued a fraudulent prospectus within the statute. There is an alternative claim. The demurrer is to the claim founded on the statute. Now, it may very well be admitted that if these facts are true a gross fraud had been perpetrated; and had they been known, there would have been a difficulty in getting applicants for shares. Baxter had the patent, could make no profitable use of it, granted half to Clare for 600*l.*, who did not pay; the two mortgaged to Millward, and then a company was got up, the directors of which, or some of them, agreed that the company should give 56,000*l.* for this hitherto unprofitable and unsaleable patent, but bargain with the owners that they, the owners, shall only receive 2,000*l.* out of the 56,000*l.*, the residue being divided among directors and promoters. No one in his senses would take a share, the company giving that sum, under these circumstances. Further, if it is true that those directors got part of the purchase-money, it is certain that they did a most fraudulent thing, and must refund to the company. But are these contracts within the section? Why should the contract between Baxter and Clare be mentioned in the prospectus? If Baxter gave the money as a gift, or sold it for any sum from one pound to a million, its value to the company is the same. No doubt the transaction shews what Baxter thought it was

worth in the sense of what it would fetch; but the statute does not say that Baxter's opinion should be stated in the prospectus. It seems to me that so far from its being necessary to state this contract, the contention that it must be stated shews the unreasonableness of the construction the plaintiff puts on the statute. The contract is fulfilled and spent, yet it is to be stated. So of the mortgage to Millward. If an estate was bought by a company, would it be necessary to set out in the prospectus all the antecedent mortgages on it, though paid off? So of the other contracts except that with Price. What does it matter to the company how the consideration is divided? I am not now considering the conduct of the directors in taking part of the purchase-money. For the purposes of the question before us that is immaterial. Then how does it concern the company that the vendors are content that they should get a trifle and the agents should get the largest part of the price? Let me not be mistaken. If the directors gave 56,000*l.* or any other sum for this patent, without enquiry as to its value or how the sum was arrived at, they grossly neglected their duty, and are responsible. But that is not the question. The question is, whether the agreements among vendors and their agents for the division of the price, or plunder, if plunder it was, are contracts within the section? I say No. The company was neither richer nor poorer on account of the way the spoil was divided among the spoilers. It may have been a folly or dishonesty to give so much if the patent was not worth it; or, if it was, it may have been a folly or necessity for the vendors to take so little; but either way, the company, I repeat, was neither richer nor poorer on account of the way the price agreed on was divided. The company was not affected by them, not bound nor to be bound. Suppose the company went on for ten years prosperously, would it matter to it or its shareholders where the price had gone? If not ten years, would it matter if the company lasted prosperously a year or a week only? If not, would it matter if the company was unprosperous from the beginning? I am of opinion that the demurrer should be

Sullivan v. Mitcalfe (App.), C.P.

allowed. It is agreeable enough to speaker and listener to denounce and hear denounced delinquent promoters and directors, of whom unhappily there are too many; but care should be taken not to put a construction on the statute unreasonable and impossible from its wideness, which, on the failure of a perfectly honest company, may work the grossest injustice on persons entirely honest and faithful to their duties.

BAGGALLAY, L.J.—The substantial question which we have to determine upon the present appeal is, What contracts, or rather what classes of contracts, are within the provisions of the 38th section of the Companies Act of 1867.

Upon this question there has been considerable difference of judicial opinion; and in the case of *Twycross v. Grant* (1), which is the only case in which the question has hitherto come directly under the consideration of the Court of Appeal, the Judges then constituting the Court were equally divided in opinion. On the present occasion the question is raised by demurrer in the simplest possible form, as it is in no respect complicated by conflicting statements of fact; the allegation in the statement of claim must for the purposes of the appeal be assumed to be true. The facts of the case with which we have to deal are as follow: The Diamond Fuel Company (Limited) was registered on the 27th of January, 1873, under the Companies Acts, 1862 and 1867, and thereupon a prospectus was issued by the defendants, other than the company, inviting the public to subscribe for shares. The prospectus so issued contained the following (amongst other) statements: that the company was formed for the purpose of purchasing the patents of Mr. David Barker for improvements in the manufacture of artificial fuel, and of acquiring and developing the works of such manufacture as then carried on by Messrs. Barker and Clare at Stratford, in Essex; that a provisional agreement had been entered into with the proprietors of the patents for the purchase of all their patent rights in the United Kingdom and abroad, together with the premises, works, machinery, plant, stock, &c., at

Stratford, for the sum of 15,000*l.* in cash and 8,200 fully paid-up shares of 5*l.* each; and that the only contract entered into was dated the 15th of November, 1872, and was between David Barker and Thomas Deykin Clare of the one part, and Francis Lambe Price, on behalf of the company, on the other part, which might be inspected at the office of the company. The contract so referred to was the provisional agreement mentioned in the prospectus, and was to the effect that the said Francis Lambe Price should purchase the patents as trustee for and on behalf of the company, and that the company should adopt such purchase immediately after its registration. The plaintiff subscribed for 200 shares in the company, and paid to the company the full amount thereof, namely, the sum of 1,000*l.*

On the 9th of September, 1878, he commenced the present action to recover the amount paid by him, upon the ground that he took the shares on the faith of the prospectus issued by the defendants, and that such prospectus was, as against him, fraudulent within the intent and meaning of the 38th section of the Companies Act of 1867, by reason of certain contracts, which had been entered into by the promoters of the company before the issue of the prospectus, not being specified in it.

The more important allegations in the plaintiff's statement of claim are to the following effect: that the defendants, other than the company, issued the prospectus already referred to, and were, at the time of such issue, promoters and directors of the company; that, although the amount made payable to Barker and Clare under the contract of the 15th of November, 1872, for the purchase of the patent, was the sum of 56,000*l.*, 2,000*l.* only of that sum was to be retained by them for their own benefit, and that under a series of contracts entered into by the promoters and directors, which it is unnecessary now to specify in detail, the balance of 54,000*l.* was to be divided between all or some of the promoters of the company; and that, at the time of issuing the prospectus, the defendants were well aware that those contracts had

Sullivan v. Mitcalfe (App.), C.P.

been entered into, and had omitted to specify them in the prospectus."

The allegations are to some extent wanting in precision, as to the parties between whom and in what proportions the 54,000*l.* was to be divided; but 3,900*l.* are stated to have been paid to the defendant Mitcalfe and 5,000*l.* to a person named Parry, and the remainder to have been divided between persons referred to as "the others of the said parties," which words, by reference to the 9th paragraph, indicate the persons mentioned in the previous paragraph as having been engaged in forming and promoting the company, including all the defendants.

What we have then to decide is, whether the contracts so omitted from the prospectus ought to have been specified in it.

The very general terms in which the 38th section of the Act of 1867 is expressed, has been the subject of comment by all the Judges who have been called upon to consider it, and their opinions, as reported, have been for the most part introduced by observations to the effect that the language of the section is so general that it cannot be literally construed, and that some limitation must consequently be put upon it. In its earlier portion it directs that every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors or trustees thereof, before the issue of any such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise, and the second portion of the section discloses the consequences which are to ensue if these directions are disobeyed.

Now the words, "any contract entered into by the company, or the promoters, directors or trustees thereof, before the issue of the prospectus or notice," taken by themselves, are in every respect unlimited; but is not the necessary limitation to be found in the context? The contract referred to, whatever may be its limited meaning, is to be specified in every prospectus or notice issued for the pur-

pose of inviting persons to subscribe for shares: why should provision be made for its being specified in every prospectus or notice issued for this purpose, whilst no provision is made for its being specified in any prospectus or notice issued for any other purpose, unless it was the intention of the Legislature to afford some protection to, or to confer some benefit upon, persons who might be likely to respond to the invitation so given to them?—and, if such was the intention of the Legislature, it is difficult to suggest any other class of contracts as being within its contemplation than such as, if made known to a person reading the prospectus or notice, would be likely to influence him in determining whether he would or would not become a shareholder in the projected company. Here there is at least a suggestion of the limitation which should be put upon the words "any contract."

But let us pass on to a consideration of the second portion of the section; it enacts that a prospectus or notice, which shall not specify any contract which, by the first portion of the section, is directed to be specified, shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of the prospectus, unless he shall have had notice of the omitted contract. Now it appears to me that in this second portion of the section there is the most marked confirmation of the view which I have mentioned as being suggested by the first, namely, that the Legislature intended by its provisions to afford a substantial protection to persons who might be invited by a prospectus or notice to subscribe for shares; for, having in the first portion of the section given directions which might or might not be obeyed, it has, in the second, provided that any omission to obey such directions shall be taken advantage of, for their own benefit, by one class of persons only, namely, by persons who have taken shares in the company; and of such class, by those only who have taken the shares upon the faith of the prospectus or notice from which the contract has been omitted, and who have had

Sullivan v. Mitcalfe (App.), C.P.

no notice of the contract from any other source; and this limitation of the class of shareholders who are to be entitled to the protection of the statutory provision has, in my opinion, an important bearing upon the construction to be put upon the section; for, if it was the intention of the Legislature to protect or indemnify a shareholder who had been misled by a prospectus or notice from which information to which he was entitled had been omitted, it must be assumed to have been equally its intention to exclude from the benefits of the enactment a shareholder who had not taken his shares on the faith of the prospectus or notice, or who, having so taken them, was, at the time when he took them, in possession from some other source of the information omitted from it. Upon the construction, then, of the language of the section, I am prepared to hold that every contract, which, upon a reasonable construction of its purport and effect, would assist a person in determining whether he would become a shareholder in the company, is a contract within the meaning of the 38th section of the Act of 1867; and having arrived at this conclusion from the considerations which I have mentioned, I abstain from saying more in support of it, as it is in accordance with the conclusions which have been arrived at by other Judges, whose opinions upon the subject are to be found in the published reports. I more particularly refer to the judgment of Mr. Justice Blackburn in *Charlton v. Hay* (12), which was concurred in by Justices Mellor and Field; to the judgments of Lord Justices Mellish and Brett in *Gover's Case* (7), (in which, though the case was disposed of upon other grounds, opinions were expressed by the Judges forming the Court upon the question now under consideration); to the judgment of the Common Pleas Division as delivered by Lord Coleridge in *Twycross v. Grant* (1); and to that of the Lord Chief Justice in the same case when it came before the Court of Appeal. With reference, however, to the judgment of Lord Justice Brett in *Gover's Case* (7) I desire to say that, whilst I entirely assent to the

observations made by him as to the remedial character of the section, and to the importance of construing it with regard to the state of the law as it existed at the time when it was enacted, I am unable to adopt the view intimated by him that the remedy of a shareholder who was entitled to the protection of the statute was to have his name removed from the list of shareholders. As at present advised, it appears to me that the only remedy which a shareholder has under the statute is against the person or persons who have omitted to specify the contract.

That the language of the 38th section will admit of such a construction as that which, in my opinion, should be put upon it is not disputed, but it is urged that a still more limited construction ought to be adopted, and that such contracts only should be treated as within the provisions of the section as are made either by the company itself, or by its promoters, directors or trustees, as representing or on behalf of it; in other words, such contracts only as affect the company in the sense of putting an obligation upon it.

This view of the section was taken by Lord Justice Bramwell in *Gover's Case* (7), and was concisely expressed by him in the following terms: "There must be some limitation to the words in the Act. That is conceded. It must be read as a contract entered into by the promoters as such;" and again, in *Twycross v. Grant* (1), he expressed himself, upon the same subject, as follows: "There must be some limitation; two have been suggested—one by the plaintiff, that every contract is meant, which would assist a person in determining whether he would be a shareholder; the other, that only those contracts are meant which affect the company, which put an obligation upon it, whether with or without some benefit attached. There may be other limitations better than either of them, but I think the choice lies between the two, and I am of opinion that the latter is right."

The Lord Chief Baron expressed an opinion to the same effect in *Twycross v. Grant* (1).

In *Gover's Case* (7) Lord Justice Bramwell expressed his views in the concise

Sullivan v. Mitcalfe (App.), C.P.

language I have mentioned, without assigning any reason beyond a general concurrence in those which had been expressed in the same case by Lord Justice James, to which I will presently refer; but, in *Twycross v. Grant* (1), he was apparently influenced by the consideration that it was enough to let the public know on what terms they could have the subject-matter of the scheme in which they were invited to join, and that it was better to leave people to look after themselves than to endeavour to protect them by affording them information which they would not take the trouble to ask for.

Now I quite admit that if a mine or a patent is offered for sale to a company, it is immaterial to state how or when or at what price the vendor acquired it, provided the vendor and the company, or the purchaser representing the company, stand to each other in the ordinary relations of vendor and purchaser. If A. has acquired the mine or patent from the owner at the price of 50,000*l.* and has contracted to sell it to a company, or to a trustee for a company, for 100,000*l.*, there can be no objection to such a transaction, and, in a prospectus or notice inviting the public to subscribe for shares, it would not, in my opinion, be necessary for the promoters or directors, if aware of the price given by A., to communicate that fact to those whom they might invite to subscribe: in such a case, the fair inference would be that the actual promoters of the company, by whatever name called, deemed 100,000*l.* a fair and reasonable price to be paid for the property agreed to be purchased, and were willing to take their own share in the adventure upon the same terms as those whom they were inviting to join with them. They may have been bad judges of the value of the property, or over-sanguine or careless, but of this the subscriber for shares must be assumed to know that he must take the risk; if he applies for them upon the faith of the prospectus, he is in no way deceived or misled. But the case is very different if, by another contract between A. and the promoters of the company, the former agrees to return to the latter 40,000*l.* of the money to be paid to him in order that that amount may be divided

amongst themselves: in this latter case, if the contract between A. and the promoters is concealed from the subscriber for shares, the latter is misled by the prospectus into believing that the promoters have agreed to give 100,000*l.* for the property, honestly, though perhaps erroneously, believing it to be worth the price, and that they are running an equal risk with himself of the purchase turning out a bad bargain, whilst they are in fact preparing the way for putting into their own pockets a portion of the money which they hope to induce him to contribute to the funds of the company.

Surely for such scandalous transactions—and I can call them by no other name, and there have unfortunately been many of them—there was need of some more adequate remedy for the deceived shareholder than the existing law afforded; the language of the section is sufficient to give it—why should it receive a limited construction which would exclude it? To adopt the limited construction which has been pressed upon us would be to reduce the remedial character of the section to a minimum; the non-disclosure of a contract of so limited and restricted a character could hardly be considered as affording a sufficient reason for conferring upon a shareholder, and upon no one else, so great an amount of protection as the second portion of the section confers upon him, and at the same time refusing him the like protection when the effect of the contract is to confer upon the promoters a large amount of pecuniary benefit, and to impose upon the company, and consequently upon all persons taking shares in it, a corresponding amount of loss.

It has been much pressed upon us in argument that the judgment of Lord Justice James in *Gover's Case* (7) supports the contention of the appellants on the present appeal, and this appears to have been the view taken of it by Lord Justice Bramwell in *Twycross v. Grant* (1). So far as I can form an opinion of that judgment from the authorised report of it, it appears to me that, with the one exception to which I will presently allude, the Lord Justice did not intend to express any opinion beyond what the decision of the case then under consideration required.

Sullivan v. Mitcalfe (App.), C.P.

The circumstances of the case were peculiar: the appellant alleged that she had taken her shares upon the faith of a prospectus from which a contract entered into by a promoter had been improperly omitted; but the relief which she claimed was to have her name removed from the list of contributories. Three of the four Judges who constituted the Court held that, if a contract which ought, under the provision of the 38th section, to have been specified in the prospectus had been omitted, the relief to which the shareholder was entitled was a personal remedy against those who had improperly issued the prospectus, and not to have his or her name removed from the list of shareholders or contributories. This was sufficient to dispose of the appeal, but two of the four Judges, namely, Lords Justices James and Bramwell, also held, affirming in this respect the decision of the Vice-Chancellor, that the contract in question had not been entered into by a person who was at the date thereof a promoter, director or trustee of the company, and that there was consequently no necessity to specify it in the prospectus. From this conclusion the other two Judges, Lords Justices Mellish and Brett, dissented. Now, whether Lord Justice James correctly estimated the effect of the evidence upon this part of the case, it is quite clear, from the whole tenor of his judgment, that it was based upon the estimate he had thus formed; for, after stating that he was at a loss to understand upon what principle it could be said that the contract was by the company, or by any promoter, trustee or director of the company, and that the character of the contract could not operate as a transformation of the contracting parties, he added, "I may illustrate my view by referring to a contract which I think would be within the Act. If, instead of contracting to sell to the company, or inviting the company to become shareholders in the thing itself, Mappin had invited them to become shareholders with him in a contract, and they had accepted that invitation, then he would by the terms of his offer, and by their acceptance of that offer, have made himself their agent as from the date of that contract, and any bye

or collateral contract made for his own benefit would be a contract by a trustee for the company or partnership."

Such being the opinion of the Lord Justice as to a class of contracts which would undoubtedly be within the provision of the Act, I can hardly think that he would hesitate to hold that the contracts which are under consideration on the present appeal ought to have been specified in the prospectus.

I may add that the case of *Charlton v. Hay* (12), to which I have already alluded, and the circumstances of which are not distinguishable in principle from the present appeal, was cited in *Gover's Case* (7), and that no dissent was expressed, either by Lord Justice James or Lord Justice Bramwell, from the judgment of Mr. Justice Blackburn on behalf of himself and Justices Mellor and Lush. In that case the contract in question was one by which the vendor to the company was to receive a portion only of the purchase-money, the residue being divided among the promoters. The Court held it to be within the section, and in the course of his judgment Mr. Justice Blackburn expressed himself in the following forcible terms: "We have to say whether this is a contract required to be disclosed by the terms of the section; and it seems to me that not only is it clearly included in those terms, but further, if it were not, the Legislature has failed to express what was certainly its intention and object. This one of the alleged contracts is, at all events, of immense importance to all the shareholders of the company, and, even if not subject to adoption by the directors or the company, it otherwise comes within the description of the contracts required to be specified." Every sentence in the passage which I have just quoted is, in my opinion, applicable to the present case. I in all respects adopt them, and am consequently of opinion that the demurrers of the defendants Peele and Brown were properly overruled by Mr. Justice Grove, and that these appeals must be dismissed.

THE SINGER, L.J.—This appeal raises the question whether upon demurrer certain contracts set forth in a statement of claim

Sullivan v. Mitcalfe (App.), C.P.

ought or ought not to be held to come within section 38 of the Companies Act, 1867.

Shortly stated, the contracts compose a series of arrangements made by parties to the formation of a joint-stock company, and having for their object its formation. They are contracts from which, when disclosed, it would be reasonably inferred that what was purchased by the company when formed was of far less value than the sum which was actually paid by the company for it; that the company's capital had been or was to be expended principally in indirect payments to the promoters of the company and persons connected with them other than the real vendors to the company, and but little in the real *bona fide* purchase of that which was to constitute the subject of the company's business; that some at least of the persons who by prospectus invited the public to take shares in the company held such a position in regard to its formation and in connection with the vendors and promoters as to make their interests and the interests of ordinary subscribers for shares in the company by no means the same; and, finally, that the company itself was one in which no prudent man, with knowledge of these facts and trusting to the success of the undertaking alone, would be likely to embark his money in shares. On the other hand, assuming the company formed, and the purchase which was the object of its formation carried out, there was nothing in any of the contracts, other than the one which was in fact disclosed, which bound or directly affected the company or its property—nothing which by adoption or otherwise could impose any burden or obligation, any loss or liability, upon it—nothing which made the value of its shares intrinsically greater or less.

Under these circumstances, we are brought face to face with two opposing views of the meaning of the section to be construed. These are shortly expressed by Lord Justice Bramwell in *Twycross v. Grant* (13), to the effect that only those contracts were meant "which

affect the company, which put some obligation on it, whether with or without some benefit attached;" and again, "contracts which they have power to reject," and expounded by Chief Baron Kelly in his judgment in the same case at p. 506. He says "that a contract to be within the provision must have been made with the company if it has been formed, and if not, with the promoters or the directors, or the trustees representing or purporting to act on behalf of the future company, and with the intent that the company, when formed, shall execute a corresponding contract, and so in effect ratify the act done by the promoters or other body of persons mentioned before its formation; also, that it must be such as to impose or be intended to impose a burden or obligation, or a loss or liability, upon the company which would affect the value of the shares in the hands of a company." The other view is stated by Lord Justice Brett (14) in *Gover's Case* (7), in the following terms: "I come to the conclusion that it" (i.e. section 38) "includes every contract made before the issue of the prospectus, the knowledge of which might have an effect upon a reasonable subscriber for shares in determining him to give or withhold faith in the promoter, director or trustee issuing the prospectus, whether such contract was made by such promoter, director or trustee before or after he became a promoter, director or trustee, and whether or not such contract was made on behalf of, so as if adopted to impose a liability on, the company." The arguments for and against these opposing views have been so elaborately set forth and discussed in *Twycross v. Grant* (1), both in the Common Pleas Division and in the Court of Appeal, that it would serve no useful purpose if I were to recapitulate them. I shall content myself with stating generally the grounds upon which I feel myself compelled to adopt a wider construction of the section than that which the former of the two views allows.

I am not myself much impressed by the argument, founded upon a presumption of the mischief for which the section

Sullivan v. Mitcalfe (App.), C.P.

was intended to provide a remedy, not because I do not accede to the principle and adopt the language of Lord Justice Brett in *Gover's Case* (7), that the enactment being remedial must be so construed as to give the most complete remedy which the phraseology will permit, but because there appears to me to be considerable uncertainty as to what was the particular mischief for which the enactment was intended to provide a remedy. No one can doubt that it was intended to give to persons invited by prospectuses or notices to become shareholders in companies some greater protection than they possessed before; but whether such protection was merely directed to prevent the concealment from such persons of contracts of the description of that which was concealed in the well-known case of *Overend, Gurney & Co. Limited*—a contract which had a direct and most material bearing upon the position of the company and the value of its shares—or whether it was intended to enforce also the disclosure of all the arrangements preceding the formation of a company made by the parties concerned in its formation, whether they directly affected the position of the company or not, is a matter which from no source properly open to us can be satisfactorily solved. In this state of circumstances any *a priori* argument drawn from the supposed intention of the Legislature is as likely to mislead as to assist. What particular contracts are or are not comprised in the enactment, and what are the conditions under which they are or are not to be disclosed, are questions which fall to be determined upon the language of the enactment itself with no other guide for its construction than is afforded by the admitted general intention of the Legislature, and the ordinary rules which govern the Courts in the interpretation of statutes and written instruments.

The heading of the two sections, of which section 38 is one, has been sometimes relied on by those who support the more limited meaning of the term "contracts" used in section 38, but the argument derived from it is, in my opinion, at best so slight as to be practically worthless.

As regards the section itself this much must be admitted, as it has been either in express terms or impliedly by every Judge who has had to consider the meaning of the section, namely, that the words, "contract entered] into by the company or the promoters, directors or trustees thereof," are so general that they must necessarily receive some qualification. Starting then with this premise, I must confess that from the mere language of the section, any more than from the presumed intention of the Legislature, I cannot collect with any sufficient certainty what that qualification is. As a mere matter of interpretation, unaffected by any rule of construction, the section appears to me capable of being read in such a manner as to bear either the wider or the narrower interpretation which has been put upon it, and the arguments in favour of the one and the other interpretation appear to me almost equally balanced. Under such circumstances, even if there were no rule of construction guiding me to the same result, I should feel myself compelled by the preponderating weight of judicial authority which, putting aside *Gover's Case* (7), which is claimed by the advocates of both the interpretations, is to be found in favour of the wider interpretation in *Cornell v. Hay* (15), in *Charlton v. Hay* (12) and in *Twycross v. Grant* (1). But, independently of authority, and assuming the language of the section to be as uncertain as I have stated that in my opinion it is, I feel equally bound to adopt the wider interpretation upon what I think ought to be adopted as a rule of construction in such a case, namely, that when from the nature of the provision contained in an Act of Parliament it is clear that a restriction must be put upon the ordinary and literal signification of some word or expression, and it is uncertain from anything to be found in the Act itself or in the circumstances judicially cognisable under which the provision was inserted what the exact character and extent of that restriction are, it is the duty of the Courts to put no

(15) 42 Law J. Rep. C.P. 136; Law Rep. 8 C.P. 328.

Sullivan v. Mitcalfe (App.), C.P.

greater restriction than the nature of the provision and the subject-matter to which it relates necessarily impose. Applying this rule in its utmost strictness to the construction of the section in question, it might be said that all contracts must be disclosed in a prospectus inviting persons to take shares in a company, at the peril at least of an action if they are not, which relate to the formation of the company or to its capital, property or business when formed, or to the position, pecuniary or otherwise, in regard to the company or its promoters or vendors, of the directors or other officers of the company, provided that one of the parties to such contracts is a person who, at the date of any such contract or subsequently becomes a promoter, director or trustee of the company.

If it be urged against such a wide construction of the section, that contracts wholly immaterial to be disclosed would thereby be brought within its provisions, the answer may be given that no consequence follows the omission to disclose in a prospectus any contract except in favour of a person taking shares on the faith of such prospectus, and that, giving a reasonable meaning to this not very happily worded expression, no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares. This is in substance the answer given to the objection by Chief Justice Cockburn in *Twycross v. Grant* (1); and the practical effect of this view of the section would be that a prospectus might with safety to those issuing it omit the mention of all contracts except such as might be reasonably said to be material to be known to persons invited to take shares, in order to enable them to form a judgment as to the policy of so doing.

But this view is no doubt open to the criticism that it supposes the Legislature to have in the early part of the section directed the disclosure of contracts which, if disclosed, would be so to no useful

purpose, and, if omitted to be disclosed, would be so with impunity. I am therefore content to put the condition which would otherwise attach only to the remedy for non-disclosure of a contract as a further limitation or restriction upon the generality of the description of the contract itself, and to adopt the view that every contract relating to the formation of a company, or to its capital, property or business when formed, or to the position, pecuniary or otherwise, in regard to the company or its promoters or vendors, of the directors or other officers of the company, and which is material to be made known to persons invited to take shares, in order to enable them to form a judgment as to the policy of so doing, is a contract within the meaning of section 38 of the Companies Act, 1867, and as such must be disclosed under the circumstances and to the extent which the section points out, provided that one of the parties to it is at its date, or subsequently becomes, a promoter, director or trustee of the company. I cannot, as a matter of law, and upon demurrer, say, that any of the contracts set out in the statement of claim are not such as may reasonably be found by a jury to come within this definition, and I am therefore of opinion that the judgment of Mr. Justice Grove overruling the demurrer was right and should be affirmed.

Judgment affirmed.

Solicitor—Edward Beall, for plaintiff; F. W. Mount, for defendant Peele; H. A. Patience, for defendant Brown.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } THE QUEEN v. PEARCE AND
March 22. } OTHERS.

*Statute 4 & 5 Will. 4. c. 76. s. 38—
Guardians ex officio—County Justices—
County of a Town.*

[For the report of the above case, see
49 Law J. Rep. M.C. 81.]

[IN THE COMMON PLEAS DIVISION
AND COURT OF APPEAL.]

1880.
 March 10. }
 April 22. } THE CAPITAL AND COUNTIES
 May 15. } BANK v. HENTY AND OTHERS.*

*Libel—Innuendo—Evidence for the Jury
 —Privileged Communication.*

The defendants were brewers, and had been accustomed to receive, in payment for beer supplied to a number of their tenants in Sussex, cheques drawn upon different branches of the plaintiffs' bank. A dispute arose between the defendants and the manager of the plaintiffs' branch bank at Chichester, through the latter refusing to cash cheques for the defendants drawn upon any other of the branch banks, and the defendants thereupon sent round to the tenants a printed circular in the following terms: "Messrs. H. and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." In an action for libel the statement of claim set out the circular with the innuendo, "meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheques of their customers." At the trial evidence was given that the plaintiffs incurred a loss through the issue of the circular, and that the defendants, on being informed of it, took no steps to prevent the loss increasing. The case was left to the jury, who, being unable to agree, were discharged without a verdict:—Held (by the Common Pleas Division, on motion to enter judgment for the defendants), that the circular was capable of the defamatory meaning suggested by the innuendo; that there was evidence for the jury that it had that meaning; that, assuming the publication of it to be privileged, there was evidence for the jury of express malice on the part of the defendants, and therefore that the case was rightly left to the jury. Held (by the Court of Appeal—BRETT, L.J., and COTTON, L.J.; THESIGER, L.J., dissenting), that the circular, according

to the ordinary or primary meaning of the language, could not reasonably be read as defamatory of the plaintiffs; that there was no evidence upon which the jury could reasonably find that it had any secondary meaning defamatory of the plaintiffs; that the publication of it was privileged, and there was no evidence of express malice on the defendants' part to destroy the privilege; and therefore that the defendants were entitled to judgment.

Judgment of the Common Pleas Division reversed.

Action for libel.

The defendants were brewers who had a number of public-houses in the county of Sussex, from the occupiers of which they were in the habit of receiving, in payment for beer supplied to them, cheques drawn *inter alia* on the plaintiffs, a joint-stock banking company, having amongst others a branch bank at Chichester, at which the defendants used to pay in and get cashed the cheques drawn on the plaintiffs which they so received. A dispute arose between the defendants and a new manager of the Chichester branch bank about such cheques in consequence of such manager refusing to cash them if they were drawn on any other than the Chichester branch, and this led to the defendants sending a circular to the occupiers of these public-houses of theirs. This circular, which was the alleged libel, was as follows: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The statement of claim set out such circular with the following innuendo: "Meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheques of their customers." Shortly after the issue of the circular a run on the bank took place, and a serious loss to the plaintiffs resulted, as alleged, through the sending out of the circular. On the attention of the defendants being called by letter from the plaintiffs to what was happening, they disclaimed having had any intention to injure the plaintiffs in send-

* *Coram Grove, J., and Denman, J., in the Common Pleas Division; Brett, L.J.; Cotton, L.J.; and Thesiger, L.J., in the Court of Appeal.*

Capital and Counties Bank v. Henty (App.), C.P.

ing out the circular, but, on the plaintiffs threatening legal proceedings, the defendants declined to take any further step in the matter.

The cause was tried in Middlesex before Lord Coleridge, C.J., in the Michaelmas Sittings, 1879. The jury were unable to agree on a verdict, and were accordingly discharged.

Herschell (Sir H. Giffard and A. L. Smith with him) moved to enter judgment for the defendants.—The words in the circular are not capable of having the meaning which is given to them by the innuendo. The defendants had a perfect right to tell the persons to whom the circulars were sent, and who were their debtors, that the defendants would not take the cheques which they had been in the habit of giving in discharge of their debts, and the circulars therefore only announce an intimation on the part of the defendants of that which they had a right to do. The words in the circular in their ordinary meaning are not actionable, and they would require an innuendo to make them actionable, and the innuendo in this case gives them a meaning of which they are not capable, and therefore this action will not lie—*Ooz v. Cooper* (1), *Blagg v. Sturt* (2), and *Mulligan v. Cole* (3). Even assuming the words to be capable of such meaning as given to them by the innuendo, there was here no evidence on which a jury could find for the plaintiffs that they bore that meaning.

Charles Russell (Reid with him), for the plaintiffs.—The words used in the circular are capable of having the libellous meaning which is attached to them by the innuendo, and if so, the question was one for the jury. There was ample evidence to support the innuendo, and the circular was read in that sense by those to whom it was addressed, and it certainly had the effect of producing a run on the bank, and causing it considerable injury.

Herschell replied.

(1) 12 W. R. 75.

(2) 10 Q.B. Rep. 899; 16 Law J. Rep. Q.B. 39.

(3) 44 Law J. Rep. Q.B. 153; Law Rep. 10 Q.B. 549.

GROVE, J.—This was an action for libel tried before Lord Coleridge and a special jury. [His Lordship here stated the facts.] At the trial Lord Coleridge held that the occasion upon which the circular was sent was privileged, but he left to the jury the question whether the circular, viewed with the surrounding circumstances, was libellous, and if so, whether there was express malice to take it out of the privilege. It is unnecessary for the present purpose for us to decide whether the publication was privileged. I, therefore, give no opinion upon that question, but I will assume in my judgment that it was privileged.

The real questions we have to decide are three. First, is this circular *per se* capable of being libellous? Could a Judge say that it is incapable of being libellous? Secondly, assuming that a Judge could not do so, then could evidence be given to prove that it was libellous—that is, to shew that it intended to convey the imputation alleged in the innuendo? and if so, was there evidence of this for the jury? Thirdly, was there any evidence of express malice, assuming the occasion to be privileged? I do not think it necessary to express any opinion upon the first question. *Mulligan v. Cole* (3), which was the strongest case cited to us in support of the proposition that this circular *per se* was incapable of receiving a construction which would make it libellous, differs considerably from the present case as to the nature of the libel. And the real *ratio decidendi* in that case was that the Judges, being of opinion that the advertisement without the innuendo would not have been defamatory, thought that the evidence did not support the innuendo. That was certainly a much stronger case than the present one, but, as I have before said, I do not express any opinion as to whether this circular would be libellous if there were no innuendo. Therefore the question in this case is really this: There being an innuendo, which is in substance that the circular was intended to convey that the Capital and Counties Bank was in an insolvent or doubtful condition, whether there is evidence that the innuendo can fairly be supported as attaching to this

Capital and Counties Bank v. Henty (App.), Q.P.

circular; in other words, whether the circular can reasonably bear that meaning, viewed by itself, and viewed with the surrounding circumstances and the relations of the parties.

I am of opinion that there was evidence to that effect, and that, therefore, the case was one which was properly left to the jury. I do not say which way the jury ought to have found, but I am of opinion that there was a question for the jury.

Let us look at the alleged libel and the relations between the parties. The defendants' firm had dealt for a considerable time with the bank. A quarrel or dispute had arisen between them and the manager of the bank, from his refusing to cash cheques which were not drawn on the Chichester branch of the bank. Then the defendants send this circular to their tenants or to certain persons who dealt with them for beer. I think it is not unimportant to remember that this circular is not a notice to the individual that the defendants will not receive any more cheques on the score of inconvenience; but that, though sent to individuals, it is a general printed notice, which, received in its ordinary meaning, is, that the defendants will not receive from anybody cheques drawn on the Capital and Counties Bank. It is not "Messrs. Henty and Sons hereby give *you* notice that they will not receive from *you* cheques in payment," but they give notice that they will not receive in payment cheques on any of the branches of the bank. This circular was printed, and might lie about and probably would come to the knowledge of a great many other persons than the tenants. Coupling all this with the fact that a large number of persons gave evidence that they read the circular in the sense I have mentioned, it might reasonably be taken in that sense by the jury, and there was also evidence that the average outgoing of the bank was changed, and that there had been a run in one month of 277,000*l.*, which, though not conclusive, is evidence of what was the natural and probable result of reading such a circular. I do not agree with Mr. Herschell that the test of this question is what in fact existed in the mind of the person penning the alleged

libel, but I think it is what is the result likely to be produced by a circular of this description? There seems to have been no necessity for the circular having been sent out for the protection of the defendants. It would have been amply sufficient for their protection if they had told their tenants that they did not intend to receive their cheques in payment; but to send a circular round to a large number of persons that they will not receive from anybody cheques drawn on any of the branches of the bank, seems to me to be evidence of an intention—in the sense in which I use the word "intention"—that this circular should be read by persons in a sense injurious to the interests of the Capital and Counties Bank. It cannot therefore be said that this is a document which is not capable of having the sense affixed to it which is suggested by the innuendo, and that there was not evidence on which the jury might fairly be asked whether it had not that effect.

Then, on the question of malice, I think there was evidence of express malice to go to the jury. I take "express malice" to mean not merely that the person publishing the libel disliked or in his own mind wished to injure the plaintiff (because a person may do perfectly right acts and yet dislike the person with reference to whom he does them), but there must be something in the act of the person to shew that he published the libellous matter, believing that it would have the effect of injuring the person, and with the view of doing him an injury. I think there is evidence of that here. The circular was sent, as I have said, unnecessarily, and there was nothing in the conduct of the plaintiffs' manager to have called for such an act by the defendants; and there was the subsequent refusal of the defendants to do anything to mend the damages which they evidently knew had taken place. Without expressing any opinion whether the occasion was privileged, I think that there was some evidence of express malice, and that the Lord Chief Justice was right in leaving the case to the jury. The result is, that we cannot enter judgment for the defendants, and there must be a new trial.

Capital and Counties Bank v. Henty (App.), C.P.

DENMAN, J.—I am of the same opinion. This is not a case in which the question is whether a new trial shall be granted after there has been a verdict, but it is a case in which the questions of libel or no libel, and whether the innuendo laid was made out, were left to the jury, and the jury were unable to find a verdict. It has been contended for the defendants that, notwithstanding such failure on the part of the jury, we can at this stage see that there was no case to go to the jury, and that the Judge at the trial would have been justified in nonsuited the plaintiffs, and entering judgment for the defendants. I think that we cannot do so. Now, the alleged libel and innuendo are the following. [The learned Judge here read the circular notice and innuendo, as in the plaintiffs' statement of claim.] It has been objected by the defendants, first, that the words in this notice are incapable of the meaning put on them by the innuendo; and, secondly, if they are capable of such meaning, that there was no evidence that they did bear the sense put on them by the innuendo. A libel is one of the most difficult of all actions for the Court to determine without a jury, because the question of libel or no libel is peculiarly a question for a jury. We are asked, however, to do so here. In the first place, it is contended that the words in the notice assert only an intention of doing what the defendants had a right to do, and therefore are incapable of being libellous. But I think it is plain that the mere fact that the words contain only the expression of an intention, even though it be a lawful intention, cannot be held to make the words incapable of amounting to a libel. Many cases might be given in which the words might be expressive only of a lawful intention, and yet cause an injury to a person, and be libellous. Take, for example, the words "I intend to prosecute J. S. for felony at the next assizes." Are the words, then, in this notice libellous? If they are such that persons reading them could consider that the plaintiffs' bank was unlikely to meet cheques drawn on it, it seems to me impossible to say that they could not be found by the jury

to be libellous. The cases relied on by the defendants' counsel by no means decide this point in favour of the defendants. The first of these cases, namely, *Ooz v. Cooper* (1), when looked at, appears to me to decide only that if the words are innocent in themselves, then, *unless* there are words in the innuendo to explain them, they must be taken in their ordinary sense, and that the Court can decide this on demurrer. That is, no doubt, a strong decision, but it does not meet the present case. The second case cited for the defendants, namely, *Blagg v. Sturt* (2), is clearly distinguishable; and although it is said there by Chief Justice Wilde, in delivering the judgment of the Exchequer Chamber, that "undoubtedly it is the duty of the Judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo," yet that learned Judge adds, "but when the Judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it." Taking that to be the law, and that it is for the Court to say whether the words alleged to be libellous are capable of the meaning given to them by the innuendo, I think it would be impossible for us in this case to say that they are not so capable, without going beyond any previous decision, and acting contrary to the policy and spirit of the law. It would be putting ourselves in the position of a jury, and deciding the question of libel or no libel as a matter of law. Words have often various meanings, and whether they are libellous or not cannot be considered as a mere matter of law, but at most as a complex question for the Court and jury, upon which the jury may have perhaps to hear much on both sides before they can say whether they are libellous or not. The case of *Mulligan v. Cole* (3), which was relied on by the defendants, is also clearly distinguishable. There it was held, no doubt, that the words in an advertisement were incapable of receiving the meaning given to them by the innuendo; but it was impossible there to give them the meaning alleged in the innuendo without violently straining the ordinary meaning of the words, and that case is therefore very far off from the pre-

Capital and Counties Bank v. Henty (App.), C.P.

sent one. Here the words in the circular are, without doing any violence to the language used, open to the construction put upon them, that the cheques drawn on the plaintiffs' bank were worthless, as the bank would not be able to pay them. The defendants do not only say in the circular that they will not receive cheques drawn on the bank from the persons to whom the circular is sent, but that they will not receive cheques drawn on such bank, which may mean and may have been intended to mean, or to be understood as meaning, cheques of the bank by whomsoever presented. At all events, it would be a question for the jury whether this circular was to be applied only to cheques in the hands of those to whom it was sent, and I am not sure that a jury might not come to the conclusion that the words were intended to bear the other construction. It is said, on the part of the defendants, that even if the words were capable of the construction put upon them by the innuendo, there was no evidence that they were used here in that sense. I feel that the only sense in which the words would be libellous is that given to them by the innuendo; but I also think that it is impossible to say that there was no evidence that they were used in that sense. The jury are at liberty to look at all the circumstances and at the whole conduct of the parties. There was evidence that many persons, in fact, did put that construction on the circular, and though I do not say that that is conclusive, it is at least a strong argument to shew that that is a construction which might not unreasonably be put upon it. In the case of *Mulligan v. Cole* (3) there was no evidence to support the innuendo, and to connect it with the alleged libel. That was a strong case, and probably is one which is not easily to be reconciled with the authorities that the question of libel or no libel is one for the jury. But it is to be observed that two of the learned Judges put their decision in that case on the ground that the plaintiff had failed to give any evidence that any other meaning was to be attached to the words complained of in the advertisement than that which they would *prima facie* bear. Here, in my opinion, there was some

evidence in support of the innuendo, and I therefore think that the matter ought to be submitted to a jury, and being of this opinion, I do not wish to say anything more which might prejudice the trial.

Motion refused.

April 22.—The defendants appealed.

Herschell and The Solicitor-General (Sir Hardinge Giffard), (A. L. Smith with them), for the defendants.—There was no evidence for the jury that the words of the circular had, or were intended to have, a meaning defamatory of the plaintiffs. It is not disputed that, though the primary meaning of words used is innocent, they may yet be shewn to have a secondary defamatory meaning from the circumstances under which, and the persons to whom, they were published. But there must be some evidence for the jury not only that the persons to whom they were uttered understood the words to have that defamatory meaning, but also that the defendant intended them to have it. There must, in fact, be some evidence in support of what was the old form of stating the innuendo in declarations for libel, "the defendant then meaning and intending," &c.—*Hearne v. Stowell* (4), *Davies v. Hartley* (5). In the latter case it was held that a witness could not be asked, "What did you understand by the words?" until a foundation had been laid for the question by evidence of something to give a peculiar character to the expression used, different from its ordinary meaning. In the present case there was no such evidence, and the words themselves are not in their primary sense libellous. *Mulligan v. Cole* (3) is directly in the defendants' favour. Where an act is lawful, and words must be used in order to perform it, and no more are used than necessary, the words cannot be libellous. Here if Henty & Sons had not sent the circular, but had, in fact, refused to receive the cheques, the result would have been exactly the same. A mere mis-

(4) 12 Ad. & E. 719. Judgment of Lord Denman, C.J., at p. 731.

(5) 3 Exch. Rep. 200; 18 Law J. Rep. Exch. 81.

Capital and Counties Bank v. Henty (App.), C.P.

understanding of the meaning of words, however plausible, by the person to whom they are uttered, cannot create an intention to defame on the part of the defendant. It is further submitted that Lord Coleridge rightly held that the publication of the circular was privileged, and there was no evidence of malice, in fact, on the part of the defendants, to take away the privilege.

The Attorney-General (Sir J. Holker) and R. T. Reid (A. G. Goldney with them), for the plaintiffs.—The plaintiffs' case ought to have been left to the jury. *Muligan v. Cole* (3) is distinguishable from this case; the decision was only that the natural meaning of the advertisement was not what was alleged, and that there was no evidence in support of the innuendo.

[COTTON, L.J.—The Judges thought that all the facts might be taken into consideration, in order to see whether the defendants could have intended the advertisement to have had a libellous meaning.]

If so, it is submitted the judgment was wrong. The question is not what the defendants intended to convey, but what a person of ordinary capacity would infer the words meant; or, are the words capable of a libellous construction? And the question is the same in criminal as in civil proceedings for libel, because a man is presumed to intend the natural meaning of what he says. Although the language used may be a plain expression of an intention to do a lawful act, that intention may be expressed in such a way as to libel another.

Where the language complained of is ambiguous, and it is doubtful whether it imputes injurious matter to the plaintiff, the question for the jury is not whether the defendants intended to injure the plaintiffs, but whether the tendency of the matter published was injurious to him—*Fisher v. Clement* (6), *Baylis v. Lawrence* (7).

[BRETT, L.J.—Do those cases mean more than that the defendant is liable if, without intending to injure the plaintiff,

he intends the words to mean what reasonable men would think they did mean, and the plaintiff is injured by them?]

It is submitted that *Fisher v. Clement* (6), at any rate, goes further. Here the only meaning which a reasonable man could put upon the circular would be that a doubt existed with respect to the stability of the Capital and Counties Bank. The circular is certainly capable of that meaning, and the case ought to go to the jury. The occasion of publishing the circular was not privileged, because it was unnecessary for the defendants to give notice beforehand to their tenants that cheques on the branch banks would not be received; and if the occasion was privileged, there was some evidence of malice, in fact, both in the manner of sending the circular and because the defendants took no steps to repair the injury the circular had caused to the plaintiffs. They also cited—*Parmiter v. Coupland* (8); *Harvey v. French* (9).

The Solicitor-General (Sir Hardinge Giffard) replied.

Our. adv. vult.

The following judgments were (on May 15) delivered by

THESSIGER, L.J.—This is a case which, to my mind, presents considerable difficulty, and upon which I am unable to form any confident opinion.

The Court is asked to say and hold that upon the evidence given at the trial there was no case proper to be submitted to the jury in support of the action, and, consequently, that Lord Coleridge, at the trial, and the Court below ought to have directed judgment to be entered for the defendants. The contention for the appellants is, that the plaintiffs failed to give *prima facie* proof that there was any libel at all, and, if there was a libel proved, that it was on an occasion which rendered it privileged in the absence of proof of express malice, and failed to give *prima facie* proof of such malice.

Upon the question of libel or no libel, it is urged that the document alleged by the plaintiffs to be a libel is nothing

(6) 10 B. & C. 472. Judgment of Lord Tenterden, C.J., at p. 475.

(7) 11 Ad. & E. 920. Judgment of Lord Denman, C.J. 924.

(8) 6 Mee. & W. 105; 9 Law J. Rep. Exch. 202.

(9) 1 Cr. & M. 11; 2 Tyrw. 585.

Capital and Counties Bank v. Henty (App.), C.P.

more or less than an act done, lawful in itself, and which only could be done by verbal or written communication; that the persons to whom it was sent by the defendants might very possibly, or even probably, speculate upon the motive which prompted the act, and form an opinion thereupon more or less favourable to the plaintiffs, according to the tendency of their minds; but that the document itself involves no statement of the motive, and cannot be read as conveying any imputation upon the plaintiffs. It is argued that it would be highly inconvenient if, under such circumstances as exist in the present case, a person were unable to say or write that he would not take the cheques of a particular bank without exposing himself to an action for defamation in which the words spoken or written, although no more than he was obliged to use in order to carry out the act, must be taken as defamatory, and, although the occasion might render them privileged, would expose him to the risk of a jury upon some slight evidence finding that he was actuated in speaking or writing the words by some by or indirect motive, and was therefore not protected by the privilege. This inconvenience may indeed be most strongly illustrated by supposing a case in which a man is prompted to do the act in question, and to speak or write the words constituting it, by the belief that the particular bank referred to is in failing circumstances. He may purposely avoid stating the motive which influences him, with the view of not injuring the bank unnecessarily, and yet what he says or writes is to be treated as equally defamatory with a document in which he states the motive. I fully feel the force of these considerations. But, on the other hand, I cannot shut my eyes to the fact that words spoken or written, which constitute an act lawful in itself, and which, so far as language is concerned, go no further than is necessary to do the act, may be used as a vehicle for conveying the most serious imputations upon the character or credit of the persons to whom they relate. There may be, and is, a perfect right on the part of any person to refuse to take the cheques of a par-

ticular bank; but if such person publishes his intention not to take them in places where, and to persons from whom, he never did receive, and never is likely to receive, any such cheques, I cannot doubt that his statement might justly be found by a jury to be defamatory, as casting, and intended to cast, a slur upon the credit of the bank. But this can only be by reason of the words spoken or written being capable of being heard or read in a defamatory sense; and if it be allowed that they are so capable, then it would seem to be a question for the jury whether, looking to the particular circumstances of the case, the words spoken or written constituted merely an act done, carrying with it no statement of the motive leading to the act, involving no defamatory meaning, or were intended solely or in conjunction with the act to convey, and did convey, such a defamatory meaning. The case of *Mulligan v. Cole* (3) is no authority to the contrary. There the plaintiff, having been a certificated Art Master at the Walsall Science and Art Institute, left his employment and took a similar one in an institution having a kindred name in the same town. An advertisement was inserted by the defendants, the chairman, treasurer, and secretary of the institute, in a Walsall paper, to the effect that the plaintiff's connection with the institute had ceased, and that he was not authorised to receive subscriptions "on its behalf," and such advertisement was held not to bear the meaning put upon it by the innuendo in the pleadings, that the plaintiff falsely assumed and pretended to be authorised to receive subscriptions on behalf of the said institute. But Mr. Justice Mellor rested his judgment upon the absence of any evidence indicating that the language of the advertisement was intended to bear a defamatory meaning, while Mr. Justice Lush doubtfully held that the case was rightly withdrawn from the jury, on the ground that the advertisement was not capable of the sense put upon it by the innuendo. He said that it could not be read as meaning more than to prevent the mistakes which might arise from the plaintiff's connection with a similar institution to that he had left,

Capital and Counties Bank v. Henty (App.), C.P.

just as on a dissolution of partnership a notice that only one of the partners is authorised to receive debts due to the firm could never be suggested as meant to imply that the other partners had been improperly collecting the debts. Such a case, however, is, in my opinion, different from the present. It is argued that the fact of a circular constituting the alleged libel having been only published by the defendants to persons who had sent, or were likely to send, cheques of the plaintiff's bank in payment of their accounts with the defendants, conclusively shews that the document ought not to be read as conveying any defamatory meaning. The fact is no doubt one which, as a fact, ought to weigh most heavily with either Judge or jury, still more when coupled with the facts which exist in this case bearing favourably upon the conduct and intentions of the defendants. But the absolute refusal to take the cheques upon any of the branches of the bank may reasonably be taken to import, in the absence of any explanation, that it is unsafe to do so; and when upon the evidence it appears that the defendants were, in consequence of the action of the manager of the Chichester branch of the bank, in a state, however natural, of some irritation; that in refusing to take cheques even when drawn upon the Chichester branch they went, however lawfully they might do so, beyond what was necessary to meet the difficulty which had arisen; and, lastly, although business men, necessarily knowing how delicate and easily affected is the credit of a bank, and having a motive for their conduct which, if stated, would have removed any possible misunderstanding of the real meaning of the circular, refrained from stating, or did not state that motive,—I feel that these circumstances, although they may be but slight indications of such an improper intention as is attributed to the defendants in sending out the circular, limited as its publication was to their customers, and even subject to selection as regards them, are still circumstances which render it difficult to say that there was no evidence to go to the jury that the circular was used and understood as defamatory. I do not for a moment wish

to be supposed to intimate that I should myself come to such a conclusion, or have necessarily been satisfied with a verdict to that effect. I merely say that I think that the question of libel or no libel is, under the circumstances of this case, one which should be submitted to a jury. Such a question, when turning as it does in this case upon the purport of what is alleged on the one side to be a mere business document, and, on the other, a defamatory libel, and which has to be read in the light thrown upon it by the relations and conduct, and according to the understanding of business men, is one upon which, in my opinion, a jury is better qualified than a Judge to form a sound opinion; and, under the circumstances, and not being able to satisfy myself that there was not some evidence proper to be submitted to the jury upon the question, I think it safer to adopt the view of Lord Coleridge and of the Court below that there was. But if this view be correct, looking to the reason on which it is founded, it carries with it as a consequence the further view that there was evidence to go to the jury of express malice sufficient to deprive the defendants of the privilege which it was considered, and, in my opinion, rightly considered, by Lord Coleridge, arose from the occasion on which, and the persons to whom, the circular was sent. The matter appears to me to stand thus: If the circular were to be found by a jury to be a libel at all, it could, in my opinion, only be so found by reason of its being intended by the defendants, as well as understood by those to whom it was sent by them, to impute something disparaging to the credit and stability of the bank; and if it be found to be a libel in that sense, it follows that the defendants were actuated by improper motives in publishing it, for they knew that there was no ground for suspecting either the credit or stability of the bank. On the other hand, supposing for argument's sake that the circular were of such a clearly defamatory character as that it could and ought to be held so, whether those publishing it really meant it as such or not, upon the principle that persons must in law be presumed to intend the natural consequences

Capital and Counties Bank v. Henty (App.), C.P.

of their acts, then the same facts to which I have referred as constituting some evidence that the defendants did intend by the circular to cast an imputation upon the credit and stability of the bank must equally constitute some evidence of express malice, for the reason already given, that they knew there was no ground for any such imputation, and therefore must have been actuated by improper motives if they intended it. I arrive then at the conclusion that the appeal ought to be dismissed, but I do so with the doubts which I have already expressed, and which are strengthened by the knowledge that the other members of the Court have arrived at an opposite conclusion.

COTTON, L.J.—The question we have to consider is, whether the case ought again to go to a jury, or whether we ought to give judgment for the defendants. In my opinion the defendants are entitled to our judgment.

Two questions have to be considered: First, whether or not the document in question is a libel, that is to say, whether or no there is in it a defamatory statement to the prejudice of the plaintiffs; and if so, the second question arises, whether it was written on an occasion which was privileged, and, if so, whether there was any evidence to go to the jury that there was express malice, or malice, in fact, on the part of the defendants.

Now, the document in question is a simple statement, very short, made to the customers of the defendants of the determination at which they had arrived not to take cheques on any of the branches of the Capital and Counties Bank. There is not in terms any statement defamatory of the plaintiffs, or to the prejudice of their credit, and therefore one must consider not what the words are, but what conclusions could reasonably be drawn from this document; because, in my opinion, a man who issues such a document is answerable not only for the terms of it, but also for the conclusion and meaning which people will reasonably draw from and put upon the document. In deciding what conclusion could be drawn, if there is not in the document

itself that which on the fair interpretation of the language is defamatory, you must look at the special circumstances of the case in order to see whether it is or is not defamatory.

To put an example in contrast with the circumstances of the present case. Here the defendants could, without being liable in an action, have refused to take cheques drawn upon either the branches or the chief office. But if they stuck up on the walls of any of the towns where the bank had a branch office, or in Chichester, an advertisement to this effect—"We hereby give notice that we will not take any cheques of the Capital and Counties Bank"—their only possible reason for doing that would be to cast an imputation on the bank, because the notice would be given, not to persons with whom they were dealing, and from whom they might expect to receive cheques on this bank; but it would be an announcement to every member of the public, and to members of the public with whom they stood in no business relation, and to whom they could have no reasons for making such a communication unless they intended to say something depreciatory of the bank. Under those circumstances it would be a reasonable conclusion that, although in terms the notice contained nothing defamatory, yet the intention was to intimate that the defendants did not trust the bank's solvency, and the notice would then be a libel.

But in the present case the circulars were sent for a purpose. They were sent to those with whom the defendants were dealing for the purpose of intimating a determination at which the defendants had arrived, and at which they had a right to arrive. Is it reasonable, under those circumstances, to construe the document as casting some imputation on the bank? The only suggestion is that the circular does not state the reason which induced the defendants to send it round. Is it reasonable that those who receive it, and know they are dealing with the defendants, and therefore that the communication may reasonably be made to them, should suggest to themselves that the meaning of the document is that the bank is not to be trusted?—that is to say, to

Capital and Counties Bank v. Henty (App.), C.P.

take that as the meaning of the document, and as shewn by the document to be the reason which induced the defendants to make this statement. When we know the special circumstances of the persons to whom it was sent, not of those to whom they might communicate it, but of the persons to whom it was sent by the defendants, in my opinion it would not be a reasonable conclusion to hold that there was anything defamatory in the statement, or to take it as anything but as an absolute communication of a determination which had been arrived at. That being so, if the case was to be decided on that question alone, I should say, on the facts before the jury, there was no evidence on which they could reasonably come to the conclusion that this was a libel. But the case does not stand there alone: the circular was sent on an occasion which was privileged; that is to say, the defendants having arrived at the conclusion not to take the cheques on the branches of the bank, had a duty cast upon them to communicate that fact to their customers who might otherwise send their cheques, which the defendants might have refused to receive in payment; and of course the defendants, if they desired to save themselves trouble, had also an interest in communicating their determination to their customers, who had also an interest in knowing of the determination arrived at. So that, in my opinion, the occasion of publishing the circular was privileged.

Then, what evidence of express malice was there in order to justify the jury in finding a verdict against the defendants? There must be, where the occasion of publishing the libel is privileged, evidence of express malice in the sense of an intention to do something other than the mere performance of the duty, or the circulation of the communication in the interests of the party who received and the party who sent it.

But, in my opinion, there was no evidence here to justify such a conclusion. We must look not only at one particular circumstance in the case, but also at the conduct of the defendants. Possibly their determination not to take any of these cheques was arrived at under a feeling of

irritation; but having arrived at that determination (and it is a determination which is not actionable), they communicated it to their customers. But it is said that there was malice in fact on their part because they do not express, as they ought to have done, the reason which induced them to send the circular round, so as to exclude the possibility of somebody suggesting or arriving at the conclusion that it was issued because they did not trust the bank. Mere stupidity or carelessness is not of itself malice, but no doubt there may be carelessness or recklessness of such a kind as may be evidence of malice. But here there is not, in my opinion, when you look at the circumstances, any such recklessness or other act on the part of the defendants as would justify the jury in finding that there was malice in fact. They sent the circular only to their customers, excluding those who were at Brighton, and they sent it to their customers, not only those from whom they got cheques on the bank, but generally to their customers who had to make payments, either periodically or at certain times, to the defendants' traveller who went round to receive money due to them.

I am satisfied that there was no intention on the part of the defendants in sending the circular to cast any imputation at all on the plaintiffs, and that the facts of the case do not, and would not, justify a jury in arriving at the conclusion that in fact they had any other intention but to send and to communicate to their customers the determination at which they had arrived, and at which they had a right to arrive; and therefore on that second ground also, which is independent of the first, I am of opinion that the jury would not be justified in finding a verdict against the defendants. In my opinion, therefore, the defendants are entitled to our judgment.

BRETT, L.J.—My view of the law in this matter is this: Since it has been determined (and Mr. Fox's Act was only declaratory of the common law) that an alleged libel must go to the jury, the first question for the jury is, whether the documents would be read in a defa-

Capital and Counties Bank v. Henty (App.), C.P.

matory sense by persons of ordinary reason in the position of those to whom it is published. If, in the opinion of the jury, it would not be so read according to the *prima facie* meaning of the language, then there is a further question (if there is any evidence upon which it can be raised), whether there were facts known both to the persons who penned the alleged libel, and to the persons to whom it was published, which would lead the latter reasonably to put upon the document the construction that, having a secondary defamatory sense, it was issued ironically, or otherwise than in the primary sense of the language. With regard to the second proposition, I think it is necessary that the facts should be known both to the person who indites the libel and to the persons to whom it is published; because if facts are known to the latter persons from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which, by the hypothesis, he could have no reason to suppose would injure anybody—the language used being such as in its ordinary sense would not be defamatory of anybody. Again, if there are facts known to the person who writes the libel which, if known to the persons who receive it, might reasonably lead them to suppose that it was used in an ironical sense, yet, if those facts are not known to the persons who receive it, that which is written—although written inadvertently or maliciously—could produce no effect upon their minds. Though the act might be negligent or wrongful on the part of the person writing the libel, the person who received it would, by the hypothesis, have no reasonable ground for reading it in any evil sense. I say, therefore, that when you come to consider the question, whether or not the document is a libel by reason of the language having a secondary, as distinct from its primary, sense, there must be evidence of facts which would reasonably make it defamatory in its secondary sense, known both to the person who wrote the document and to the persons to whom it was published. Applying this view to the present case, the first

question is, whether that which the defendants wrote could reasonably be taken by those who received it (for they were the only persons to whom it was published) in any defamatory sense. This is not the case which was put in argument where a document is published by putting it on the walls. Then it is published to all the world. Persons might possibly then be justified in saying that the reasonable conclusion to come to, where a statement that cheques of a bank will not be received is published on the walls of a town, is that the person who published it doubted the stability of the bank. Here the persons to whom the document was published were not the general public, but people who had knowledge of the particular facts. They had been in the habit of cashing cheques drawn by their customers upon the branches of this bank, or they had been in the habit of receiving payment from their customers by those cheques, and of forwarding those cheques to the defendants in payment of their accounts.

Now that was a mode of payment which the defendants in the ordinary course of business were not bound to accept. It was a course of business which one would almost think in the majority of cases persons in the position of the defendants would not accept. If those cheques were only to be honoured at the district on which they were drawn, it was the most inconvenient mode of payment for the defendants that could well be conceived, because the defendants would have to send back those cheques to the places where they were to be cashed. The only thing which, in a business point of view, would make it likely that the defendants would continue to receive payment of their accounts by such cheques would be that they could cash those cheques at the place where they themselves were carrying on business. Now, that being so, the defendants were entitled to refuse any longer to receive payment in that form for a multitude of reasons. First of all, because it was no longer convenient to them; but, secondly, and mainly, because they did not choose to do it. They were entitled to refuse such a mode of payment, not only legally,

Capital and Counties Bank v. Henty (App.), C.P.

but as matter of pure business. They were entitled to refuse such cheques from such customers for such payments merely because they no longer pleased to do so. If they did no longer please to do so, they could not intimate that to their customers except by writing and telling them so. Something was said about their sending this round by means of a printed circular, but that was in a moment explained by shewing that they had so many customers of that kind, that to have ordered their clerks to write it was not a reasonable way of letting the customers know. So that the mode of sending out the circular at all events was not an unreasonable one. Therefore, by this document, they were doing, as my brother Cotton has said, an act which they were entitled to do without any sinister motive whatever. They write in language which is only sufficient to intimate their intention and will, and those who receive the intimation are surely bound, as reasonable men, to know that the defendants have the right, at their own pleasure, to do so. It seems to me unreasonable that, where there is a multitude of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. Therefore I am of opinion that this document could not reasonably be taken in a defamatory sense by those to whom it was published, according to the primary meaning of the language used in it.

But it is said it might be taken to be defamatory in a secondary sense, in consequence of certain facts. The facts relied on are that the defendants might be and were angry because the manager of the bank at Chichester ceased to give them the assistance and facility which the bank at Chichester had formerly given, by cashing the cheques drawn upon branches of the bank, and that the defendants wrote this circular in consequence of that anger. But these facts were not known to the persons to whom the circular was sent; and if I am right in my view of the case, that the facts must be known to both sides, there is no evidence of facts known to both sides by which a secondary defamatory meaning could be put upon the document. If

so, there was, therefore, no evidence that this was a defamatory document either in a primary or a secondary sense. If that be so, the question of privileged occasion and of malice does not arise. But supposing I am wrong with regard to the first question, and that it be true to say that this document in its primary sense to the person to whom it was published might reasonably convey a defamatory meaning—if that be so, I entirely agree with Lord Coleridge that the occasion was privileged. If the occasion was privileged and the document was a libel, nevertheless the defendants are not liable unless they misused the privileged occasion, and unless the reason why they misused it was that they were actuated by malice in fact. In my judgment, it is not enough to shew that the defendants were actuated by malice in fact; you must shew that by reason of malice in fact they misused the privileged occasion. What is there to shew that the defendants were actuated by malice in fact, which caused them to misuse the occasion? It seems to me that in this particular case the only way in which a case of malice causing them to misuse the occasion could be made out, would be by satisfying the jury that the defendants intended to convey an imputation upon the bank's credit. If they did not, unless the jury were persuaded that they were, through anger, acting with such recklessness as not to care whether they injured the bank or not, there is no evidence of malice in fact. It has not, except in the extremity of argument, been urged that anybody could reasonably believe that the defendants intended to lead the person to whom the circular was sent to believe that the bank was incapable of meeting its engagements. From what could a jury draw such an inference? The defendants did not put the circular on the walls; they sent it to the people to whom it was necessary that they should express their intention. There were other customers of theirs in a place where the difficulty did not arise, and to them they did not send the circular. In my opinion, it would have been wholly unreasonable for any jury to find that the defendants intended to im-

Capital and Counties Bank v. Henty (App.), C.P.

pute that the bank was incapable of meeting its liabilities; and I can see no evidence of such rashness and recklessness as would shew that they were careless whether they injured the bank or not. It has been suggested by my brother Thesiger that it was imprudent on the defendants' part not to state the reason of their refusal to take the cheques. With great deference, I should be wholly dissatisfied with a verdict saying that a mere omission to give the reason, when no reason was necessary, was evidence upon which a jury might found so formidable a conclusion as that the defendants maliciously and wickedly intended to injure the bank. I am of opinion that no persons in the position of those who received this document could reasonably come to the conclusion that it ought to be taken in a defamatory sense; that there were no facts known to them which would justify them in giving it any secondary defamatory sense; and I am of opinion, further, that if there was some evidence that this document was defamatory according to the *prima facie* meaning of the language, there was no evidence of malice in fact to shew that the defendants had abused the privileged occasion.

Judgment reversed, and entered for defendants.

Solicitors—Nash & Field, agents for W. A. Stuckey, Brighton, for plaintiffs; Robinson, Preston & Stow, agents for Raper & Freeland, Chichester, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. } ARKWRIGHT (appellant) v.
Feb. 27. } EVANS (respondent).

Mines—Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77)—Fencing Shaft of Abandoned Mine—Owner—Person interested in Minerals.

[For the Report of the above case, see 49 Law J. Rep. M.C. 82.]

[IN THE QUEEN'S BENCH DIVISION.]

1880. } THE NEW ZEALAND AND AUS-
June 26. } TRALIAN LAND COMPANY v.
Aug. 7. } RUSTON AND ANOTHER.

Principal and Agent—Trustee and Cestui que Trust—Bills of Lading—Rights of Undisclosed Principals—Sub-agents.

The plaintiffs owned large estates in New Zealand, the produce of which was shipped to England for realisation, principally in the London market. They had offices at Glasgow, but no office or agency in London; and the mode adopted by them for the realisation of their produce was to ship the wheat in New Zealand and take bills of lading, making it deliverable to them in London. These bills were from time to time indorsed to Messrs. M. & T. of Glasgow, with instructions to sell the goods in London. Messrs. M. & T., when sales were effected, delivered "account sales" in the usual form, debiting all expenses and del credere commission, and then paying the balance by cheque at the expiration of three months from the average date of the sales appearing upon the account. Messrs. M. & L. from time to time re-indorsed the bills of lading received by them from the plaintiffs specially to the defendants, who carried on business as cornfactors and brokers in London, for the purpose of sale by them, the terms of the employment being altogether different from that upon which the plaintiffs employed Messrs. M. & T. The plaintiffs were aware that sales effected by Messrs. M. & T. for them in London were made by agents employed by them; but the plaintiffs were in no way parties to these sub-contracts, nor were their names disclosed in them. The indorsement by the plaintiffs to Messrs. M. & T., and by Messrs. M. & T. to the defendants, was for the purpose of sale only, and was not intended to pass any property in the cargoes. The defendants, in pursuance of their employment, effected sales of certain cargoes, and paid the proceeds into their own account with their bankers in the ordinary way, and from time to time made general remittances to Messrs. M. & T. on account of them. The proceeds thus got mixed up with all their receipts from other sources, but the proceeds of their sales could be traced and

New Zealand &c. Land Co. v. Ruston, Q.B.

identified by reference to the defendants' books.

In an action brought by the plaintiffs to recover from the defendants so much of the proceeds of certain cargoes as they had not remitted to Messrs. M. & T. the jury found, first, that the plaintiffs through their agents did not employ the defendants to sell and account for the proceeds to the plaintiffs; and, secondly, that the defendants knew that Messrs. M. & T. were acting as agents for another person.

Held (by FIELD, J., upon further consideration), that the plaintiffs were entitled to sue the defendants for the balance in their hands, and that the latter were not entitled to set off any claim, arising at other times and upon other transactions, which they might have against Messrs. M. & T. Held also (upon the second finding of the jury), that the plaintiffs, as owners of the cargo, were entitled to follow the proceeds of the property in the hands of the defendants in their fiduciary character of agents and trustees.

This case came on for hearing upon further consideration. The facts are fully stated in the judgment of Field, J.

H. Matthews, Watkin Williams, and J. C. Mathew, for plaintiffs.

Charles Russell and Finlay, for defendants.

Cur. adv. vult.

Judgment was delivered (on August 7) by

FIELD, J.—The plaintiffs in this action sought to recover the sum of 2,571*l.* 8*s.* 4*d.*, being the balance in the defendants' hands of the proceeds of three cargoes of wheat (sold by them on the London corn-market), after giving them credit for such sums of money as they had remitted on account of the cargo to Messrs. Matthews & Thielman (by whose order they had effected the sales).

The defendants admitted the fact of the sales, the receipt of the proceeds, and the amount of the balance; but defended themselves by alleging that they had acted under the employment of and received the proceeds for the account of Messrs. Matthews & Thielman, and not of

the plaintiffs, and that there was no such privity of contract between the plaintiffs and them as rendered them liable to the plaintiffs; and, further, that even if there were any such relation of principal and agent between them, they were entitled to set off against this balance money due to them from Messrs. Matthews & Thielman upon other accounts, the sales having (as they alleged) been effected upon the employment of the latter under a distinct and separate contract, in which the name of the plaintiffs was not disclosed. Upon the balance of these accounts the defendants admitted that there was due from them to Matthews & Thielman a sum of 121*l.* 10*s.* 1*d.*, as to which an arrangement had been made which it is not necessary to enter into here.

The action arose under these circumstances: The plaintiffs are the owners of large estates in New Zealand, and have for many years shipped the produce of their estates to England for realisation, and principally on the London market. They have their offices in Glasgow, but have neither office nor agent in London; and the mode adopted by them for realisation of their produce has been for the agents in the colony to ship the wheat there and take bills of lading, making it deliverable in London to the plaintiffs. These bills of lading were forwarded from the colony to the office at Glasgow; and the course of business there has been for the plaintiffs' secretary to indorse the bills specially to the above-mentioned firm of Matthews & Thielman, with instructions, as the agents of the plaintiffs, to sell the goods in London. It was not intended by the parties to pass, nor did the plaintiffs pass, the property in the goods to Messrs. Matthews & Thielman, who had nothing more vested in them but an authority to sell, with the necessary right of possession. Messrs. Matthews & Thielman were, until the month of October, 1878 (when their estate came under process of sequestration in Scotland), merchants and factors of great respectability, and in a large way of business in Glasgow, and the plaintiffs (who only knew them as factors, and not as merchants) always reposed the greatest confidence in them, and never made any

New Zealand &c. Land Co. v. Ruston, Q.B.

enquiry as to, or in any way trusted or gave credit to, any of Matthews & Thielman's subordinate agents, who might be employed by them for the purpose of the requisite sales of the plaintiffs' produce.

The course of business between the plaintiffs and Messrs. Matthews & Thielman was, for the latter, when any given sales had been effected, to deliver "account sales" in the usual form, debiting all expenses and *del credere* commission of three per cent., and then pay the balance appearing upon the account by cheque, at the expiration of three months from the average date of the sales appearing upon the account.

Messrs. Matthews & Thielman had no house or agency in London; and their mode of realising the produce on behalf of the plaintiffs was, to indorse the bills of lading received by them from the plaintiffs specially to the defendants, who are extensive corn factors and brokers in London, for the purpose of sale by them; and the terms of their employment differed from those upon which the plaintiffs employed Messrs. Matthews & Thielman, the defendants' terms being a factorage of two per cent., and the balance being payable at one month and three days from average dates of sales.

The plaintiffs were aware that sales effected by Messrs. Matthews & Thielman for them in London were made by brokers or agents employed by them; but the plaintiffs were in no way parties to these sub-contracts, and the plaintiffs' names were not disclosed upon them, Messrs. Matthews & Thielman appearing upon the face of them not as agents for anyone, but as principals.

It was not intended on such sub-indorsement of the bills of lading by Matthews & Thielman to the defendants, that any property should, nor did any property pass to the latter, the indorsement to them being, like the indorsement by the plaintiffs to Matthews & Thielman, only for the purpose of sale. The property, therefore, in the cargoes remained in the plaintiffs from the beginning until the defendants had effected a sale and passed the property to their buyers in pursuance of the authority vested by the

plaintiffs in Messrs. Matthews & Thielman and the subordinate mandate of the latter to the defendants.

The money sought to be recovered in this action represented the balance of the proceeds of three cargoes of wheat *ex* James Wishart, Auckland and Oamaru, the bills of lading of which were indorsed and delivered by the plaintiffs to Matthews & Thielman, and by Matthews & Thielman to the defendants in the manner and for the purpose before stated.

The defendants in pursuance of their employment effected sales of the cargoes in question, and paid the proceeds in to their own account with their bankers in the ordinary way, thus mixing up these proceeds with all their receipts from other sources, and from time to time making general remittances to Messrs. Matthews & Thielman on account of them.

The defendants' books of course shew the amounts received, and in respect of each particular cargo, so that there is not the slightest difficulty in separating the proceeds of these sales from the other credits of the defendants appearing in their accounts, and thus tracing and identifying them.

In arriving at the balance of 2,571l. 8s. 6d. claimed by the plaintiffs in this action, they have given credit to the defendant for all sums thus remitted, and they are claiming in this action only the net balance in the hands of the defendants upon the consignment and sales of these three cargoes, at the time when the plaintiffs intervened and claimed as principals to receive the then existing balance, free from the claim on the part of the defendants to set off against the balance amounts due to them from Messrs. Matthews & Thielman upon other transactions.

At the trial I left two questions to the jury: first, Did the plaintiffs through their agents employ the defendants to sell and account for the proceeds to the plaintiffs, and did the defendants accept that employment and sell for the plaintiffs? secondly, Did the defendants know or have reason to believe that Matthews & Thielman were acting in these sales as agents for another? The jury negatived the first and affirmed the second pro-

New Zealand &c. Land Co. v. Ruston, Q.B.

position; and I now proceed to deliver my judgment.

The first question raised is, whether there is any such privity of contract between the plaintiffs and the defendants as to entitle the former to sue the latter.

At the trial, there being no fact in dispute as to the nature and character of the various dealings and employment, of which I have given a narrative, I was inclined, as I still am, to treat this as a question of law arising upon and to be implied from the admitted relation of the parties; but the learned counsel for the defendants strongly urged me to leave the first question to the jury, and, as I am always desirous of avoiding any miscarriage of justice on such a ground, and also having in a mercantile case the assistance of a jury of merchants, I thought it advisable to do so.

I put the question in the words of the plaintiffs' statement of claim; and inasmuch as (as pointed out by Mr. Russell for the defendants) there was in this case, first, a contract of employment by the plaintiffs of Messrs. Matthew & Thielman upon one set of terms, and, secondly, a sub-contract of employment, to which the plaintiffs were not expressly parties, by Matthews & Thielman and the defendants upon different terms, and that in the absence of the existence of any agency in Matthews & Thielman for a third person known to or believed to exist by the defendants—it is no doubt true, in a sense, that the plaintiffs did not directly, in the words of the question, employ the defendants to sell for them. But it has never appeared to me that the separate contracts of employment, or the difference in the mode and amount of remuneration, or in the times at which the balances were payable, which existed between the two contracts in this case, can make any difference in the legal relation of the parties to each other. As regards the existence of the mandate of sale, which is common to both, there is not of course the slightest doubt but that a contract may be effected by one man with another through the intervention of a mesne agent, as was done here, although the terms of employment may differ in some respects.

The owner of an estate in England em-

ploy a manager at a salary to realise the produce of his estate, leaving him absolute discretion as to the way in which he thinks it most advisable to realise, and the latter employs a broker or factor or agent on commission to effect the sale; but it cannot for a moment be supposed that the original principal may not, at any time before the sub-agent has accounted to the mesne agent and paid over to him or accounted for the proceeds of the sale (subject of course to any set-off accrued in ignorance that the mesne agent was not a principal), intervene and claim the proceeds. This principle was laid down by Lord Mansfield in *Rabone v. Williams* (1), in which he says, where a factor dealing for a principal, but concealing him, delivers goods in his own name, the principal may appear and bring an action in his own name. It was stated again in *Sims v. Bond* (2), where it was said that, where a contract not under seal is made with an agent for an undisclosed principal in the name of the agent, either the agent or the principal may sue upon it.

And this doctrine seems to me as applicable to contracts of employment as to those of sale, and to authorise the intervention by the principal in the contract with the sub-agent as fully as it does in the ultimate contract of sale by the latter.

In my direction to the jury I pointed out the various elements of the case to which I have now adverted. And, in arriving at the conclusion on the first question at which they did arrive, I am bound to assume that they took all these matters into their consideration. Inasmuch, however, as there were, as I have already stated, clearly two different contracts of employment—one between the plaintiffs and Matthews & Thielman, and the other between Matthews & Thielman and the defendants, in which the plaintiffs' names were not disclosed, and to which they were in fact no party—it may be that the jury failed to realise the existence of the employment to sell, which was the leading object of and ran through both contracts, and in respect of which

(1) 7 Term. Rep. 360, n.

(2) 5 B. & Ad. 389.

New Zealand &c. Land Co. v. Ruston, Q.B.

element in the contract, which is common to both, is based the right of the original principal to intervene and sue the ultimate agent or the ultimate vendee, as the case may be, subject to all their existing equities.

But, however this may be, I cannot allow the finding of the jury to stand in the way of what appears to me to be the true result of the admitted facts, and which constituted, in my judgment, that relation between the plaintiffs, Messrs. Matthews & Thielman and the defendants, in the events which have happened, which entitles the plaintiffs to sue the defendants for the balance now in their hands.

The learned counsel for the defendants, in support of their contention to the contrary, relied upon the cases of *Williams v. Everett* (3) and *Robbins v. Fennell* (4), and other cases of that description; but, upon examination, it appears that these cases proceeded either upon different principles, or were decided upon their own particular facts.

There is, of course, no doubt that the right of the principal, when he employs the factor and allows him to sell in his own name, to call upon the sub-agent or vendee, is subject to the right of the sub-agent or purchaser to claim the benefit of any payment or set-off which may have been made or accrued in ignorance of the fact that the mesne agent filled that capacity; but it is also equally clear that if the sub-agent or vendee knew, or had the means of knowing, that he was dealing, not with a principal but with an agent for somebody else, no such right exists—*Fish v. Kempton* (5).

Now the jury have found in the present case (to my entire satisfaction) that the defendants did at the time of their employment know that Matthews & Thielman were acting for somebody else; and the consequence therefore is, that, in my judgment, the defendants are not only directly liable to account to the plaintiffs, but are not entitled to set off any claim arising at other times and upon other

transactions which they may have against Matthews & Thielman.

I should have been quite content to have rested my judgment for the plaintiffs upon the application of these principles. But Mr. Watkin Williams, for the plaintiffs, also relied upon the second finding of the jury, as conclusively entitling the plaintiffs to judgment in respect of their rights as owners of the cargoes, and, as such, entitled to follow the proceeds of the property in the hands of the defendants in their fiduciary character of agents and trustees. I think this contention well founded. It cannot be denied that the plaintiffs handed the bills of lading in question to Matthews & Thielman as agents for the sale of the goods on the plaintiffs' account, and that Matthews & Thielman handed them to the defendants for the like purpose on their account. The jury have found, as I also stated, that the defendants had reason to believe that Matthews & Thielman were thus acting as agents for some other person. The evidence leaves no doubt on my mind that the defendants also knew that the plaintiffs were that "other person;" but whether that be so or not is in my judgment immaterial. It is now well and clearly established that a factor, broker or other mere agent for sale, is in the same position with regard to his principal as all other trustees or bailees who occupy a fiduciary position are with regard to their *cestuis que trust*—*Knatchbull v. Hallett* (6). And therefore, whether the particular name of the principal was known or not, a fiduciary relation of principal and agent was constituted in this case between the defendants and the plaintiffs, who were actually the principals. The plaintiffs, therefore, had the right at any moment of time, before their property was altered by sale, to intervene and claim and take back the bills of lading from either Matthews & Thielman or the defendants, satisfying or subject to any equitable rights or liabilities which might have come into existence in consequence of their trusting Matthews & Thielman with the documents of title and possession.

(3) 14 East, 582.

(4) 11 Q.B. Rep. 248; 17 Law J. Rep. Q.B. 77.

(5) 7 Com. B. Rep. 687; 18 Law J. Rep. C.P.

(6) 49 Law J. Rep. Chanc. 415; Law Rep. 16 Ch. D. 606.

New Zealand &c. Land Co. v. Ruston, Q.B.

They might even have intervened after a valid contract of sale with a vendee had been made, and claim from the latter any unpaid purchase-money, subject to similar equities.

In the present case that stage had been passed, and the purchase-moneys had been actually received by the defendants in their capacity of agents from the vendees. Is there any reason why the plaintiffs should not claim and recover these net proceeds from their trustees?

No doubt it has been thought at common law that, when the money of a principal has been received by an agent and mixed up and confused with his own property, so that the somewhat technical rules of the common law did not supply a known remedy, this could not be done. However this may have been, it is now established that, possessing, as I now do, all the powers of, and entitled to administer all equities administered by, a Court of equity, I am hampered by no such difficulty.

The doctrine of the Court of equity, whose jurisdiction I now have, is, that if property is disposed of by persons in a fiduciary position, the person employing can, if the sale is rightful, take the proceeds of the sale if he can identify them; and if the sale is wrongful, he can still take the proceeds of the sale, because he may adopt the sale for that purpose. The right of the beneficial owner to follow the proceeds remains, although the proceeds may have been invested together with moneys belonging to his trustee or agent; and, if the trustee or agent sell the goods bailed, the bailor can follow the proceeds wherever they can be distinguished, whether they are kept actually separate or are mixed up with other moneys—*Knatchbull v. Hallett* (6). It is in fact a mere question of identity.

Now, applying these principles to the facts of the present case, I find that the relation of trustee and *cestui que trust* (using the words in the enlarged sense to which I have adverted) existed between the plaintiffs and the defendants, either originally or at the time of the rightful intervention of the plaintiffs, at which time the defendants had in their hands the sum now claimed, and capable of

being traced and identified as the proceeds of the trust property.

I further find that the defendants had notice of the existence of the trust, so as to prevent them from being equitably entitled to set off any claim against Matthews & Thielman, other than such as arose out of the consignments in question; and I therefore give judgment for the plaintiffs for 2,449l. 18s., with costs.

Judgment for plaintiffs.

Solicitors—Young, Jones, Roberts & Hale, agents for Maclay, Murray & Co., Glasgow, for plaintiffs; Stibbard, Gibson & Co., for defendants.

Callaghan, Janus 5029 Ch 14.

[IN THE COMMON PLEAS DIVISION.]

1880.

May 14.

Clament, Maclay
LAZARUS V. ANDRADE. 5229 Ch 14.
Roberts, Roberts 5329 Ch 314

Bill of Sale—Assignment of future acquired Property—Stock-in-Trade.

A bill of sale purported to assign all the stock-in-trade in certain specified premises, and also "the stock-in-trade which should at any time during the continuance of the security be brought into the premises or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade now being therein":—Held, a valid assignment of stock-in-trade which had been subsequently brought into the premises in addition to, or in substitution for the stock-in-trade originally therein.

Further consideration.

Interpleader issue in which the plaintiff, as grantee of a bill of sale, claimed certain goods which had been seized by the defendant in execution of a judgment recovered against the grantor. The action came on to be tried before Lopes, J., and was adjourned for further consideration, and the learned Judge afterwards delivered a written judgment in which the facts and arguments sufficiently appear.

Orispe and Hart, for the plaintiff.

Bullen, for the defendant.

Cur. adv. vult.

Lazarus v. Andrade, C.P.

LOPES, J.—This bill of sale purported to assign to the plaintiff all the stock-in-trade, chattels, goods and effects in the messuage, particulars whereof were set forth in a schedule thereunder written. And also the stock-in-trade, goods, chattels and effects which should or might at any time or times, during the continuance of the security, be brought into the messuage, warehouse and premises, or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade, chattels and effects now being therein, or any of them.

The sheriff had seized stock-in-trade not being contained in the said schedule, nor in the premises when the bill of sale was executed, but other stock-in-trade not comprised in the schedule, which had been brought into the premises by the grantor subsequently to the date of the bill of sale. Such last-mentioned property had been brought into the premises in addition to or in substitution for stock-in-trade in the premises when the bill of sale was executed.

It was contended for the defendant (the execution creditor) that the goods brought into the premises subsequently to the execution of the bill of sale did not pass to the plaintiff, and that the title of the defendant in respect of them was preferable to the title of the plaintiff (the claimant). *Holroyd v. Marshall* (1) and *Leatham v. Amor* (2) were relied on by the plaintiff, and *Belding v. Reed* (3) by the defendant. The principle deducible from these decisions is that property to be after acquired, if described so as to be capable of being identified, may be, not only in equity but also at law, the subject-matter of a valid assignment for value. The contract must be one which a Court of equity would specifically enforce. *Belding v. Reed* (3) was decided before the Judicature Acts, and is distinguishable from the present case. The ground of that decision was that the description "all other the personal estate and effects whatsoever now being or hereafter to be

on the premises or elsewhere in the United Kingdom," was so vague that it did not entitle the claimant to institute a suit for specific performance of the contract. Neither the character of the property nor its whereabouts was indicated, and there was nothing to earmark it. In this case the property is to be brought into the premises or to be appropriated to the use thereof, either in addition to or in substitution for property then on the premises. I think the assignment sufficiently specific, the property in question having become specific by being brought on to the premises in addition to or in substitution for property mentioned in the schedule. The case of *Leatham v. Amor* (2) is a strong authority in favour of this view.

Judgment for the plaintiff.

Solicitors—Noon & Clarke, for plaintiff; Stollard & Whitting, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]
1880. } *Mayer of Portsmouth v. Smith*
May 27. } THE QUEEN v. PLATTS.
53280298

The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 63, 66—Meaning of "Street"—Road without Line of Buildings—Power of Commissioners to divert Highway—Indictment.

By 10 & 11 Vict. c. 34. s. 66, the commissioners may allow, upon such terms as they may think fit, any building within the limits of the special Act to be set forward for improving the line of the street in which such building is situated:—Held, that the term "street" as used in the above section did not include a road without a line of buildings, and that the commissioners had no power under that section to divert any portion of a highway by widening it and obliterate a portion of the old highway which had thereby become necessary.

This was an indictment for obstructing a highway, tried before Lush, J., at the Leeds Assizes, in which his Lordship directed judgment to be entered *pro forma*

(1) 10 H.L. Cas. 191; 33 Law J. Rep. Chanc. 193.

(2) 47 Law J. Rep. Q.B. 581.

(3) 3 Hurl. & C. 955; 34 Law J. Rep. Exch. 212.

The Queen v. Platts, Q.B.

for the Crown, reserving all questions of law for the Court with power to draw inferences of fact.

The facts were as follows: In 1874, the prosecutor, Mr. James Craven, of Priest Thorpe Lane, near Bingley, bought some land there from a Mr. Fox, and about the same time the defendant bought some adjoining land from the same owner. The land bought by each purchaser adjoined an ancient highway, called Priest Thorpe Lane, which was a country highway with only houses at intervals, varying greatly in their distance from the highway.

The property in question was within the limits of the "Bingley Improvement Act," which is carried into execution by a board of about forty commissioners. These commissioners, about or before 1874, made arrangements with Mr. Fox and some of the adjoining landowners to give portions of their land to widen Priest Thorpe Lane. Accordingly, the plan on the deed of conveyance to the prosecutor shewed the line of the proposed new road, but contained no covenant by the prosecutor in regard thereto.

The commissioners decided, in 1878, to carry out the diversions, but to alter the line of the new road slightly, and to carry the north-eastern side of it further to the north-east than was contemplated by Mr. Fox, thus taking more of his land than he had agreed to supply. He objected, but the commissioners disregarded him altogether, and on reference to his conveyance it was found that the site of the old road opposite his property had not been conveyed to him, and if the commissioners carried out their plan he would be divided from the new road by part of the site of the old road. The defendant urged the commissioners to make the alteration as he was erecting a mansion on his land, and the commissioners approved of the plan and allowed the defendant to build upon the site of the old road opposite his land, the new road being made by the commissioners.

It was admitted that no order had been obtained by the commissioners, or any Parliamentary powers enabling them to stop up any portion of the old highway. The defendant, however, claimed

that the straight portion of the road was substituted for the curve, that he could stop that portion of the curve which was co-extensive with his land; and accordingly he carried his garden wall across the old lane to the north-eastern boundary of the new line of road, and enclosed a large portion of the old road adjoining his property by a substantial wall, and formed a rockery and garden across the old road. The prosecutor objected to the old highway being stopped up as it formed the frontage to part of his land, and he accordingly in due course preferred an indictment against the defendant at the Leeds Summer Assizes, 1878, when a true bill was found, and the case came on for trial before Lush, J., as above-mentioned.

A rule *nisi* was afterwards obtained by the defendant, calling upon the prosecutor to shew cause why the verdict obtained for the Crown should not be set aside and a verdict entered for the defendant, or why a new trial should not be had for misdirection, or a *venire de novo* awarded on the ground of miscarriage.

A. Wills and Tennant, for the prosecution, shewed cause against the rule. The only recognised way of stopping up any part of a highway is by application to the Court of Quarter Sessions, under the Highways Act (5 & 6 Will. 4 c. 59), and this has not been done. The right claimed by the defendant to build his wall across that which was undoubtedly property on which the public had a right of passage is based on the 66th section of the Towns Improvement Act, 1847 (10 & 11 Vict. c. 34), which enacts that, "With respect to improving the line of streets and removing obstructions, be it enacted that the commissioners may allow, upon such terms as they think fit, any building within the limits of the special Act to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated."

The 66th section is one of several sections dealing with the improvement of the line of the streets, and the term "streets," as used in the section, applies only to streets properly so called; that is to say, a line of houses. By the inter-

The Queen v. Platts, Q.B.

pretation clause (section 13), "street" shall "extend to and include any road," and there is no doubt but that the term in some parts of the statute includes every highway; but the question here is whether the section does not apply to streets proper. There is no line of buildings here; there is a line of road, but not, it is submitted, of street. The word "street," as used in the 66th section of the Towns Improvement Clauses Act, must, it is contended, bear the ordinary meaning of a road with a continuous row of houses on either side—see *The Queen v. Fulford* (1). Moreover, it is submitted that the word "building" is not intended to include a mere fence wall.

Cave and Forbes, for the defendant, supported the rule.—The verdict here was merely entered *pro forma*, and this Court has power to enter it for the defendant.

[LUSH, J.—There is no authority as to that, but I cannot see why we should not enter the verdict for the defendant instead of sending the case to a new trial.]

The road in question was clearly a "street" within the meaning of the interpretation clause. Here the building was brought forward to improve the line of the street. Power is given under the 67th section to alter the level of a road, and there seems to be no good reason why a road cannot be altered horizontally, always provided its breadth remain as before.

COCKBURN, C.J.—I am of opinion that this rule must be discharged. The commissioners having acquired land for the purpose of straightening the course of road have practically diverted the road, and that has rendered part of the old road unnecessary. It may be, that under the circumstances the proper course is to get this portion of the road shut up altogether, but that can only be done under proper authority. No power exists, unless it be under the Acts of Parliament that have been referred to during the argument, by which the commissioners have power to shut up any portion of a road which has become unnecessary. Now I

can find no such power conferred under the provisions of 10 & 11 Vict. c. 34. The commissioners have power under that statute to improve a street, but no authority is conferred upon them to divest any portion of the old road of its character as a public highway. The maxim, "once a highway, always a highway," applies.

But then it is said that they are enabled to do this by virtue of section 66, which gives the power to improve the line of street. But in my judgment this is not a street within the meaning of section 66. The interpretation clause is permissive and not imperative. There are here no line of buildings, and the road is nothing but an ordinary highway. The authority conferred under section 66 is confined to streets in the ordinary acceptance of the term, and as distinguished from a highway. For these reasons I am of opinion that the verdict was properly entered for the Crown.

LUSH, J.—I concur. The commissioners have power to alter or improve existing highways; but they have no power to stop up highways unless it be that such power is conferred under the 66th section. Now the 66th section uses the term "street," and under the interpretation clause "street" may include a road; but the interpretation clause does not say that the term "street" is to include every road, but only where the context requires it. The question, therefore, arises, In what sense is the term street used in section 66? I think that the answer is plain, looking at the succeeding sections, namely, that "street," as used in section 66, means a road lined with buildings; that is to say, a street in the ordinary acceptance of the word. Here the road is clearly not a street in the sense I have mentioned, and the only way in which it can be legally stopped up is by application to the justices for the usual order under the Highway Acts.

MANISTY, J.—I am of the same opinion, and think it clear that section 66 was never intended to apply to a case like the present. Had the Legislature entertained any such intention they would, I think, have used different language, as was done in the Highway Act (4 & 5 Will. 4. c. 50) and Turnpike Acts, where

The Queen v. Platts, Q.B.

power is given to stop up and "divert"—a word specially applicable to the present case. I think that the term "street," as used in section 66, is only applicable to streets properly so called, and that consequently this rule must be discharged.

Judgment for prosecution.

Solicitors—W. & J. Flower & Nussey, agents for Killick, Hutton & Vint, Bradford, for prosecution; Sharpe, Parkers & Co., agents for Weatherhead and W. & G. Burr, Bingley, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THOMAS AND ANOTHER v.
June 20, 28. { THE BIRMINGHAM CANAL
COMPANY.*

*Canal, overflow of—Extraordinary Rain
—Vis Major—Damage to Individual arising
from Act for averting General Catastrophe
—Injuria absque damno.*

The plaintiffs, owners of collieries, sued the defendants, proprietors of a canal constructed under an Act of Parliament for damages caused to their mines by water which overflowed from the canal into a brook, and thence into the mines. They also in the alternative claimed to be entitled to a mandamus for the summoning of a jury to assess compensation for the same injury, as being one caused by the works which the canal company were authorised to construct and maintain.

It was found in the Special Case stated by an official referee that on the occasion of an extraordinary rainfall the defendants opened a sluice and discharged from the canal into a brook more water than the latter was able to carry off; the consequence being that the brook overflowed into the plaintiffs' mines. It was found further that if the sluice had not been so opened the canal bank would shortly have burst; that the adjacent country and the plaintiffs'

mines would have been inundated; that the courses which the defendants adopted to avert such a catastrophe was a prudent one, and the only effectual one which could have been adopted in the emergency; that so far as the plaintiffs' mines were concerned the opening of the sluice caused them to be flooded some hours sooner than they would otherwise have been, but that no additional damage was caused thereby to the plaintiffs, the inundation being inevitable by reason of the excessive rainfall and consequent accumulation of water:—Held, upon these findings, that even assuming the defendants' act to have been a wrongful one, it was *injuria absque damno*, and therefore not a ground of action. Held, secondly, that the compensation clauses of the Acts of Parliament did not apply to such a case.

This was an action brought by the plaintiffs, owners of collieries at Bloxwich, in Staffordshire, against the defendants, a canal company, to recover damages occasioned by the flooding of their collieries with water discharged from the defendants' canal into the Sneyd Brook, which brook was unable to carry off the water so discharged into it by reason of the extraordinary rainfall of the 18th, 19th and 20th of October, 1875.

After statements of claim and defence were delivered, the action was referred to an official referee for the purpose of his finding the issues and reporting thereon to the Court. Accordingly the following statement of facts was returned by the official referee as being the facts proved before him, and stated specially for the opinion of the Court, with power to the Court to draw inferences therefrom.

1. The plaintiffs throughout the year 1875 were, and still are, the occupiers of three collieries near Bloxwich, in the county of Stafford, called the Hatherton, the Meadows, and the Paradise Collieries.

They are the lessees of the greater portion of the first-mentioned colliery, and owners in fee of the residue of it and of the other two collieries, with a pumping station and engine on the first-named colliery.

2. The two last-named collieries are separated from a colliery called the

* The publication of this case has been delayed in order to add to it the judgment of the Court of Appeal. As the prosecution of the appeal seems now uncertain the case is published as it is.

Thomas v. Birmingham Canal Co., Q.B.

Beachdale Colliery, which belongs to the Beachdale Colliery Company, by the Sneyd Brook, as shewn on the plan marked A, accompanying this case.

3. The latter colliery had previously to the year 1875 been extensively worked by its owners, and for this purpose two shafts had been sunk, as shewn on the said plan. The top of one of these was level with the surface, the other had a pit mound, and the workings from those shafts had been so extended that the water passing down them would freely pass into the mines of the plaintiffs in the Hatherton Colliery, and thence to the bottom of their pumping stations.

4. The excavation of the coal in the Beachdale Colliery had caused a very considerable depression or sway, as it is locally termed, of the surface; so much so, that it formed a shallow basin, the lowest point being between the two shafts, and there it was much lower than the head of the Sneyd Brook.

5. These mining operations, too, had in the month of July, 1875, depressed the bank of the Sneyd Brook on the Beachdale Colliery side, especially at and about the point marked W, so as considerably to reduce its capacity to carry away the water flowing down its channel; and on the 20th of October, 1875, the brook for some considerable distance near the point marked V on the said plan was only capable of discharging 3,500 cubic feet of water per minute, and between the points marked K and L 2,500 cubic feet of water per minute, without overflowing into the Beachdale Colliery.

6. The defendants were and are the proprietors of the canal and its branch shewn on the said plan. These were constructed as portions of the Wyrley and Essington Canal, under the powers of an Act passed in 32 Geo. 3. c. 81, and afterwards transferred to and incorporated with the Birmingham Canal Navigation, under a statute passed in 3 Vict. c. 24. The level of the canal, of which these form a portion, is called the high level, and with its various branches extends to nearly forty-eight miles of one continuous level without any lock or break.

7. At the point marked S there is an overflow weir for the purpose of allowing

the escape of any surplus water, and the water flowing over it is conveyed into the Sneyd Brook at the point marked F by means of an artificial channel or carrier extending from the weir to that point; and at the spot marked X there was and is a sluice which can be drawn up and thus emit water from the canal into the Sneyd Brook. Both these works were made under the powers of the Acts above referred to, and the Act of 5 Will. 4. c. 84, for the convenience and safety of the canal navigation. The capacity of the former for the purpose of relieving the canal was increased some years before the time in question, and the latter has only been used for many years past for the purpose of letting down the canal water for repairs. There was no evidence before me that the opening of it was ever resorted to or required for the purpose of relieving the canal from flood water.

Its construction had some years before the time in question been slightly altered, but this did not increase or diminish its capacity to admit of the passage of water.

8. The natural watershed above the sluice at X, which would be accommodated by the Sneyd Brook, would consist of about 1,136 acres, but a portion of the water which would in its natural course pass into the brook, being the water from the watershed of about 576 acres, part of this area of 1,136 acres, has been intercepted and taken into the canal, and nearly opposite the points at which two of the small streams are thus intercepted there are two small weirs on the brook side of the canal, over which surplus water passes into the brook. The water, too, derived from an area of about 6,500 acres beyond the area naturally drained by the brook has been brought into this summit level of the canal, being distributed over the whole length of the level, but in the course of that level there are various outlets for surplus water, the construction, capacity and treatment of which on and about the said 20th of October were not shewn before me.

9. In the month of July, 1875, a severe flood occurred over the whole district, and upon that occasion the water flowing down the brook, increased by the over-

Thomas v. Birmingham Canal Co., Q.B.

flow at the weir, S, ran over the bank at the point marked U on the said plan into the Beachdale Colliery, and passed down the pits in the Beachdale Colliery and thence into the plaintiffs' mine, causing them very considerable inconvenience and increased expense in pumping.

On the 18th, 19th and 20th of October ensuing, a rainfall of a most unusual character, both in point of duration and quantity, occurred. It was a rainfall unprecedented for many years in this district; and on the afternoon of the 19th, as the water was rapidly rising in the canal, the defendants shut a sluice which is one of the works they were empowered to make and use at the point marked D on the said plan, through which the waters of the Sneyd Brook had been, under ordinary circumstances, allowed to flow into the canal, and thus sent the water coming down the brook below that point. This was a prudent and proper precaution on the part of the defendants.

10. Early on the morning of the 20th, there was a vast accumulation of water of a most unusual character throughout the whole district, and in the still water of the canal, near the weir, the water stood six inches above the level of the crest of the weir, and 3,000 cubic feet of water per minute were passing over it, and thence into the Sneyd Brook. The water was also trickling over the bank of the canal at a spot about a quarter of a mile below and just above the plaintiffs' pumping station, and there was imminent peril of the canal bursting at that point where it is formed on a steep embankment of considerable height; and had it burst there, as I find it would have done if relief had not been afforded, an inundation must have ensued which would have swept away the plaintiffs' engine and inundated their mines, and filled their pits and workings, and caused great devastation and injury to property, and probably loss of life, throughout a very wide area.

11. At this time there was a quantity of water not less than 1,500 cubic feet per minute passing down the brook course to the point of junction with the carrier at F, so that a volume of water amounting to 4,500 cubic feet per minute

was passing below that point through and over the brook course.

12. The channel, therefore, between the points marked on the said plan K and L was wholly inadequate to accommodate such an influx of water; and I find that it had been for some time previously to the opening of the sluice presently mentioned running over into the basin formed by the mining operations in the Beachdale Colliery, so that at the time the sluice was opened it stood at a considerable depth over the greater portion of this basin, and was running down the shafts.

13. The person entrusted by the defendants with the charge of this portion of the canal, seeing the peril of the bursting of the canal, in order to prevent it ordered the sluice at the point marked X to be raised three inches, and this allowed about 500 cubic feet of water per minute to escape through it into the brook. This was a prudent and proper measure to adopt in order to prevent the bursting of the canal, and according to the evidence before me the only effectual measure which could be adopted in the emergency. The effect of this opening was that the overflow of the canal bank was stopped, and a considerable reduction in the flow of the water over the weir took place, the height of water in the still water above the weir being reduced to four inches, and the flow over the weir to about 2,000 cubic feet of water per minute.

14. The water, however, thus let down considerably increased the flood below, and increased the water in the basin of the Beachdale Colliery, filling it to the brim somewhat, but only a little, sooner than it would have been filled if the sluice had not been opened. The water thus accumulated in the basin poured down the shafts of the Beachdale Colliery and passed thence to the plaintiffs' pumping engine, which on the third day became unable any longer to cope with the water; and eventually their pits were filled, they were prevented from working their colliery, their works were choked up and very great damage was sustained by them in various ways in connection therewith.

15. The downpour of rain continued the whole of the day of the 20th of Oc-

Thomas v. Birmingham Canal Co., Q.B.

tober, but abated in the evening when the sluice was shut. From the quantity of water which was passing over the weir and down the brook before the sluice was opened, it is evident, and I find that, assuming the canal had not burst, the basin in the Beachdale Colliery would have been filled, and the plaintiffs' mines would have been flooded to the same extent as they were flooded had the sluice not been opened.

16. Upon the hearing before me the plaintiffs' counsel in his opening speech stated that he proposed to shew by evidence that the construction of the canal was imprudent and injudicious and ought to have been different; that the weir had been altered some years before; that its capacity had been imprudently increased, and that some other weirs had been discontinued; and that other provisions ought to have been made in the construction and arrangement of the canal, and in its maintenance for the discharge of water in times of flood. He subsequently tendered evidence for this purpose, the reception of which was immediately objected to by the counsel for the defendants as beside the issue raised on the pleadings, which complained only in paragraph 5 that water was discharged from the sluice; and he contended that upon the pleadings as they stood I could not entertain the claim suggested on this ground. The plaintiffs' counsel thereupon submitted that he was entitled to give this evidence, and go into this question and recover damages upon the pleadings as they stood; but assuming he was not, he applied to me to amend the pleadings by the introduction of allegations to the above effect. The defendants' counsel did not dispute my power to amend, but argued that in the exercise of my discretion I ought not to do this, as the question which the amendments would raise would be a surprise to the defendants and wholly different from that on the record, and at all events it ought only to be made on most onerous terms. A long correspondence and several proceedings between the parties were referred to, which satisfied me that the defendants had no notice of any such claim, and that they could not reasonably

have come prepared to meet it; and the issue which would be thus raised being so widely different from that raised by the present record, in the exercise of my discretion I held that I ought not to allow it; but at the request of the plaintiffs' counsel, who argued that my decision was in this respect open to review by the Court, I reserved the question as to the propriety of allowing the amendment for the opinion of the Court. The counsel for the defendants objected to this course, and contended that I was bound to exercise my discretion, and that, according to the cases which had been decided, this was not open to review; but I thought the preferable course in my position was to leave both questions open for the judgment of the Court, and if the Court should be of opinion that this was a question which I could legitimately submit to the opinion of the Court, and also that this was an amendment which I ought to have allowed, it should be made upon such terms as the Court might think just.

17. The plaintiffs likewise contended that the discharge of the water from the sluice was a trespass to their mines, and if not so, at all events was such a wrongful act as entitled them to maintain this action; but the defendants submitted that, under the circumstances, they were justified in opening the sluice, and that no act of theirs caused the damage to the plaintiffs, and that the real cause of the mischief was the extraordinary flood, which was the act of God.

18. The defendants also submitted that the opening of the sluice was an act done in exercise of the powers conferred by the Act of Parliament, and no action could be maintained against them for such an act.

19. The plaintiffs, on the other hand, submitted that, if this were so, then they were entitled to a *mandamus* to the defendants to issue their warrant to assess compensation for this trespass, damage or injury, under the provisions set forth in their statement of claim; or that they were entitled in this action to recover, as damages for their omission to issue their warrant, such a sum as the jury would have assessed as damages or compensation.

Thomas v. Birmingham Canal Co., Q.B.

The defendants, on the other hand, submitted that the plaintiffs were not entitled to compensation for the injury they had sustained, and even if they were so entitled, this action could not be maintained for a *mandamus*, and that the plaintiffs could not recover in this action damages against them for not issuing their warrant.

The questions for the opinion of the Court are—

1. Whether the opening of the sluice, and allowing the water to escape thereby, was a trespass on the plaintiffs' property; or, under the circumstances, and the present pleadings, a wrongful act of the defendants against the plaintiffs entitling them to recover damages.

2. If so, on what principle should the damages be assessed?

3. Whether the proposed amendment was such as, under the circumstances above mentioned, I ought to have allowed to be made.

4. If the Court should be of opinion that the defendants were authorised by their Act of Parliament to do what is complained of, whether the plaintiffs are entitled in this action to a *mandamus* directed to the defendants to issue their warrant for summoning a jury to assess compensation for the plaintiffs.

5. Whether the plaintiffs are entitled to recover in this action such a sum as a jury, if summoned by the defendants under their warrant, would have assessed as compensation to the plaintiffs as damages for their neglect to issue such warrant.

The pleadings, Acts of Parliament, and plan are to be taken as part of the statement of facts, and may be referred to on the hearing of it.

McIntyre (*Anstie* with him), for the plaintiffs (on June 20).—Our contention is, first, that by the wrongful acts of the defendants this injury was caused to the plaintiffs' mines, and that they are liable in an action of damages. Secondly, if the defendants are entitled to justify their acts as having been done under the authority of their Act of Parliament, then we claim damages in the nature of compensation for the injuries sustained by us in the carrying out of the works

which the defendants were authorised to construct and maintain.

[COCKBURN, C.J.—We must take it as found by the referee, that the circumstances made it incumbent on the defendants to avert the greatest possible amount of mischief; that if they had not taken the course which they did, the canal would have burst and inundated the whole neighbourhood, including the plaintiffs' mines.]

The finding is limited to the canal as it had been constructed and altered by the defendants; but it seems to be rather inconsistent with the facts as to the amount of relief afforded to the pressure on the canal by raising the sluice, which could not have been a discharge of 1,000 cubic feet per minute.

[COCKBURN, C.J.—The important fact is, that the water so discharged did relieve the canal; and the question is, whether they are bound to make compensation for doing that which was the only thing under the circumstances to be done to avert a catastrophe.]

They were not entitled, we contend, to save the neighbourhood at our expense.

[COCKBURN, C.J.—You would have suffered equally by the bursting of the banks.]

Possibly so; but they were in the first instance bound at all hazards to prevent the water which they brought on the land from damaging adjacent owners.

[COCKBURN, C.J.—They had Parliamentary sanction for bringing the water there.]

But it must be taken to be a faulty construction which admitted of the damage arising, and therefore we have a right to compensation.

[COCKBURN, C.J.—The question of faulty construction can only be raised upon an amendment of the pleadings.]

Then we say that they are not authorised by their Act to let off the water in the manner and to the extent which they did.

[COCKBURN, C.J.—But it was done under pressure of *vis major*, and found to have been done of necessity. I can find no case in which mere apprehension of danger, or the anticipating the act of God, has been held a justification for the doing

Thomas v. Birmingham Canal Co., Q.B.

damage. In *Nicholls v. Marsland* (1) the banks burst, and the jury found that that was the act of God, and on that ground the proprietor was absolved from the consequences.]

If the Court are against the plaintiffs on the case as it stands, we ask to amend.

[COCKBURN, C.J.—The only conditions on which we can allow you to amend and raise this perfectly new point as to the original faulty construction of the canal, are those of paying all the costs up to the present time; for you would render the reference as held abortive, and ought to pay the expense of it. If you do not accept this you must fail.]

The plaintiffs did not accept this offer.

COCKBURN, C.J.—This case involves a principle of great public importance, and without entertaining a doubt as to how it should be decided, we should like to put our judgment in a written form.

H. Matthews and Jelf, for the defendants, were not called upon to argue.

Cur. adv. vult.

The judgment of the Court (2) was (on June 28) delivered by

LUSH, J.—I have to deliver the judgment of the Court in this case of *Thomas v. The Birmingham Canal Company* which was argued before us a few days ago. The facts have been very recently discussed here, and therefore I need not go into them. We forbore to deliver judgment in this case at the close of the argument, not because we had any doubt that it ought to be substantially for the defendants, but from a doubt whether, as the damage complained of did not accrue from the bursting of the canal bank, but was caused by the voluntary act of the defendants' agents in letting off the surplus water in order to prevent a terrible catastrophe, that circumstance might not entitle the plaintiffs to judgment for some amount.

If the defendants had done nothing to relieve the canal of the accumulation of water, the facts found by the arbitrator

would have brought the case directly within *Nicholls v. Marsland* (1), for it is found that the banks could not have sustained the continued pressure of the accumulating water, but would soon have given way, the result of which would have been not only to flood the plaintiffs' mines to the same extent to which they were flooded, but also to have flooded a large tract of country around, causing great destruction of property, and probably loss of human life also.

The course which was adopted of letting off the water by opening the sluices averted this calamity, but the consequence was that the plaintiffs' mines were flooded some hours sooner than they otherwise would have been. If it had been expressly found, or if it could be reasonably inferred from the facts stated by the arbitrator, that any additional damage was thereby caused to the plaintiffs, it would have been necessary to decide the important question, whether, under such circumstances of imminent peril of life and property, the act was in point of law wrongful; but nothing of the kind is stated, and it must be taken that the damage to the plaintiffs would have been the same if no such act had been done. Assuming, therefore, that it was a wrongful act to open the sluices and so let out the water from the canal to flow in the direction of the plaintiffs' mine instead of allowing that and all the surrounding area to be deluged by the bursting of the bank, it was *injuria absque damno*, and consequently not a ground of action. We expressed our opinion during the argument that this case does not fall within the compensation clauses.

Our judgment is therefore for the defendants.

Judgment for defendants.

Solicitors—Duignan & Smiles, agents for Duignan, Lewis, Williams & Elliot, Walsall, for plaintiffs; Tucker & Lake, agents for Wragge & Co., Birmingham, for defendants.

(1) 44 Law J. Rep. Exch. 134; 46 Law J. Rep. Exch. 174; Law Rep. 10 Exch. 255; *ibid.* 2 Ex. D. 1.

(2) Cockburn, C.J.; Lush, J.; and Manisty, J.

Reynolds v. Bromley 50 L.R. 2 181.
Ellis v. Deacon 50 L.R. 2 328.
Guthrie v. Smith 50 L.R. 2 682.

VOL. 49.]

MICHAELMAS 1879 to MICHAELMAS 1880.

857

[IN THE QUEEN'S BENCH DIVISION.]

1880.

May 6. }
Aug. 7. }

STOOKE v. TAYLOR.

Practice—Costs—Claim and Counter-claim—Reference to Arbitration—“Costs to abide the Event”—Amount recovered—County Courts Act, 1867 (30 & 31 Vict. c. 142), ss. 5 and 7—Judicature Act, 1873, s. 67—Rules of Court, Order XIX. rule 3, Order XXII. rule 10, Order LV. rule 1.

Where a plaintiff establishes his claim in an action for a sum over 20l., although the amount for which he obtains judgment may be reduced by a defendant's counter-claim to less than that amount, the plaintiff is entitled to his costs in the High Court, as section 67 of the Judicature Act, 1873, does not apply to such a case.

Where a defendant establishes his counter-claim (which is either wholly or in part for unliquidated damages) for any sum, although it may be less than the claim the plaintiff has established, he is entitled to the costs of his counter-claim.

The plaintiff claimed 10l. for rent, 100l. damages for breach of covenant, and 30l. damages for the conversion of goods by the defendant. By his counter-claim the defendant sought to recover 100l. for breach of covenant, and 5l. balance of rent due from the plaintiff to the defendant. At the trial the claim and counter-claim were referred to an arbitrator, “the costs of the action to abide the event of the award or certificate; the costs of the reference to be in the discretion of the arbitrator,” to whom power was also given to give judgment. The arbitrator made his award in favour of the plaintiff for 15l., and directed that the defendant should pay the plaintiff's costs of the reference and should bear the costs of the award; but he gave no certificate under section 5 of the County Courts Act, 1867, so as to entitle the plaintiff to the costs of the action. Upon an application to the Queen's Bench Division, the case was sent back to the arbitrator to find separately upon the claim and counter-claim. He thereupon found that the plaintiff was entitled to 35l. in respect of his claim, and that the defendant was entitled to 20l. upon his counter-claim, leaving a balance of 15l. due to the plaintiff, in respect of which he confirmed his award.

VOL. 49.—Q.B., C.P. & EXCH.

Jake v. Andrews 57 L.R. 2 283.
Murray v. J. G. G. v. Kaye 57 L.R. 2 581.
Mr. Gowan v. Middleton 57 L.R. 2 356.

The plaintiff obtained from a Judge at chambers an order allowing him the costs of the action. The defendant applied to set aside the order:—

Held, that the order was good, as, according to the findings of the arbitrator, the plaintiff had “recovered” 35l. in the action. Held also (FIELD, J., dissenting), that as the defendant had succeeded in establishing his counter-claim (which was not a mere set-off or claim for liquidated damages), he must be held to have recovered in his action, and therefore that he was entitled to have the costs of his counter-claim.

Staples v. Young (Law Rep. 2 Ex. D. 324) dissented from.

Chatfield v. Sedgwick (Law Rep. 4 C.P. D. 459) distinguished.

This was an appeal by the defendant against an order of Stephen, J., made at chambers, that the plaintiff should recover his costs and charges of the action (1.)

(1) By section 67 of 36 & 37 Vict. c. 66: “The provisions contained in the 5th, 7th, 8th and 10th sections of the County Courts Acts, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court.”

By section 5 of 30 & 31 Vict. c. 142: “If in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record the plaintiff shall recover a sum not exceeding twenty pounds if the action is founded on contract, or ten pounds if founded on tort, whether by verdict, judgment by default, or demurrer or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a Judge at chambers shall by rule or order allow such costs.”

By Order XIX. rule 3: “A defendant in an action may set off or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.”

By Order XXII. rule 10: “Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the

5 R

Stooke v. Taylor, Q.B.

The facts of the case and the nature of the arguments are fully set out in the judgment of the Court.

Bucknell for the plaintiff.

Bompas (*Howard Smith* with him), for the defendant.

During the argument the following cases were referred to: *Potter v. Chambers* (2), *Staples v. Young* (3), *Chatfield v. Sedgwick* (4), *Neale v. Clarke* (5), *Myers v. Defries* (6), *Beard v. Perry* (7), *Ashcroft v. Foulkes* (8), *Blake v. Appleyard* (9).

Cur. adv. vult.

COCKBURN, C.J. (on Aug. 7).—This case raises a question of considerable importance with reference to the right to costs in actions brought in a Superior Court, in cases in which a County Court possesses a concurrent jurisdiction. It comes before us on an appeal from an order of Mr. Justice Stephen, allowing the plaintiff his costs in an action brought in this Division, the facts connected with which are as follows: The action was brought by the plaintiff for breach of the covenants in a lease, to pay rent, and keep

balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

By Order LV.: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of equity: Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn, the Judge before whom such action or issue is tried or the Court shall otherwise order."

(2) 48 Law J. Rep. C.P. 274; Law Rep. 4 C.P. D. 457.

(3) Law Rep. 2 Ex. D. 324.

(4) Law Rep. 4 C.P. D. 459.

(5) Law Rep. 4 Ex. D. 286.

(6) 48 Law J. Rep. Exch. 446; Law Rep. 5 Ex. D. 180.

(7) 2 B. & S. 493; 31 Law J. Rep. Q.B. 180.

(8) 18 Com. B. Rep. 261; 25 Law J. Rep. C.P. 202.

(9) 47 Law J. Rep. Exch. 407; Law Rep. 3 Ex. D. 195.

the premises in a proper state of internal repair, and also for the conversion of the plaintiff's goods. The defendant, by way of counter-claim, claimed damages from the plaintiff for breach of a covenant in the same lease, to keep the premises in a proper state of internal repair, as also for rent due in respect of the occupation by the plaintiff of a loft and store-room, part of the premises demised to the defendant.

The cause coming on for trial at Nisi Prius, was referred to arbitration, the arbitrator to have "all the powers as to certifying and otherwise of a Judge of the High Court of Justice," the "costs of the action to abide the event of the award or certificate," "the costs of the reference and award, or of the certificate, to be in the discretion of the arbitrator." After hearing the parties, the arbitrator made his award in favour of the plaintiff for the amount of 15*l.*, directing that the defendant should pay the plaintiff's costs of the reference, and should bear the costs of the award, but giving no certificate under section 5 of the County Courts Act, 1867 (1), so as to entitle the plaintiff to the costs of the action.

Mr. Justice Stephen, having made an order allotting the plaintiff the costs of the action, an application was made to this Court to set that order aside, upon which the Court directed that the case should go back to the arbitrator, to say how he arrived at the sum of 15*l.*, and to find separately on the claim and counter-claim, and also on the plaintiff's claim for the conversion of his goods. Thereupon the arbitrator found specifically that the plaintiff was entitled to recover in respect of the breach of covenant by the defendant to repair, and for the conversion of his goods to the amount of 25*l.*, and 10*l.* for rent, which was not disputed, making in all 35*l.*; while the defendant was entitled to recover 20*l.* on the counter-claim for breach by the plaintiff of the covenant to repair; leaving a balance of 15*l.* in favour of the plaintiff, in respect of which, and in all other respects, he confirmed his award.

On these findings of the arbitrator I am of opinion that the order of Mr. Justice Stephen, allowing the plaintiff the costs of the action, should be upheld, but that

Stooks v. Taylor, Q.B.

the order should be varied to the extent of also allowing the defendant his costs on the counter-claim. The question was submitted to us on the part of the defendant as depending on the combined effect of the 5th section of the County Courts Act, 1867, and the 67th section of the Judicature Act of 1873. But, inasmuch as the question arises whether the latter section has here any application at all, it appears to me expedient to consider in the first instance how the matter would stand on the County Courts Act, independently of the Judicature Act, and then to see what bearing, if any, the latter has on the question. The first County Court Act (the 9 & 10 Vict. c. 95), while it gave jurisdiction to the County Court in personal actions (with certain specified exceptions) in which the debt or damage claimed did not exceed 20*l.*, left the concurrent jurisdiction of the Superior Courts of law untouched. But in order to induce plaintiffs to resort to the County Court in matters within its jurisdiction, it was provided by section 129 that, except in certain specified cases, where in an action brought in a Superior Court a verdict was found for the plaintiff for a sum less than 20*l.* in an action founded on contract, or less than 5*l.* in an action founded on tort, the plaintiff should have no costs, unless the Judge who tried the cause should certify that the action was fit to be brought in the Superior Court. By the 13 & 14 Vict. c. 61, the jurisdiction of the County Court was enlarged to "debts, damages and demands" not exceeding 50*l.*, but the provision as to costs remained as before, except that, by section 11 of the later Act, for the words of the 129th section of the former, "if a verdict shall be found for the plaintiff," were substituted the words "if a plaintiff shall recover"—words to which a specific effect has been attached; and that for the words "a sum less than 20*l.*" of the first Act, were substituted the words "a sum not exceeding 20*l.*" The effect, therefore, of the later Act was to give to the County Courts a concurrent jurisdiction with the Superior Courts up to 50*l.*, without subjecting a plaintiff who sued in the Superior Court, and recovered less than 50*l.*, if he recovered more than 20*l.* in

contract or 5*l.* in tort, to the penalty of losing his costs. The plaintiff had the option of suing in the County Court if he thought proper to avail himself of a cheaper and speedier procedure; but he was not bound to do so unless he pleased. He still had the right to resort to the higher court—nor could the defendant decline the forum—subject, however, to the loss of his costs if he failed to recover a sum exceeding 20*l.* in an action of contract, 5*l.* in one of tort. In this respect the County Courts Act of 1867, so far as relates to costs in actions *ex contractu*, has left the law exactly as it stood before, the only change in respect of costs introduced by that Act being the provision in section 5, by which the amount which a plaintiff must recover in a Superior Court in an action founded on tort to entitle him to costs is raised from 5*l.*, the amount required by the former statutes, to 10*l.* The amount to be recovered in order to entitle the plaintiff to his costs in an action *ex contractu* remains as before. So far, therefore, as the question depends on the County Court Acts, if the plaintiff can be here said to have "recovered" 35*l.*—inasmuch as though enabled to sue in the County Court to recover that amount, he was not compelled to do so in order to recover his costs in a judgment for that amount—he will be entitled to his costs, unless the 67th section of the Judicature Act of 1873 has effected a change herein—a question to be considered presently.

But it is said that the plaintiff has not "recovered" 35*l.*, that he has "recovered" only 15*l.*, and therefore has not satisfied the requirement of the 13 & 14 Vict. and 30 & 31 Vict. In my opinion this is not so. The plaintiff, as it seems to me, recovers 35*l.* in the action which he brings, although it is true that, by the effect of the statutes, he obtains judgment only for the amount by which the sum he recovers exceeds the amount recovered by the defendant on his counter-claim. That this would have been so under the old Procedure and the County Court Acts, independently of the Judicature Act, is, I think, clear. A defendant, whether sued in a Superior Court, or in a County Court, to make good his claim

Stooke v. Taylor, Q.B.

against the plaintiff, not only for unliquidated but also for liquidated damages, unless where there was an admitted set-off, must have brought his separate and independent action. Each party would have recovered, and would have been entitled to judgment in his respective action. It is only by the express enactment of the 9 & 10 Vict. c. 95. s. 93, that the right to have execution on the judgment in a County Court action is limited to the excess of the judgment for the larger amount over the smaller. The section just referred to provides that "if there shall be cross judgments between the parties, execution shall be taken out by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments." It is obvious that as "cross judgments" must be taken as equivalent to judgments in cross actions, each party is here treated as recovering the amount for which he obtains judgment in his own action, although by an equitable provision, introduced by the statute into the procedure of the County Court, execution is only allowed for the balance of the larger judgment, after deducting the amount of the smaller. And this express enactment was necessary to enable this equitable arrangement to take place. In the prior state of the law as to the effect of a cross action, nothing of the sort could have taken place; so although, if the defendant's claim was for liquidated damages, he might, by virtue of the statute, set off the amount against the plaintiff's claim, if his claim was for unliquidated damages, it was not open to him to do so until, under a new system of procedure, a counter-claim was allowed to take the place of a cross action, with advantages to the defendant which were not afforded him by the older form of procedure.

Let us see, then, how the matter stands under the new system introduced by the Judicature Acts. A defendant, who having a claim for unliquidated damages

against the plaintiff suing him, must before have brought a cross action, is now enabled to meet the plaintiff's claim by a counter-claim, in other words, by a proceeding which, without being in form a cross action, is so in substance—for that is what a counter-claim in effect amounts to—and is thus enabled to have his claim tried and disposed of concurrently with that of the plaintiff, so that the latter shall gain no advantage in point of time, but justice shall at one and the same time be done between the parties. To effect this the more completely, the plaintiff, if he establishes a claim to a larger amount than the defendant is able to make good on his counter-claim, is allowed to have judgment for the difference only. But he has nevertheless credit for the residue of his claim, so far as he has established it, against the counter-claim of his adversary, and to that extent must, I think, be taken to have recovered it. If he had not recovered it in his own action, he could not have the benefit of it against what in effect is the action of his opponent.

In like manner the defendant is entitled by the statute to have the amount which he may have established on his counter-claim deducted from the amount of the plaintiff's claim. Why? Because he has recovered it in his action against the plaintiff. It may happen, and sometimes does happen, that the plaintiff fails in making good his claim altogether, while the defendant succeeds in establishing his, and so on his part becomes entitled to recover, and has judgment on his counter-claim. Or the defendant establishes a claim to a larger amount than the plaintiff has been able to make good. Order XXII. rule 10, provides that in such case the Court may give judgment for the balance. In whose action does he obtain judgment? I apprehend clearly in his own, not in that of the plaintiff. In effect each party establishing his claim recovers to that amount in his own action, though the statute adjusts the balance between them, and limits the judgment and execution to it.

It was, however, pressed upon us on the discussion of the rule with reference to the question of costs, that the claim of

Stooks v. Taylor, Q.B.

the plaintiff having been reduced by the counter-claim to 15*l.*, and a counter-claim being, as was contended, equivalent to, and standing on the same footing as, a plea of set-off, the plaintiff could not, according to the statutes of set-off, be said to have recovered more than 15*l.*, and therefore was not entitled to costs, a contention upheld by the decision of the Exchequer Division to that effect in *Staples v. Young* (3), an authority which, if it is to be followed, is decisive of the question before us. But I cannot acquiesce in the view taken in *Staples v. Young* (3), or abide by and follow the decision in that case. In my opinion it is altogether a mistake to treat a counter-claim and set-off as standing on the same footing, or a counter-claim as equivalent only to a set-off. Set-off and counter-claim may be, and commonly are, essentially different; and it becomes necessary, therefore, to see in each case whether a counter-claim amounts in effect to no more than a set-off, or whether it is in effect a cross action. Set-off and counter-claim are both the creation of statute, the common law not admitting of the action of a plaintiff against a defendant being met by an independent claim of the defendant against the plaintiff, but leaving the defendant to his cross action. The effect of these two modes of proceeding must, therefore, be sought in the statutes by which they were introduced, and in their results; and when these are looked at, it will be seen how essentially these two forms of procedure differ. By the statutes of set-off this plea was available only where the claims on both sides were in respect of liquidated debts, or money demands which could be readily and without difficulty ascertained. The plea could only be used in the way of defence to the plaintiff's action as a shield, not as a sword. Though the defendant succeeded in proving a debt exceeding the plaintiff's demand, he was not entitled to recover the excess; the effect was only to defeat the plaintiff's action, the same as though the debt proved had been equal to the amount of the claim established by the plaintiff and no more. By the terms of the Act the plea must be pleaded in the action, and it is by the

effect of the express enactment of the statute that, "in case the plaintiff shall recover, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after the one debt shall have been set off against the other," that the defendant gets the benefit of the statute. While, therefore, it has been rightly held by the Court of Common Pleas in *Ashcroft v. Foulkes* (8), and by this Court in *Beard v. Perry* (7), that where a plaintiff's claim in an action in the Superior Court is reduced by proof given under a plea of set-off to less than 20*l.*, he cannot be said to have "recovered" more than 20*l.*, though apart from the set-off he has established his claim to that extent, it by no means follows that the same privilege will apply to a counter-claim.

Morally, there can be no doubt that there is an essential difference between those two cases. In a case of set-off, the claim being for liquidated damages, its existence and its amount must be taken to be known to the plaintiff, who should have given credit for it in his action against the defendant. This reasoning does not apply to a counter-claim, the effect of which, as distinguished from a mere set-off, is altogether different. It is, as I have already pointed out, to all intents and purposes an action by the defendant against the plaintiff. It is not confined to debts or liquidated damages. It is not even necessary that the claim should be analogous to that of the plaintiff. A claim founded on tort may be opposed to one founded on contract or *vice versa*. But the most striking difference is that the counter-claim operates not merely as a defence, as does the set-off, but in all respects as an independent action by the defendant against the plaintiff. To the extent to which the damages accruing to the defendant on the counter-claim may be in excess of those accruing to the plaintiff on his claim, the defendant becomes entitled to judgment, with this additional advantage that, having been obliged to meet the plaintiff on the forum chosen by the latter, he is not bound as to costs by the conditions on which the plaintiff depends for obtaining them. And there is this further essential differ-

Stooke v. Taylor, Q.B.

ence between these two forms of procedure, that where the defendant's claim is for liquidated damages—in other words, one of set-off—the plaintiff in his claim can give credit for the amount, and so avoid the costs of the set-off, whereas, when the claim is for unliquidated damages, he is unable so to protect himself. Nothing can be more explicit than the language of rule 3 of Order XIX. on that head: "A defendant in an action may set off or set up by way of counter-claim," thus distinguishing between set-off and counter-claim as distinct forms of procedure, "against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim."

The law as to the difference between set-off and counter-claim is correctly stated by Mr. Pitt-Lewis, in his very useful work on County Court Practice, p. 321. "A set-off," he says, "would seem to be of a different nature from a counter-claim, inasmuch as a set-off appears to shew a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-claim, it would seem, consists of a cross claim, not necessarily extinguishing or destroying the plaintiff's demand. In other words, a set-off appears to consist of a defence to the original claim of the plaintiff; a counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long existed. The right to set up a counter-claim was first given by the Judicature Acts." In *Winterfield v. Bradnum* (10) Lord Justice Brett says, "A counter-claim is sometimes a mere set-off; sometimes it is in the nature of a cross action; sometimes it is in respect of a wholly independent transaction. I think the true mode of

considering the claim and counter-claim is, that they are wholly independent suits, which, for convenience of procedure, are combined in one action. I know that a practice has arisen that, if the counter-claim overtops the plaintiff's claim, judgment is entered for the defendant, and costs given accordingly. But I think that the allocatur should only be for the difference of the costs between the respective parties." *Myers v. Defries* (6) was therefore, in my opinion, rightly decided, where it was held that where the plaintiff succeeded on his claim, and the defendant on his counter-claim, the word "event" in Order LV. was to be read distributively, and each party was entitled to his costs.

I am therefore of opinion that, while under the special enactments of the statutes relating to a set-off, a plaintiff recovers no more than the amount of his claim as reduced by the set-off, the effect of a counter claim is altogether different, and that where such a claim is set up as a cross action, each party recovers the amount of his claim, although by a wise and salutary provision, the party establishing his claim for the larger amount, whether plaintiff or defendant, obtains judgment for the excess only of his claim over that of the other. It appears to me, therefore, that the contention of the defendant, founded on the authority of *Staples v. Young* (3), and the reasoning in that case, that a plaintiff does not recover the amount which he establishes on his own claim, when the amount for which he can have judgment is reduced by the counter-claim, is unsound and ought not to prevail.

But it is argued that by the operation of section 67 of the Judicature Act of 1873, which incorporates the 5th section of the County Court Act, 1867 (30 & 31 Vict.), the standard on which the right of a plaintiff to costs depends is raised to the amount of 50*l*. In my opinion this is an entire misconception, both of the purpose and the effect of the enactment. The section is as follows: "The provisions contained in the 5th, 7th, 8th, and 10th sections of the County Courts Act, 1867, shall apply to all actions in the High Court of Justice, in which

(10) 47 Law J. Rep. Q.B. 270; Law Rep. 3 Q.B. D. 324, 326.

Stooks v. Taylor, Q.B.

any relief is sought which can be given in a County Court." It is contended that, inasmuch as relief can be given in a County Court to the extent of 50*l.*, that amount must be recovered in order to entitle the plaintiff to costs. But if such had been the purpose of this enactment, we should have met a most remarkable instance of legislative oversight and incapacity. For the incorporation of the 5th section of the Act of 1867 by reference can have no greater effect than if the section had been introduced bodily into the Act. But all that the 5th section of the Act of 1867 does is to enact that unless a plaintiff recovers a sum exceeding 20*l.* in contract, or 10*l.* in tort, he shall have no costs. It does not touch the case in which a plaintiff recovers an intermediate amount. So that the result would be that the enactment would defeat itself, and the standard of costs would remain just as it was before. But this *reductio ad absurdum* arises only on a mistaken reading of the 67th section. The purpose and effect of that enactment was, I cannot but think, not to raise the amount of the relief sought, so as to deprive a plaintiff of costs in an action within the concurrent jurisdiction of the County Court unless he recovered 50*l.*, but had reference to the nature and character of the relief sought, and to the jurisdiction to be exercised in the particular instance. The purpose was to apply the rule as to costs established by the County Court Acts in actions at common law, to which the jurisdiction of the County Court was originally confined, to the other instances in which jurisdiction had been conferred on it by subsequent legislation, such as the equitable jurisdiction, and jurisdiction in matters of probate, without provision being made as to costs, where relief was sought in a Superior Court in cases within the jurisdiction of the County Court. The intention and effect of the enactment were to establish a uniform rule as to costs in all cases in which a concurrent jurisdiction was exercised by the County Court, and in which express provision has not been made by the statute conferring the particular jurisdiction. I am therefore of opinion that the 67th section of the Act

of 1873 has not the effect of raising the amount necessary to entitle the plaintiff to costs beyond the amount fixed by the 5th section of the Act of 1867.

But it is said that, although the view which I have thus expressed would have been the right one had the cause been tried out, and the verdict of the jury taken and judgment given thereupon in the ordinary course, yet that, as here, the cause was referred to arbitration, and, by the terms of the order of reference, the costs of the action were to abide the event, the arbitrator having made his award in favour of the plaintiff for 15*l.*, as the balance of the two claims as established, this was the event on which the costs of the action were to depend. This contention is directly at variance with the decision of the Exchequer Division in *Cole v. Firth* (11), but it is said to be upheld by that of the Court of Appeal in *Chatfield v. Sedgwick* (4). But, in my opinion, when rightly considered, the judgment in the last-mentioned case, giving the costs to the defendant, is not in conflict with my view of the law. The plaintiff in that case sued the defendant for 57*l.* 10*s.*, but, on a reference to a Master, established his claim to the extent only of 16*l.* 1*s.* 5*d.* The defendant, on his counter-claim, established a claim against the plaintiff to the amount of 23*l.*, thus making a balance in his favour of 6*l.* 18*s.* 7*d.* It was held by the Common Pleas Division that while the plaintiff, having recovered less than 20*l.*, was disentitled to costs by section 5 of the County Courts Act, 1867, the defendant, not coming under the operation of the County Court Acts, was, though he recovered only 6*l.* 18*s.* 7*d.*, entitled to the costs of his counter-claim. This decision was, in my opinion, perfectly correct. Claim and counter-claim being for liquidated damages, to the extent to which the amount established by the defendant was co-extensive with and so operated to extinguish the plaintiff's claim, the counter-claim operated as a set-off; in reference to the amount by which it exceeded the plaintiff's claim, it operated as a cross action, recovering in

Stooke v. Taylor, Q.B.

which the defendant would be entitled to his costs. *A fortiori* would this be the case if the counter-claim is to be treated as a cross action to the full extent of the defendant's demand. It is true that the Court of Appeal, while upholding the judgment of the Common Pleas Division, appear to have done so on a different ground, namely, that by the terms of the order of reference to the Master the costs were to abide the event, and that the decision of the Master that on the balance of amount the plaintiff owed the defendant 6l. 18s. 7d. was the event. I am not at all sure that I rightly appreciate the meaning or effect of this decision. In one sense, indeed, but in one sense only, the decision of the Master that the plaintiff owed the defendant 6l. 18s. 7d. may be said to have been the event on which the costs would depend. The counter-claim being, so far as it was co-extensive with the plaintiff's demand, a plea of set-off, would, on being established, defeat the plaintiff's right of action, and so entitle the defendant to costs. *A fortiori* was this the case when, after thus extinguishing the plaintiff's claim, the counter-claim, operating as it did as a cross action, established a cause of action against the plaintiff.

If, however, the *ratio decidendi* in *Chatfield v. Sedgwick* (4) is to be taken to be, as from the language of the judgment would seem to be the case, that the provision in the order of reference makes the right to costs depend absolutely on whether the balance is on the side of plaintiff or defendant, I must respectfully dissent from such a position, and can only hold myself bound by the decision when the facts with which I have to deal are precisely the same as those in *Chatfield v. Sedgwick* (4), which certainly is not the case here. The effect of such an order of reference is, I apprehend, simply to substitute the reference as regards the issues of fact, and the legal consequence resulting from them, for the trial by Judge and jury. The provision that the costs of the action shall abide the event amounts to no more than that whatever would have been the legal effect of the verdict and judgment, as regards costs, shall remain the same as if the verdict of the

jury had been taken and judgment had followed thereupon. It cannot be taken to mean that where the counter-claim is in effect a cross action, founded on an independent cause of action and not a mere set-off, as for instance where the one party claims liquidated the other unliquidated damages, or where the claim of the one is founded on contract, that of the other in tort, the balance of the amount awarded on their respective claims is to constitute the event, so as to entitle the party in whose favour such balance is found to the costs of the action. When claim and counter-claim are in effect cross actions, the term "event," as here used, must be taken as applicable to each. Damages are in effect awarded in each, and costs ought equally to be assessed in each, although by the effect of the statute judgment is given for the difference only between the amount adjudged on each, and, as was pointed out by Lord Justice Brett in *Winterfield v. Bradnum* (10), the allocatur for costs should be for the difference only. Where the only issue is whether, or to what extent, a plaintiff can make out his claim, or where the defence consists of mere set-off, though pleaded in the form of a counter-claim, the award of the arbitrator as to amount may well be held to be the event on which the costs are to depend. But where the counter-claim is in effect a cross action, which under the new system may be in tort as opposed to an action *ex contractu*, or *vice versa*, to hold that the right to costs is to depend on which way the balance of the damages awarded may be as the event by which the right is to be determined, would obviously in many cases lead to grievous injustice. The proof of the one party may be of a complicated character, involving much expense, that of the other extremely simple. To say that A., who has been put to heavy expense in establishing his claim, of which B. by disputing it has put him to the proof, is to be deprived of the costs of his action because B. in a cross action, possibly of a totally different character, succeeds in establishing a claim to a few pounds, or even shillings, more, or *vice versa*, appears to me, I must say, inconsistent with reason and justice. If

Stooke v. Taylor, Q.B.

the intention of the parties is that the costs shall depend absolutely on the event as so understood it will be easy to say so expressly, but in the absence of any such expressed intention we ought not to give such an effect to the word "event." Such a rule would, moreover, lead to this anomaly: it would have the effect, where the balance was in favour of the plaintiff, but for a sum not above 20*l.*, of doing away with the effect of the County Court Acts as to costs. For if the event on which the costs are to depend is to be determined absolutely on the existence of a balance, independently of its amount—not on how much the plaintiff may recover, but on whether he recovers anything above the amount recovered by the defendant on the counter-claim—the necessary effect will be that, the costs depending on the mere fact of a balance, however small, upon every such reference the salutary rule of the County Court Acts will be superseded. In *Chatfield v. Sedgwick* (4), for instance, the balance might have been the other way, and yet the plaintiff might not have established a claim over 20*l.*; yet, according to the principle on which the judgment rests, he would have been entitled to his costs of the action in spite of the County Court Acts.

I cannot concur in such a conclusion, and therefore, as I have said, can only hold myself bound by the decision where the facts are the same as in *Chatfield v. Sedgwick* (4). There both claim and counter-claim were for liquidated damages. Here the claim is partly for liquidated, partly for unliquidated damages. The counter-claim is wholly for unliquidated damages, so that the counter-claim is to all intents and purposes a cross action which distinguishes the case from *Chatfield v. Sedgwick* (4). I feel myself at liberty, therefore, to exercise an independent judgment on the case before us, and am of opinion that the plaintiff is entitled to the costs on his claim, the defendant to his costs on the counter-claim.

MANISTY, J.—Having regard to the exhaustive judgment pronounced by the Lord Chief Justice, I might content myself by saying that I concur in it; but, as the case will probably, for obvious rea-

sons, be carried to a higher tribunal, and it is one of considerable importance, I have thought it right to add a few observations of my own. I conceive that there is a broad distinction between matter of set-off and matter of counter-claim, properly so called, and I cannot help thinking that the diversity of opinion which unfortunately is to be found in several of the decided cases bearing more or less directly upon the point now raised, is owing to due regard not being had to that distinction. In the case of a set-off, properly so called, the plaintiff has it in his power, whether his action be brought in a Superior Court or in a County Court, to give credit for the amount of the set-off and to sue for the balance really due to him. If that balance be less than 20*l.* (the action being founded, as it must be, in contract, in order to admit of a set-off), then by virtue of the 5th section of the County Courts Act, 1867, the plaintiff, unless he obtain a certificate or order, is not entitled to any costs; the reason being that the relief sought could be given in the County Court if the plaintiff exercised his right to give credit for the defendant's set-off, and sued for the balance really due. A counter-claim, properly so called, is the creature of the Judicature Act, 1873. It is an independent suit which for the sake of convenience may be tried at the same time as the claim—see *per* Lord Justice Brett in *Winterfield v. Bradnum* (10). It differs essentially from a pure set-off. Assuming a plaintiff to have a good claim, founded either in contract or tort, for a sum exceeding 50*l.*, he cannot, by giving credit for an amount not the subject of set-off, but which can only be recovered by way of counter-claim or cross action, get relief in a County Court; therefore, notwithstanding the defendant by a counter-claim recovers a sum which, when the verdicts on the claim and counter-claim come to be set off one against the other, leaves a balance due to the plaintiff of less than 20*l.* or 10*l.*, as the case be, and for which he obtains judgment, still the plaintiff is entitled to his costs of and relating to his claim: and why?—Because he has recovered by verdict (see section 5 of the County Courts Act, 1867) more

Stooke v. Taylor, Q.B.

than 20*l.* or 10*l.*, as the case may be; and in like manner the defendant in such case is entitled to his costs of and relating to his counter-claim—see *Cole v. Firth* (11). In that case the plaintiff recovered on his claim for work and labour 37*l.*, and the defendant recovered on his counter-claim as damages for breach of contract (which, of course, could not be the subject of set-off, properly so called) 37*5l.*, leaving a balance due to the defendant of only 4*l.*, for which he obtained judgment: the Court held that the plaintiff was entitled to his costs of and relating to his claim, and that the defendant was entitled to his costs of and relating to his counter-claim. The only distinction that I can see between that case and the present is, that in the former the sum recovered by the plaintiff on his claim exceeded the sum of 50*l.* (consequently he could not have obtained relief in the County Court), whereas in the present case the plaintiff recovered less than 50*l.*, namely, 25*l.* as and for unliquidated damages, and 10*l.* for rent, making together 35*l.*, so that he might have sued and obtained relief in the County Court. This brings me to the question whether this distinction between the two cases makes any difference as regards the plaintiff's right to costs. It is contended on the part of the defendant that it does. It is said that the plaintiff is precluded from recovering his costs by the 67th section of the Judicature Act, 1873, inasmuch as he might have sued and recovered the whole 35*l.* in the County Court. All that the 67th section of the Judicature Act says is, that the 5th section of the County Court Act, 1867, shall apply to all actions in the High Court of Justice in which any relief is sought which can be given in a County Court. Now it is true that the present action is one in which the relief sought by the plaintiff could have been given in the County Court; but section 5 of the Act of 1867 only operates to deprive a plaintiff of costs in the event of his not recovering more than 20*l.* or 10*l.*, as the case may be; and in this case the plaintiff did recover in respect of his claim more than 20*l.*, namely, 25*l.* for unliquidated damages (as to which there could be no

set-off), and 10*l.* for a debt, making in all 35*l.*; consequently section 5 has no operation in the present case. In *Staples v. Young* (3), Baron Cleasby and Baron Pollock are reported to have held that the right to costs depends upon the result of the cross verdicts on a claim and counter-claim, the intention of the Judicature Acts being, as they say, to place counter-claim and set-off upon the same footing. If those learned Judges did so decide, their decision is, as it seems to me, in direct conflict with that of the same Court (composed of Chief Baron Kelly and Baron Pollock) in the case of *Cole v. Firth* (11), to which I have already adverted, and also with that of the same Court (composed of Chief Baron Kelly and Mr. Justice Hawkins) in the recent case of *Neale v. Clarke* (5). In that case the plaintiff claimed upwards of 1,000*l.* on a balance of account; the defendant, nominally by way of set-off and counter-claim, but really by way of set-off only, claimed a larger sum. The cause was referred to arbitration, the costs of the cause to abide the event. The arbitrator awarded that the defendants were indebted to the plaintiffs in respect of their claim in the sum of 1,067*l.* 0*s.* 6*d.*, and that the plaintiffs were indebted to the defendants in respect of their set-off and so-called counter-claim in the sum of 1,055*l.* 10*s.* 3*d.*, which they were entitled to set off against the amount established by the plaintiffs, leaving a balance of only 11*l.* 10*s.* 3*d.* due from the defendants to the plaintiffs, for which they obtained judgment. The Court held that the plaintiffs and defendants were each entitled to the costs of the claims on which they had respectively succeeded, Mr. Justice Hawkins being of opinion that, as the matters of the so-called counter-claim and set-off were matters of pure set-off, and consequently the case was one in which the plaintiffs could have sued in the County Court for the sum really due to them, namely 11*l.* 10*s.* 3*d.*, they were not entitled to any costs; but, considering himself bound by the decision in *Potter v. Chambers* (2), he concurred in giving judgment for the plaintiffs with costs. The only other case to which I need to advert is *Chatfield v. Sedgwick* (4). This

Stooke v. Taylor, Q.B.

case is strongly relied upon by the defendant, and being a decision of the Court of Appeal, I should of course feel bound to follow it, whatever my own opinion might be, provided it was in point, but I do not think it is. No doubt there are *dicta* in that case which, abstractedly, support the defendant's contention, but the two cases are essentially different: in that case there was no verdict. The action, which was in contract, was referred to the Master, pursuant to the 3rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and he certified that there was due to the plaintiff in respect of his claim only 16*l.* 1*s.* 5*d.*, and that there was due to the defendant in respect of what was called his counter-claim (though it was really in part set-off and in part counter-claim) 23*l.*, and that the balance due from the plaintiff to the defendant was 6*l.* 18*s.* 7*d.* Upon those findings the plaintiff could not, in any view of the case, be entitled to any costs, because the action being in contract, and the sum found to be due to him being under 20*l.*, he was deprived of his costs by the 5th section of the County Courts Act, 1867; that was the event of the reference, so far as he was concerned, irrespective altogether of either set-off or counter-claim. Then as regards the defendant, he was found not only to have a set-off to an amount equal to the sum due to the plaintiff, but that the plaintiff owed him 6*l.* 18*s.* 7*d.* more, which of course could only be recovered by counter-claim under the new system, or by cross action under the old system; the event, therefore, so far as the defendant was concerned, was wholly in his favour, and the Court held that he was entitled to his costs. It was impossible for the Court in any view of the case to come to any other conclusion, and I think all that the learned Judges meant was, that, having regard to the findings on the claim and counter-claim, the plaintiff was not entitled to any costs, and that the defendant was entitled to the costs of and incidental to his counter-claim. In the present case the action came on for trial at Nisi Prius, and a verdict was taken for the plaintiff on his claim for the nominal amount claimed, and for the defendant on the counter-

claim, subject to a reference to a member of the bar on the well-known usual terms, the costs of the action to abide the event of the award or certificate, the costs of the reference and award or certificate to be in his discretion; power was also given to the arbitrator to give judgment. The arbitrator found by his amended award or certificate that the plaintiff was entitled to recover in respect of his claim 35*l.*, and the defendant in respect of his counter-claim 20*l.*, and in pursuance of the power given to him by the order of reference, without which he could not have done so, he gave judgment for the plaintiff for the difference, namely, 15*l.* The question is, What is the meaning of the term in the order of reference, "costs of the action to abide the event of the award or certificate"? But for the *dicta* in *Chatfield v. Sedgwick* (4), to which I have adverted, I should have thought "costs of the action" meant the costs of the claim and counter-claim respectively, and that the "event of the award or certificate" meant that the costs should follow just as they would have done if instead of a verdict having been found for the plaintiff on the claim and for the defendant on the counter-claim, subject to a reference, the jury had found a verdict for the plaintiff for the sum certified by the arbitrator to be due to him in respect of his claim, and a verdict for the defendant for the sum certified by the arbitrator to be due to him in respect of his counter-claim. There can be no doubt but that in such case judgment would have been given by the Judge or the Court for the plaintiff for the difference, say 15*l.*, and each party would, according to the invariable practice, have been allowed his costs in respect of the matter upon which he had succeeded. An award or certificate in such a case stands in the place of a verdict; the power to enter judgment is a separate and distinct matter. Before the Judicature Acts, when a verdict was taken subject to a reference, costs of action to abide the event, and the arbitrator found some issues for the plaintiff and some for the defendant, the result being that the plaintiff was entitled to judgment, the Master in taxing the costs as a matter of course disallowed the plain-

Stooke v. Taylor, Q.B.

tiff the costs of the issues on which he failed, and allowed the defendant the costs of the issues on which he succeeded; so *vice versa*, if the findings entitled the defendant to judgment, he got the general costs of the cause, including the costs of the issues on which he succeeded. I cannot see any reason why the term "costs of the action to abide the event of the award" should in a case like the present receive a construction different to that which it has always hitherto received. By Order L.V. rule 1, of the Judicature Act, 1875, it is enacted that where any action is tried by a jury, the costs shall as a general rule follow the event. If the contention of the defendant be correct, this result, as a general rule, would follow, namely, that in every case in which there is a claim and counter-claim, and the plaintiff gets a verdict on his claim for a sum exceeding 50*l.* (it may be for thousands of pounds), and the defendant gets a verdict on his counter-claim for a larger sum, the defendant would be entitled to his costs, but the plaintiff would not be entitled to any. I am at a loss to see any principle upon which such a result could be justified. Take the case of a plaintiff bringing an action for goods sold and delivered, in which he gets a verdict for, say, 100*l.*, and the defendant counter-claims for a libel, and gets a verdict for, say, 105*l.*, so that judgment would be given for the defendant for 5*l.* If the defendant's contention in the present case be right, the defendant in the supposed case would be entitled to his costs, but the plaintiff would not be entitled to any. Surely that would not be just, and I do not believe it is the law. For these reasons I am of opinion that the order of Mr. Justice Stephen which is appealed against was right, and that consequently the appeal should be dismissed with costs. I am also of opinion that the defendant is, by virtue of the order of reference and without any further order, entitled to his costs of the counter-claim, but, as the case is before us, there may as well be an order for the Master to allow the defendant his costs.

FIELD, J.—This was a motion on the part of the defendant to rescind so much

of an order of Mr. Justice Stephen as directed that the plaintiff should recover his costs and charges of the action, or that the defendant should recover his costs and charges of his counter-claim under the following circumstances: The action was brought to recover, first, 10*l.* for rent admittedly due by the defendant; and, secondly, unliquidated damages for breach of covenants in respect of the same premises (100*l.*), and for conversion of the plaintiff's goods (30*l.*). The defendant admitted that the 10*l.* was due, but put in issue the breach of covenant and conversion, and defended for the whole by a counter-claim for, first, unliquidated damages for breach of covenants by the plaintiff (claiming 100*l.*); and, secondly, for money due for use and occupation of other premises, and claiming 15*l.* At Nisi Prius this action was referred to an arbitrator by an order made by consent; the reference was given upon the terms "that the costs of the action should abide the event and determination of the award or certificate, and that the costs of the reference and award or certificate should be in the discretion of the arbitrator." There was also the further usual term that the arbitrator might "find generally for the plaintiff or for the defendant, and need not find upon any specific issue unless required so to do." The arbitrator was not required by either party to find upon any specific issue, and by his first award he awarded generally that the plaintiff was entitled to 15*l.* and no more, without stating upon what issue or issues that amount was due. By his second award, made in pursuance of an order of Court, he found that the plaintiff was entitled to 10*l.* for rent; that the defendant had broken his covenant to repair, and had been guilty of the conversion charged, and awarded that the plaintiff was entitled to recover in respect of such breach of covenant and conversion the sum of 25*l.*, making together 35*l.* awarded to the plaintiff. He also found that the plaintiff had broken his covenant as alleged by the defendant, and that the latter was entitled to recover in respect of that breach 20*l.* And so he found upon the whole matter that the plaintiff "was entitled to recover

Stooks v. Taylor, Q.B.

in the action the sum of 15*l.* and no more." Now, in the view which I take of this case, it seems to me unnecessary to consider what might have been the result of this application if the contest between the parties in the action had proceeded to trial in any of the ways provided by law for that purpose, and if its course to such a trial had not been intercepted by the consent of the parties and the order of reference. The question which would have arisen in that event would have involved the construction of many enactments and rules, and the application to them of a series of decisions, some of which appear to me difficult to reconcile with each other, and in accordance with some of which I should be only able to decide because I thought myself bound to do so. I have, however, in consequence of the views of my Lord and my brother Manisty, very fully gone through those enactments, rules and decisions, and having been favoured with a perusal of my Lord's judgment—and I understand that my brother Manisty agrees in principle with that judgment—I am glad to say that I see no reason to dissent from the conclusions at which they have arrived, so far as those are based on the assumption that the agreement between the parties, as expressed by the order of reference, has not altered their position. But it seems to me that the agreement of the parties has had that effect, for by it the course of action on its way to trial was arrested, and that the rights of the parties as to costs depend upon the construction of the order and of the award made under it. Now the true construction of such an agreement and award seems to me to have been decided by the Court of Appeal in the case of *Chatfield v. Sedgwick* (4), by which decision I should be bound, even if I did not, as I do, concur in it. The facts of that case were that the plaintiff sued the defendant for work done and money lent. The defendant set up a counter-claim for goods supplied. The action was by consent referred to the Master, and by the order the costs of the action were to abide the event, as in the present case. The Master found that the defendant owed the plaintiff 16*l.* 1*s.* 5*d.*, and that

the plaintiff owed the defendant 23*l.*, so that on the whole the plaintiff owed the defendant 6*l.* 18*s.* 7*d.*, and in that state of things the Master of the Rolls and Lord Justice Brett (the other Lord Justice concurring) held that, upon the true construction of the order, the question referred was, which of the parties, taking claim and counter-claim together, was the creditor and which the debtor; and the Master having found in favour of the defendant, that was the event which the costs were to follow. I am unable to distinguish that case in principle from the present, and I hold therefore in this case that the plaintiff is entitled to the costs of the action, and that the defendant is not entitled to any, and so the order of Mr. Justice Stephen stands, without any variation or addition. There is no doubt, as is pointed out by my Lord, one difference between that case and the present, in this respect, namely, that in *Chatfield v. Sedgwick* (4) the matter set up by counter-claim was, to the extent by which it was less than the sum to which the plaintiff was entitled in the nature of a set-off, and as to the residue in excess of the plaintiff's claim, in the nature of liquidated damages, which might have been made a shield by way of set-off, had the plaintiff's rightful claim been larger. But as the litigation stood at the time of the agreement the counter-claim only operated as a set-off to the extent of the 16*l.* 1*s.* 5*d.* recovered by the plaintiff, and as a cross action as to the residue. And inasmuch as the *ratio decidendi* in *Chatfield v. Sedgwick* (4) was that the language used by the parties evinced an intention that the party who should succeed in obtaining an award in his favour for the balance, after taking all the claims into consideration, should be entitled to his costs, I am not able to see that the nature of the counter-claim can, under such circumstances, make any distinction between the two cases in principle. If parties choose before going into an expensive enquiry to stake the costs upon the final balance, each does it with full knowledge that the other party's claims are liquidated or unliquidated, or are matters of set-off or counter-claim, as the case may

Stooke v. Taylor, Q.B.

be; and at the time when the agreement is made the precise limits of the campaign are fully and exactly marked out, and known to both sides. They may, and I think often do, prefer to make the costs dependent upon the final result, rather than upon the very complicated and difficult-to-be-ascertained question of cross costs and costs of issues, and in such a case there is, of course, no injustice in holding them to their bargain. I arrive, therefore, at the result I have done with the greatest respect for the judgments of my brethren with which mine is in conflict, but with a clear conviction that I am bound by the decision of the Court of Appeal, and a cordial concurrence in what appears to me to be its principle.

Order accordingly.

Solicitors—S. Hamilton, agent for J. W. Friend, Exeter, for plaintiff; Parkers, agents for Michelmores & Hacker, Newton Abbott, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1880. { THE QUEEN v. THE VICAR
April 27. { AND CHURCHWARDENS OF TOT-
TENHAM.*

Vestry—Mandamus—Vicar and Churchwardens—Authority to fix Hour of Vestry Meeting.

The vicar and churchwardens of a parish have power to fix the hour of holding vestry meetings, and the parishioners cannot, by mandamus, compel them to alter it.

Judgment of the Queen's Bench Division affirmed.

Appeal from a judgment of the Queen's Bench Division (reported 48 Law J. Rep. Q.B. 407).

A rule *nisi* was obtained in the Queen's Bench Division, calling upon the vicar

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; and Cotton, L.J.

and churchwardens of Tottenham to shew cause why a *mandamus* should not issue, commanding them to insert on the notice paper of the next vestry meeting a notice that a resolution would be proposed, "that the hour for the vestry meetings shall be 7 p.m." The vicar and churchwardens had appointed an earlier hour for the vestry meetings, and refused, on the requisition of a number of ratepayers of the parish of Tottenham, to place the above notice on the notice board.

The Queen's Bench Division discharged the rule, and the applicant for a *mandamus* appealed.

A. Charles and Fullarton appeared for the appellant.

W. Phillimore, for the respondents.

The argument for the appellant was substantially the same as in the Court below, and sufficiently appears from the judgments (*post*).

Counsel for the respondents were not required to argue.

The following statute and authorities were referred to: 58 Geo. 3. c. 69, *Butt v. Fellows* (1), *Smith v. Deighton* (2), *Mawley v. Barbet* (3).

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the Queen's Bench Division should be affirmed. The application to us is to review a decision of that Court, refusing to issue a *mandamus* to the vicar and churchwardens, or some or one of them, of the parish of Tottenham, compelling them or him to place on the notice paper of the next vestry meeting a notice that a resolution would be proposed that the hour for holding vestry meetings should for the future be 7 p.m.

Now, it is conceded that it would be useless to issue a *mandamus*, ordering them to put upon the notice paper convening a vestry meeting a notice which would be wholly inoperative for the purpose to which it professed to be directed. I am of opinion that would be the case in respect to this notice. If it was placed

(1) 3 Curt. 680.

(2) 8 Moore P.C. 179.

(3) 2 Esp. 687.

The Queen v. Vicar &c. of Tottenham (App.), Q.B.

upon the board in the first instance, and afterwards carried, I have heard no answer whatever to the suggestion, that if the churchwardens, or some or one of them, next day chose to call a vestry meeting for some other time, that meeting would be perfectly legal, and the notice convening it would be perfectly good.

The appellants are really attempting to compel the vicar and churchwardens to put on the board a notice, purporting to bind the parish, which notice for the future would have no effect whatever. I think the grounds upon which the Queen's Bench Division decided this case are sufficient to justify their judgment. But there are other grounds, some of them taken in the Court below, and others not taken, because, perhaps, it appeared unnecessary to rely on them, upon which the judgment can be maintained. For time out of mind it has been the right of the vicar and churchwardens to summon vestry meetings for days and times certain.

That is part of the well-established custom of the realm. It is now attempted to take away from them the inherent right which for centuries they have exercised, and give it to the parishioners. That appears to me a good reason for refusing the *mandamus*. Mr. Fullarton has cited no authority except the judgment of Sir Herbert Jenner Fust, in *Butt v. Fellowes* (1). That judgment seems perfectly intelligible and founded on good sense and principle; it held, where on the election of a churchwarden some duty had to be performed by him, and he being in fact in office convened a meeting of the vestry to carry out lawful purposes, that, even if it turned out that there was a sound objection to his appointment, the proceedings at the meeting which had been held were not rendered invalid. Mr. Fullarton argued that a parish vestry is a corporation with a power to make by-laws for the future, but there is no authority which supports that contention. On these grounds I am of opinion that the *mandamus* was properly refused by the Queen's Bench Division, and that their judgment should be affirmed.

BRETT, L.J.—I am of the same opinion. The reasons given by Lord Coleridge appear amply sufficient to support our judgment, and there is neither law nor authority in favour of the appellant's contention.

COTTON, L.J.—I am of the same opinion. The real intention of the applicants here is to provide that vestry meetings in the future shall not be held except at seven o'clock p.m. This notice is meant, if the resolution passed, to make a vestry meeting held at any other hour illegal. In my opinion no resolution of a meeting could have that effect. It is not disputed that a meeting called for a different hour by those entitled to call vestry meetings would be legally constituted.

I think the Queen's Bench Division were right in refusing a *mandamus*. There are plenty of other ways of expressing what are the wishes of the parishioners without coming for a *mandamus*. Any churchwarden may summon a vestry meeting, and the parishioners can appoint a churchwarden who will put the notice on the board which they require.

Appeal dismissed.

Solicitors—Brooks, Jenkins & Co., for respondents; Peckham & Co., for appellants.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } TOMBS (appellant) v. MAGRATH
May 4. } (respondent).

Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 21, sub-s. 1—*Administrative Battalion—Dismissal of Member—Commanding Officer—Regulations of 1878.*

[For the report of the above case, see 49 Law J. Rep. M.C. 75.]

[IN THE COURT OF APPEAL]

(Appeal from the Queen's Bench Division.)

1880. } MELLOR (*appellant*) v. DENHAM
 March 18. } (*respondent*).

Practice—Appeal—“Criminal Cause or Matter”—Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 47—Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 74 and 92—School Board—Offence against By-laws.

[For the report of the above case, see 49 Law J. Rep. M.C. 89.]

[IN THE EXCHEQUER DIVISION.]

1879. { THE MALTON LOCAL BOARD OF
 July 2. { HEALTH (*appellants*) v. THE
 MALTON FARMERS' MANURE AND
 TRADING COMPANY, LIMITED
 (*respondents*).

Offensive Trade—Public Health Act, 1875, s. 114—“A Nuisance or Injurious to Health”—Injury to Health of Sick Persons—Nuisance not to Health.

[For the report of the above case, see 49 Law J. Rep. M.C. 90.]

THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1880.

CASES RELATING TO
THE POOR LAW, THE CRIMINAL LAW,
AND OTHER SUBJECTS

CHIEFLY CONNECTED WITH

The Duties and Office of Magistrates,

PRINCIPALLY DECIDED IN THE
QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER DIVISIONS,

AND IN THE

COURT FOR CROWN CASES RESERVED,

MICHAELMAS SITTINGS, 1879, TO TRINITY SITTINGS, 1880,
BOTH INCLUSIVE.

REPORTED

In the Court for Crown Cases Reserved,
By WALTER HENRY MACNAMARA, Esq.,
BARRISTER-AT-LAW.

In the Queen's Bench Division,
By J. H. ETHERINGTON SMITH, Esq., AND RICHARD HOLMDEN
AMPHLETT, Esq.,
BARRISTERS-AT-LAW.

In the Common Pleas Division,
By WILLIAM PATERSON, Esq., AND GILBERT GEORGE KENNEDY, Esq.,
BARRISTERS-AT-LAW.

In the Exchequer Division,
By W. DECIMUS I. FOULKES, Esq., AND FRANCIS PARKER, Esq.,
BARRISTERS-AT-LAW.

MAGISTRATES' CASES.
VOLUME XLIX.

LONDON:

PRINTED BY SPOTTISWOODE AND CO., NEW-STREET SQUARE.
PUBLISHED BY EDWARD BRET INCE, 5, QUALITY COURT, CHANCERY LANE.

MDCCCLXXX.

SUPREME COURT OF JUDICATURE.

CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS

CHIEFLY CONNECTED WITH

The Duties and Office of Magistrates.

LAW JOURNAL REPORTS, VOL. XLIX.

MICHAELMAS, 1879, to MICHAELMAS, 1880.

43 *Victoria*.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. SIR ROBERT
Nov. 19, 20. } CARDEN.

Defamatory Libel—Jurisdiction of Magistrate on Criminal Charge of Libel—Evidence of Truth of Libel, when admissible—6 & 7 Vict. c. 96 (Lord Campbell's Act), ss. 5 & 6—30 & 31 Vict. c. 35. s. 3.

On the hearing before a magistrate of an information under section 5 of Lord Campbell's Act (6 & 7 Vict. c. 96), for maliciously publishing a defamatory libel, the magistrate has no jurisdiction to receive evidence, whether on cross-examination of the complainant's witnesses or on the direct testimony of witnesses called by the accused, to prove the truth of the libellous matter charged, on the ground that the truth is not in issue before him, and cannot at that stage constitute any defence.

This was an application for a mandamus to Sir Robert Carden, an alderman and magistrate of the city of London, in a case pending before him of a charge brought by Edward Levy Lawson against Henry Labouchere and Charles Wyman for publishing a defamatory libel, commanding him to hear evidence in cross-examination by the defendants of the

complainant and the complainant's witnesses, and direct evidence of the defendants and their witnesses on the information of the complainant against Henry Labouchere, the defendant, for a libel referring to the said Edward Levy Lawson, to prove, first, that the alleged libel was not a false and defamatory libel; second, that it was a free and fair comment on a public man in a matter to which he had given prominence and called public attention, and which was a question of public interest; third, that the alleged libel was true in substance and in fact; fourth, that it was for the public benefit that the alleged libel should be published; and fifth, that it was not published knowing it to be false; and commanding the said magistrate further to hear all evidence relating to the same libel and to the circumstances under which the same was published, and to the conduct of the complainant in reference thereto, with a view to the exercise of the discretion of the said alderman as to whether he should or should not commit the defendants for trial; and commanding him further to hear all evidence on cross-examination of the complainant and his witnesses going to the credit of the said witnesses;

B

The Queen v. Carden, Q.B.

and to bind over the witnesses to appear at the trial.

The information against the defendants was under section 5 of Lord Campbell's Act (6 & 7 Vict. c. 96), of publishing a false and defamatory libel only, and there was no charge under section 4 of having published it knowing it to be false. The libel in great measure had reference to the conduct of the complainant as proprietor of the *Daily Telegraph* newspaper.

From the affidavits it appeared that the question raised before the magistrate arose upon the contention of the defendants that they had a right to prove that the libel was true in substance and in fact, and that it was for the benefit of the public that it should be published. The magistrate, on the authority of *The Queen v. Townshend* (1), declined to permit the defendants to continue their cross-examination or to call witnesses to establish either of those points.

A rule *nisi* for the mandamus having been granted on November 4th by Field, J., and Manisty, J.,

Sir John Holker (Attorney-General), Sir H. S. Giffard (Solicitor-General), Serjeant Ballantine and Poland now shewed cause for the prosecutor.—The question is really whether a defendant is at liberty, when charged with publishing a defamatory libel, to prove before the magistrate that it is true and for the benefit of the public. It was argued that he has this right by virtue of section 3 of 30 & 31 Vict. c. 35. But that Act did not make any change in the class of evidence to be received, it only provided for the binding over of any witnesses which an accused person might have; the inquiry must still be into relevant matter. Now in *The Queen v. Townshend* (1) it was decided that evidence of the truth of a libel was irrelevant on the hearing of a criminal charge before a magistrate; and it is an error to say that that case was overruled in *Ex parte Ellissen* (2). The latter case was a charge under section 4 of Lord Camp-

bell's Act, where the charge in the information was of publishing a libel knowing it to be false. So that there the truth was material to the charge; but under section 5 no question of truth arises until the defendant is in a position to take advantage of the statute (3). Now before Lord Campbell's Act a man was not allowed at his trial to prove the truth of the libel; but it was thought then that, under certain safeguards, he might be allowed to do so. Lord Campbell's judgment in *The Queen v. Newman* (4) shews what was the intention of the Act. This gave no general right to raise the defence before the magistrate, for it was not constituted a defence before him on the preliminary inquiry, and he has no jurisdiction to pronounce upon it.

(3) 6 & 7 Vict. c. 96, s. 4. "And be it enacted that if any person shall maliciously publish any defamatory libel knowing the same to be false, every such person being convicted thereof shall be liable to be imprisoned for any term not exceeding two years, and to pay such fine as the Court shall award."

Section 5. "And be it enacted that if any person shall maliciously publish any defamatory libel, every such person being convicted thereof shall be liable to fine or imprisonment or both, as the Court may award; such imprisonment not to exceed the term of one year."

Section 6. "And be it enacted that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matter charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and, further, to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof . . . Provided always that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification . . ."

(4) 1 E. & B. 268; 22 Law J. Rep. Q.B. 156.

(1) 4 F. & F. 1089; 10 Cox C.C. 356.

(2) Q.B. Mich. Term, 1868, not reported. Cf. *Starkie on Libel*, 4th edition, p. 592.

The Queen v. Carden, Q.B.

The magistrate is directed by Jervis's Act (11 & 12 Vict. c. 42), and by Russell Gurney's Act (30 & 31 Vict. c. 35), what to do as to taking evidence. That evidence is to be material to the case, and that must mean material to the issue which he is trying, namely, whether a *prima facie* case is established. No question arises as to justification till after plea.

[LUSH, J.—Could a magistrate on a charge of murder hear evidence of insanity?]

No, nor in mitigation of punishment, where the case was one with which he could not deal summarily. It is manifest how dangerous it would be to compel a magistrate to take evidence on which perjury could not be assigned.

[COCKBURN, C.J.—An accused person might occupy an indefinite time in cross-examination and in calling witnesses, and after all not raise the defence at the trial by pleading the necessary plea.]

And it is to be observed that there is no provision for evidence in rebuttal being given, as would have been the case had the statute intended to admit the evidence contended for.

Then, too, the magistrate could have no guide as to what was involved in the suggested defence, whereas at the trial the defendant is tied down by the plea which he is obliged to place upon the record.

[LUSH, J.—The plea must state the particular facts on which the defendant relies, and I can well conceive that a plea might be had on demurrer for not stating facts which could in law be a justification.]

It is impossible to suppose that the limited and general provisions in Russell Gurney's Act can overrule the express provision in Lord Campbell's Act, under which alone the defence can be set up (5).

J. E. Gorst (Lumley Smith with him), for Sir R. Carden.

(5) 30 & 31 Vict. c. 35. s. 3. "... And if the accused person shall call or desire to call any witness or witnesses such justice or justices shall in the presence of such accused person take the statement on oath of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing."

O. Russell, Wildry Wright and Macdonnell, in support of the rule.—The first proposition on the part of the defendants is, that the magistrate is compellable to hear evidence on cross-examination relating to the facts and circumstances of the case; and the second that he was bound by Russell Gurney's Act to hear and bind over all witnesses tendered by the defendants.

It does not affect the defendants' right that the cross-examination and evidence do also have a tendency to prove the truth of the allegation. He may prove the truth of his facts to shew that his comment based on them is a fair one.

The accused is entitled to have evidence for use at the trial, and it is a fallacy to say that because a magistrate has not power to decide he has not jurisdiction to hear. On a charge of murder it might be that provocation could be proved by one witness, and though his evidence could not prevent the magistrate from committing, yet the accused would be entitled to have the evidence given and recorded.

[LUSH, J.—That would be within the jurisdiction of the magistrate, because such evidence might lead to a committal for a minor offence, manslaughter.]

But it is contended that an accused is entitled to give in evidence facts which would go in mitigation generally.

Then before Lord Campbell's Act truth would have been a defence, though no doubt for many years immediately preceding the Act it was not admitted to be so. The last case was in 1720; and Lord Campbell's speech (66 *Hansard*, p. 200), in introducing his bill, shews that he recognised the fact.

It becomes important to trace the growth of the magistrate's power and jurisdiction in taking evidence. From 1 & 2 Ph. & M. c. 13, followed by 2 & 3 Ph. & M. c. 10, it appears that a magistrate had a right to go into the facts and circumstances of the case, and the Act 7 Geo. 4. c. 64. ss. 1, 2 and 3, implies that the accused can test the evidence by cross-examination generally, in felonies and misdemeanours, which the magistrate has no power to deal with finally.

The Queen v. Carden, Q.B.

[COCKBURN, C.J.—That is entirely with a view to his saying whether the accused should be tried or not; the magistrate has nothing to do with deciding whether at the trial the accused shall be compelled to plead justification or not.]

Then by Jervis's Act (11 & 12 Vict. c. 42. s. 17) as a witness may be cross-examined to credit, the accused has a right to have everything taken down of "the facts and circumstances" of the case, not only, that must mean, those which tell against him, but all which would help the Court, which must ultimately decide, to come to their conclusion.

[COCKBURN, C.J.—We shall need authority for that proposition.]

The word material means that which tells on the question of the guilt or innocence of the accused or bears on the character of the offence. There is no limitation as to the questions to be put or evidence given, and Russell Gurney's Act is directly aimed at the perpetuation of testimony. The words "tending to prove the innocence" are wide enough to include evidence of truth, because it is impossible to say that that which eventually will, if established, prove his innocence, has not a tendency to prove it in the earlier stage.

Then the second point which rests wholly on the same Act is based on the intention of that Act to permit an accused person to call all his witnesses at the expense of the country by having them bound over by the magistrate. Section 3 (5) applies in express terms to all indictable offences, and that includes libel. It is, as the statute itself shews, not only evidence on which the magistrate would be able to determine whether to commit or not, but evidence after he shall have made up his mind to commit.

[COCKBURN, C.J.—As to relevancy I do not see any distinction between cross-examination and evidence adduced by the prisoners' witnesses.]

But it is admitted that evidence of truth will be relevant at the trial on plea pleaded, and why is not the defendant to have the advantage which the Act intends to give him, as to having his witnesses bound over to appear?

Anyhow, whether the alleged libel is a

fair comment on the acts of a public man is a relevant question, and would have been a defence before Lord Campbell's Act, although necessarily much of the same evidence would be given as in trying to prove the truth.

[COCKBURN, C.J.—You cannot make a fair comment on false facts: the question is, whether the alleged facts are true.]

Lastly, although the information is under section 5 of Lord Campbell's Act, yet, if the defendant be committed, the prosecutor will be able to indict him under section 4 for publishing the libel knowing it to be false. Thus putting in issue the very point which it is said is not now raised against him.

COCKBURN, C.J.—This, no doubt, is a case of considerable importance, but it is to my mind so clear that I think we ought not to hesitate a moment in at once discharging this rule. Indeed, the application, under the circumstances, for a mandamus, is of a somewhat startling nature. We have undoubtedly jurisdiction where a magistrate, having authority to hear and determine, declines to exercise the jurisdiction he possesses, and thereby interrupts or frustrates justice, by the exercise of our mandatory authority to direct him to hear and determine. But this is an occasion where while a case is in course of hearing, we are asked to interfere and to direct a magistrate as to the course he shall pursue. Now, while we have authority to issue a mandamus to hear and determine, we have no authority to control the magistrate in the conduct of the case, or to prescribe to him the evidence which he shall either receive or reject, as the case may be; therefore, to my mind, it is an anomalous proceeding to call upon us to issue a mandamus while the case is still under discussion. We are not called upon to exercise our appellate jurisdiction. That could only properly be done when the case is at an end, and where such case is subject to our appellate jurisdiction. But we are not now exercising any such jurisdiction. We are called upon to issue a mandamus commanding a magistrate to do a certain thing. There is, no doubt, a precedent

The Queen v. Carden, Q.B.

in the case of *Ex parte Ellissen* (2) for saying that where a magistrate declines to exercise the jurisdiction which he possesses, and thereby obstructs the proper course of justice, this Court may interfere on the ground that he has not heard and determined in the full sense of the term. For my own part, I must say I think in the case that has been referred to here we went to the utmost limits of our mandatory jurisdiction, and I, for one, should be unwilling to extend the principle of that case to any set of circumstances which did not clearly fall within it. But it is said that in this case the magistrate has declined jurisdiction. That is a question which, of course, involves the point whether he had jurisdiction to receive this evidence, and, in my firm and unshaken opinion, he had not. Let us see, first, what is the duty and province of a magistrate when a party is brought before him for the purpose of being committed or held to bail upon a particular charge. The duty of the magistrate is simply to determine upon hearing the evidence for the prosecution, and evidence if it is adduced on the part of the defence, whether there is a case on which the accused ought to be sent for trial. It is no part of his duty or his province to try the case. In considering the guilt or innocence of the accused he has only to see whether there is a fitting case upon which to put the accused upon his trial. That being the issue before him, unless some statutory duty is imposed upon the magistrate, the evidence before him must be confined to that which is alone the question before him. If he exceeds the limits of that inquiry, in my opinion he transgresses the bounds of his duty. Now, in this case the charge is one of libel, and what was it the duty of the magistrate to enquire into? First, to see whether the written matter which was charged to be libellous was on the face of it a libel. Secondly, to see whether the charge of publication was brought home to the accused, or, at all events, so far brought home that he ought to be put upon his trial. It is said that the magistrate has to do more, that it was incumbent upon him to receive evidence to shew the truth of that which, unless the truth were

shewn, was undoubtedly libellous. I meet that proposition with an unhesitating negative. By the common law of England, as settled prior to Lord Campbell's Act, and as it still remains settled independently of that Act, truth, whatever may have been the state of things in ancient times, was not a defence upon a criminal charge of libel. It therefore can only become a defence under the statute to which I have referred; and it can only be a defence under the statute when the statutory conditions have been complied with. A magistrate therefore can only take evidence of the truth of a libel when it is in issue before him under that statute; at common law he could not enter into any such enquiry. But then does Lord Campbell's Act, which introduced so great and important an alteration and innovation in our law in permitting truth to be a defence upon a criminal charge of libel, enable a magistrate to enter upon this new branch of enquiry in a case like the present? Certainly and surely not, because such a defence does not arise at that stage, and it cannot therefore be put forward and insisted upon before the magistrate. I tested that by this most pertinent question, which I put more than once, and to which I have received no satisfactory answer so far as this application is concerned. Suppose Mr. Labouchere had succeeded fully and entirely in shewing the truth of this libel, what would have been the duty of the magistrate? Notwithstanding the truth of the libel and the cogency of the evidence, the magistrate would have been compelled to commit or hold Mr. Labouchere to bail, because it was matter which could not be gone into or decided upon before him. You must first have commitment or holding to bail, next indictment, next pleas, and the pleas must be such as to satisfy the exigencies of the statute—and until you have those pleas upon the record which satisfy the exigencies of the statutory conditions there is no defence which can be raised on the ground of truth. How, then, can a magistrate enter upon an enquiry which is beyond his province and jurisdiction, when, even if the truth were established to the uttermost, he cannot hold his hand, but must commit the

The Queen v. Carden, Q.B.

party, if there is a libel, and if the publication is sufficiently brought home. To my mind, therefore, it is abundantly clear that any enquiry into the truth of these libellous matters was beyond the province of the magistrate, and was wholly irrelevant to the only enquiry which it was competent to him to institute, namely, whether, independently of the statutory defence, which could only be raised at an ulterior stage of the proceedings, the case was sufficiently brought home to the accused to call for commitment or holding to bail. That is my view with regard to jurisdiction. In my opinion the jurisdiction of the magistrate is confined to the enquiry as to whether or not, upon a proper review of the whole evidence before him, for the defence as well as for the prosecution, he arrives at the conclusion that the case is one which he ought to send for trial, and a defence which cannot be raised till afterwards is beyond his jurisdiction to enquire into. Therefore, so far as the truth of the libel was concerned, Sir Robert Carden was quite right in what he did. But then it is said that, although the proof of the truth of the matters contained in this libel would not have been available so as to justify the magistrate in declining to commit the defendant, it might have been received with a view to its being available to him for a collateral purpose, namely, for perpetuating the testimony. Now, I look to the statute and I find no reference to the perpetuation of evidence as a reason why magistrates should receive it. I quite agree that, incidentally, the perpetuation of evidence is a very great advantage which arises from the procedure established by the statutes for the administration of criminal justice in the matter of magisterial enquiries. Indeed, several important advantages result from the system of procedure which has been thus established by statute. First, those who have to frame indictments have before them the evidence contained in the depositions, and are able to frame the indictments in accordance with the precise facts of the case. Then, again, the Judge has the advantage before proceeding to hear the evidence on the trial of making himself more or less familiar

with the "facts and circumstances" of the case. Then there is the great advantage that if there is any material discrepancy between the statements of a witness on the trial and those made before the magistrate, that discrepancy may be pointed out, and the evidence of the witness established or materially shaken, as it ought to be, in such an event. And, lastly, there is the very important advantage that if a witness who has given his evidence before the magistrate dies or is too ill to attend, you have his testimony in a form in which it can be used. But although there are these advantages incidental to this system of procedure, I find nothing in the statute which warrants the conclusion that, because of these advantages, the magistrate can exceed the limits and bounds of his proper jurisdiction, and enter into an enquiry which is *ultra* and foreign to the question whether he shall commit or hold to bail merely to perpetuate such testimony. I see nothing in the circumstances which warrant any such presumption that that was the statutory intention, and still less any language which indicates that that was the intention of the Legislature. Then it is said, lastly, "But this evidence was receivable because it was commenting on the conduct of a public man." Now I really think the fallacy of such an argument is so transparent that it is hardly worth while to occupy a minute of time in exposing its wrongfulness. It is true that if you comment upon given facts which are not in themselves libellous, though your comment be apparently libellous and unjust, it may acquire the character of privilege, because the man of whom you are speaking is a public man. I will illustrate that in this way. Suppose a writer were to state a series of facts—true in themselves, at all events not libellous—of a public man standing before a constituency for election, and to say, "This man is a dishonest politician; he is not a man fit to be trusted with the confidence of the constituency." Well, the comment in itself might be unjust and a libellous comment; but the facts upon which it was founded not being themselves libellous, he would be entitled to say, "Because the individual has put him-

The Queen v. Carden, Q.B.

self forward in a public capacity I am entitled to make comments upon him, which comments are privileged, so long as they are not malicious." But take the converse of the proposition. To say that you may first libel a man and then comment upon the libel is, to my mind, to enunciate that which is so transparent an absurdity that every one must see that it is not worthy of argument. If you say a man is a murderer, and has committed every crime on the face of the earth, and then say, "And therefore I say he is so and so and so and so," you cannot, by calling him a public man, justify comments or justify facts. Now here the fallacy which underlies the whole argument is that there are facts which are stated independently of the comments. It is said that Mr. Lawson is so and so and so and so, and, therefore, he is a disgrace to journalism. Well, it may be that you may speak of a public man as a disgrace to journalism, possibly—I am not expressing any opinion about that as matter of comment—but if you choose to justify a general and sweeping accusation that he is a disgrace to journalism by stating a series of facts, every one of which is in itself libellous, you cannot justify the statement of the libellous facts on the ground that they are comments on a public man. Facts are one thing and comments are another. If your facts are not injurious, and you can show them to be true, it is possible that your comments, if made upon the conduct of a public man, may escape the consequences of libel by reason of the privilege which would attach to them. But your facts must be in themselves not libellous. The statements must be either not libellous, or you must be in a position to prove the facts. But here the facts stated are clearly and unmistakably libellous, unless the truth can be proved. But then the difficulty of proving truth is this—that you cannot prove the truth of that which is libellous until a stage of the proceeding altogether ulterior to the magistrate's jurisdiction, and, therefore, from whatever point of view I look at them, the arguments in this case entirely fail, and we can only arrive at one conclusion, that this defence was not evidence before the magistrate. We may

bear in mind that there is only one ground on which it can be put that the reception of this evidence is urgent at this stage, and that is that the witnesses may die or fall ill whom the accused wishes to call or to cross-examine, but the danger is so remote that we could not be justified in extending the provisions of the statute merely to meet it. Just let me put this case by way of illustration. Suppose, with reference to the duty which, it is contended, is imposed upon the magistrate by Russell Gurney's Act, that Mr. Labouchere, instead of offering this evidence to establish the truth of his statements, had said, "Well I shall not dispute upon the present occasion your duty to commit me or to hold me to bail. This is not the stage at which I shall ask you to receive evidence to prove the truth of the assertions I have made; but I will ask it of you for a collateral purpose. I desire to put it on record in order to perpetuate testimony that I published this libel under circumstances of the greatest possible provocation." Would that have been admissible? Would it have been within the province and duty of the magistrate to receive it? I say emphatically no. It was not within his province, because it had nothing on earth to do with the question whether Mr. Labouchere should be committed or not. That test appears to me to be a complete answer to the able argument by Mr. Russell that Russell Gurney's Act was intended to enable a defendant to obtain evidence and perpetuate evidence by calling witnesses before the magistrate with the view of establishing anything which at any time throughout the whole course of the enquiry, not only before the magistrate, but afterwards on the trial, could possibly have any relevancy or be material to the defence. It is clear that the magistrate could not, for a mere collateral purpose ulterior to the exercise of his jurisdiction, take upon himself to receive evidence which did not go to the only issue before him—namely, whether the case was one which ought to be sent for trial. On these grounds I am clearly of opinion that the rule must be discharged.

LUSH, J.—The argument urged before us in this case raises two questions, which

The Queen v. Carden, Q.B.

I think I ought to keep distinct, because they are distinct. The one is of a general character; the other has reference to this particular case. The first is of great and general importance, as affecting the jurisdiction and practice of magistrates in their investigation of criminal charges and their discretion in dealing with accused persons brought before them. The contention is that every person brought before a magistrate on a criminal charge has a right to require him to receive evidence which might be serviceable to him on his trial, in case he should be committed for trial, even though the evidence would have no tendency to prove or to disprove the guilt of the party so accused, and even if it only goes to mitigation of punishment. That was the general proposition contended for by Mr. Russell—that whatever evidence was proposed to be adduced, the magistrate was bound to receive it, even though his only duty was to determine whether a sufficient case had been established for committing the defendant for trial or holding him to bail. So far as I am aware, it is the first time such a proposition has been urged, and it is one for which I can find no authority, nor even any dictum giving it sanction. Mr. Russell based his argument upon particular phrases to be found in two Acts of Philip & Mary, in 7 Geo. 4, in Jervis's Act, and again in Mr. Russell Gurney's Act, and he endeavoured to support it by considerations of convenience, inconvenience and hardship in certain events, I may say that considerations of inconvenience occur to one on the other side, if such an argument is to prevail; but of course all such considerations can have no weight with the Court if they are inconsistent with the provisions of the statute. The phrase first occurs in the Act of Philip & Mary, which required that in the case of felony the justices shall take the examination of the prisoner and information of them that bring him in of the fact and circumstances thereof; and the same or as much thereof as shall be material to prove the felony shall be put in writing, before admitting him to bail. The magistrate is therefore to hear all the facts, so as to collect what is material from

them. Another Act of the same reign extended that provision to cases where the prisoner was committed and not bailed; and the Act 7 Geo. 4, using the same language, further extended them to misdemeanours. It became the duty of the magistrates under these statutes to record so much evidence as was material to prove the guilt of the party accused. Then came Jervis's Act, which by section 17 provided that the evidence of the fact and circumstances of the case so taken in writing—and it must be remembered that at that time what the justice had to put into writing was what was material to the issue before him—might be read at the trial in case of the death, absence or illness of the witness who gave it. Then came Mr. Russell Gurney's Act, which provides for the first time for taking the evidence on behalf of the prisoner, and upon this it was argued that its object was to perpetuate the evidence for the prisoner's benefit. But it appears to me that the 3rd section shews that it was intended to remedy a grievance of poor persons who had previously to go to the expense of subpoenaing their witnesses, in order to get them at the trial. Complaints had—the Act stated—been frequently made as to the injustice done to accused persons who, by reason of their poverty, were not able to summon witnesses on their trial; and it provided that they might be called before the magistrate, give their evidence, and be bound over to appear on the trial. They could, however, be examined or cross-examined only as to facts and circumstances material to the defence or tending to prove the innocence of the accused person. The statute excluded the taking of evidence as to character, and yet that may be very important, as also evidence in mitigation of punishment. If, as Mr. Russell says, a person accused may have witnesses to prove anything that might be serviceable at his trial, why does the provision exclude witnesses to character? The reason is, that they must be witnesses material to the case—of the prisoner that may be—or tending to prove his innocence. These two expressions are on purpose to point to the two kinds of defence that may be raised

The Queen v. Carden, Q.B.

—one in reduction of the crime, the other in establishing innocence. A man might be charged with murder, and he was at liberty, if he could do so, to adduce evidence which would reduce the crime to manslaughter; or with robbery with violence, which by evidence he might reduce to the lesser offence; or with aggravated assault, which he might by evidence shew to have been a common assault. If a party were charged with having published a defamatory libel, well knowing it to be false, he might by evidence reduce the offence to the minor charge of having published a defamatory libel. All such evidence would be material to the case of the accused, though not proving his innocence. Those are the only statutes, and there is nothing in the later ones to widen the field of enquiry. Evidence is to be received on the one hand to prove the guilt, on the other to prove the innocence or rebut the presumption of the guilt of the accused.

Then as to the alleged object of the statutes being to perpetuate testimony, that point has been fully dealt with by the Lord Chief Justice. Perhaps at common law the deposition of a witness who had died might have been admitted at the trial; but it is to be observed that now the provision for the reading of the deposition is of a very limited character, for if a witness runs away his deposition cannot be read. One object of having the deposition was for the information of the prisoner himself, and another for the information of the Judge who might try him; but whatever be the various objects the language of the Act excludes all evidence not material to the case or tending to prove the prisoner's guilt or innocence.

Then, as to the particular proposition, it was urged that the magistrate had wrongly refused to receive evidence as to the truth of the alleged libel; and in comparing the affidavits made by Mr. Labouchere and Sir Robert Carden, I cannot doubt that that involves the question which the parties came before us to have decided. I therefore come to the question whether, on a charge of publishing a malicious libel, it is com-

petent to prove more than publication, and that the party making the charge is the person referred to in the alleged libel. Now, it is perfectly clear that up to the time of the passing of Lord Campbell's Act the truth of a libel was no defence at all. That Act made an alteration in the law, and under certain conditions it enabled a person charged with publishing a defamatory libel to rely for his defence on the truth of the libel. But it expressly provided that the question of the truth of the libel should be raised by plea, and the plea can only be had recourse to after committal. It has been said—and it is unfortunately true—that if the defendant here should be committed for trial or held to bail, he may, though charged under the 5th section of Lord Campbell's Act, be indicted under the 4th section. I hope the law will be altered in that respect; but the question we have to decide is what is the law now as to the taking of evidence on the preliminary enquiry on a charge founded on the 5th section of the Act. If the defendant had been charged with having published a defamatory libel, well knowing it to be false, he would be entitled to adduce evidence to shew that he had no such knowledge, and thus indirectly of proving the truth of the libel; but on a charge of publishing a defamatory libel, justification as to the truth of the libel can only be grounded upon a plea; and it is optional to a defendant when he comes to take his trial so to defend himself or not; but if he does, he must not only state that the publication of the alleged libel was for the public benefit, but the facts on which he relies to bear out that assertion. The case of *Ex parte Ellisson* (2) has been relied on as overruling that of *The Queen v. Townshend* (1), but I think it is to be regretted that the learned editor of the book in which it is so stated had not made enquiry at the Crown Office, for he would then have seen that the two cases had been similarly decided, and persons would not have been misled by supposing that the one had overruled the other. In my opinion those two cases were perfectly well decided, and, therefore, that in this case the rule

The Queen v. Carden, Q.B.

for a mandamus ought to be discharged with costs to both parties.

MANISTY, J.—As I took part in granting this rule I think it right to say that it was not owing to any doubt entertained either by my learned brother, Mr. Justice Field, or myself, as to the law of the case that we granted the rule. We entertained no doubt; but, having regard to that which is now admitted on all hands to be the fact—namely, the importance of the case—we thought it better, more expedient, that a rule *nisi* should be granted, in order that the matter should undergo such discussion as it has undergone—full, exhaustive, and elaborate as it has been—and be solemnly decided in order that there might be no doubt or difficulty in future. Having said so much, my observations on the case will be very short. Agreeing as I do with the exhaustive judgment of the Lord Chief Justice, supplemented in some very important points as regards the general administration of the law by Mr. Justice Lush—agreeing as I do with the principles they have enumerated and the conclusions at which they have arrived—I have little to add to what has been said. I have little to add because it seems to me quite sufficient to found my judgment on the statute itself—I mean Lord Campbell's Act. In that statute will be found, as I take it, the answer to this application. We need go no further. Now, it cannot be doubted that until the passing of Lord Campbell's Act the magistrates had no jurisdiction whatever to enter into the question of the truth or falsehood of a libel, and even under the 5th section of the Act charging simply a defamatory libel—the section under which these proceedings are brought—evidence as to the truth of a libel cannot be given before a magistrate. Therefore, it was decided—rightly decided, as it seems to me—in the case of *The Queen v. Townshend* (1), that if a magistrate, on the preliminary inquiry, went into evidence as to the truth of the libel, he went into evidence that was not relevant to the matter before him, and that the evidence so given could not be made the subject of an indictment for perjury at any stage of the case, either before or after the trial. The depositions would be

simply so much waste paper. Therefore, it seems to me that to compel a magistrate to take evidence irrelevant to the issue before him would be simply going through a mockery—a hollow mockery. But it is said that the evidence might be useful to the defendant afterwards at the trial, if only in mitigation of punishment. Well, that could not at any time have been held, and even affidavits as to the truth of a libel after trial or after conviction cannot be received. Indeed ever since the great case of *The King v. Sir Francis Burdett* (6) affidavits as to truth never have been received. They have always been rejected. It is only when a person charged with libel has complied with the 6th section of Lord Campbell's Act that the question can be gone into. It is now open to a person to plead the truth of the matter charged, but at the same time he must establish that it was for the benefit of the public that the matters so charged should be published; and it is only when that plea has been entered—guarded as it is—that the question can be gone into. It is, in fact, specially enacted that the matters charged shall not be enquired into without such plea. In this case the defendant has had no opportunity of legally entering such a plea—the enquiry has not yet arrived at the stage for it; and if the magistrate were to receive the evidence he would be going beyond the limits of his jurisdiction. In my opinion it is only necessary to refer to the common law, and to the provisions contained in the 6th section of Lord Campbell's Act, to find ground for discharging this rule upon the point of the reception of evidence as to the truth of the matter. And there I might well conclude what I have to say; because any one looking at the affidavits will see that that was the only question which the magistrate intended to be presented to the Court. Several other points, however, have been raised, on only one of which will I comment. It has been urged that the defendant was entitled to a mandamus on the ground that the evidence he desired to be received would tend to shew that the libel was a fair comment on the

(6) 4 B. & Ald. 95.

The Queen v. Carden, Q.B.

public acts of a public man. Well, with regard to some of the passages of that libel—and only some have been mentioned—I should have thought that, after hearing them, it required some courage to say that any magistrate could be asked to receive evidence to lead him to the conclusion that that which the libel itself shews is not true was true—namely, that that libel, consisting as it does of what I venture to say may fairly be characterised as vulgar, coarse abuse and vituperation, and that of a very remarkable and extreme character, could for one moment by any sensible person be treated as fair comment upon the public conduct of a public man. And, if the question was before us whether a mandamus should issue to compel the magistrate to receive evidence to contradict that which on the face of the libel itself is manifest and transparent, if we granted such an application we should be simply ordering him to do that which is revolting to common sense, and which, it seems to me, would bring scandal upon that high prerogative writ of mandamus—that we should really be offering, in the name of the Queen, an insult to the understanding and the common sense of the magistrate to whom it was directed. Therefore, it seems to me to be only necessary to look at the libel itself to say that this Court could never entertain the suggestion of issuing a mandamus compelling the magistrate to receive evidence that the matter charged in this case constituted a fair comment on the public acts of a public man.

Rule discharged.

Solicitors—A. T. Cox, for complainant; T. J. Nelson, the City Solicitor, for Sir R. Carden; H. Kimber & Co., for defendants.

[CROWN CASE RESERVED.]

1879. }
Dec. 6. }

THE QUEEN v. MARTIN.*

Forgery—Fictitious Christian Name.

The prisoner in payment for a pony and cart purchased by him from the prosecutor, drew a cheque, in the presence of the prosecutor, upon a bank in which he, the prisoner, had no account, in the name of William Martin, his real name being Robert Martin, and gave it to the prosecutor as his, the prisoner's, own cheque drawn in his own name. The prosecutor received it in the belief that it was drawn in the prisoner's own name:—

Held, that as the prisoner gave the cheque entirely as his own, his subscribing it by a fictitious name did not make it a forgery, the credit having been wholly given to himself, without any regard to the name, or any relation to a third person.

Dunn's Case (1 L. C. C. 59) followed.

CASE reserved by Cockburn, C.J.

The prisoner Robert Martin was tried on an indictment which charged him in one count with having forged, and in another with having uttered, a forged order for the sum of 32*l.* with intent to defraud. The facts were as follows:—

The prosecutor George Lee is a horse-dealer at Ashford in Kent. The prisoner Martin had been for many years collector of the tolls of the markets of Ashford and Maidstone, and was well known to the prosecutor. In the course of the present year, the prisoner, having ceased to hold the above-mentioned offices, left the neighbourhood and went to reside in Southwark. On the 2nd of September, being again at Ashford, for what purpose did not appear, he saw the prosecutor Lee in the street in a pony-cart, and accosted him, enquiring if he (Lee) had a pony for sale, whereupon the prosecutor recommended him to buy the pony he was then driving. A deal ensued, the result of which was that the prosecutor agreed to sell, and the prisoner to buy, the pony and carriage for 82*l.*

The prisoner proposing to give his cheque for the amount, both parties went

* *Coram* Cockburn, C.J.; Lush, J.; Huddleston, J.; Lindley, J.; and Hawkins, J.

The Queen v. Martin, C.C.R.

into an adjoining inn in order that the cheque might be there drawn. The prisoner then produced a printed form of cheque of the bank of Messrs. Wigan & Co., bankers of Maidstone, taken from a cheque-book of which he had become possessed as a former customer of the bank. This he filled up in the presence of the prosecutor, with the name of the latter as payee, signed it in the name of William Martin, his name being Robert, and delivered it to the prosecutor, who put it in his pocket without further looking at it or observing in what name it was signed, after which he proceeded to give possession of the pony and carriage to the prisoner. On the ensuing morning the prisoner drove the pony and carriage to town, and on the day after drove to Barnet Fair, where he sold both. On the cheque being presented at Messrs. Wigan's bank, payment was refused on the ground that the signature was not that of any customer of the bank.

The prisoner had been a customer of the bank, and had had an account there in his proper name of Robert Martin; but his account remaining overdrawn for some time after he had ceased to be the collector of the market tolls, and the bank insisting on the balance due to them being paid, the amount was accordingly paid on the 4th of June, and the account was then closed. No money was afterwards paid in to the prisoner's credit, nor was any cheque drawn by him. He asserted, indeed, in his defence on this charge that he had expected money to have been paid in to his account, but no evidence was adduced to shew that there was any foundation for this statement. No name was mentioned of any person owing him money or by whom he expected money to be paid into the bank on his account. He had ceased to all intents and purposes to be a customer of the bank, and must have been fully aware that a cheque drawn by him on the bank would certainly be dishonoured.

Under these circumstances there can be no doubt that the prisoner had been guilty of the offence of obtaining the prosecutor's goods by false pretences. But the indictment being for forgery of

the cheque, and it appearing to me doubtful whether the charge of forgery could upon the facts proved be upheld, I reserved the case for the consideration of the Court.

In considering this question I have further to call attention to the following facts:—

The prisoner in drawing this cheque and delivering it to the prosecutor, did not do so in the name of, or as representing, any other person, real or fictitious. The cheque was drawn and uttered as his own, and it was so received by the prosecutor, to whom the prisoner was perfectly well known as an acquaintance of twenty years' standing, and by whom he was seen to sign it. The prisoner did not obtain credit with the prosecutor by substituting the Christian name of William for that of Robert. He would equally have got credit had he signed his proper name of Robert. The credit was given to the prisoner himself, not to the name in which the cheque was signed; the cheque was taken as that of the individual person who had just been seen to sign it, not as the cheque of William Martin as distinguished from Robert Martin, or of any other person than the prisoner. On the contrary, if the prosecutor, who knew the prisoner's name to be Robert, had observed that the signature was in the name of William, he would in all probability have suspected something wrong, and would have refused to take the cheque.

There was nothing whatever from which the motive of the prisoner in signing a wrong Christian name could be gathered. There happened, indeed, to be a William Martin a customer of the bank, but this was unknown to the prisoner; besides which, as the prisoner was perfectly aware that his person and true name were well known to the prosecutor, it could not be supposed that he intended to pass himself off as, or the cheque as the cheque of, any William Martin other than himself. The only motive which has occurred to my mind as one which might have induced him to sign a false Christian name is, that he may have thought that by so doing he might avoid being liable on the cheque

The Queen v. Martin, C.C.R.

when payment had been, as it was certain to be, refused. This, however, amounts to no more than conjecture. Be it as it may, and whatever may have been the motive, it occurred to me that while there had been a fictitious signature to the cheque in question, so far as the Christian name was concerned, yet the signature having been affixed by the prisoner, and the cheque delivered by him as his own, though there had been a signature in a fictitious name, the name could not be said to be that of a fictitious person, and that in this respect the case did not fall within the principle of the cases in which it has been held that the use of the pretended name of a fictitious person amounts to forgery. I have, therefore, sought the assistance of the Court as to whether, under the circumstances, the affixing a fictitious Christian name to this cheque by the prisoner amounts to forgery as charged in the indictment.

No counsel appeared to argue the case.

HAWKINS, J., referred to *Dunn's Case* (1).

COCKBURN, C.J.—This case is concluded by authority, independently of which I entertain no doubt. In *Dunn's Case* (1) it was resolved by the Judges that "in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person." The conviction must therefore be quashed.

The other Judges concurred.

Conviction quashed.

(1) 1 L. C. C. 69.

[CROWN CASE RESERVED.]

1879. }
Nov. 22. } THE QUEEN v. WILSON.*

Debtors Act, 1869 (32 & 33 Vict. c. 62. s. 12)—*Adjudication of Bankruptcy—Infant—Trade Debts—Infants Relief Act, 1874* (37 & 38 Vict. c. 62, s. 1).

The prisoner was convicted under section 12 of the *Debtors Act, 1869* (32 & 33 Vict. c. 62), for that he, within four months before the presentation of a bankruptcy petition against him, upon which he was adjudged bankrupt, quitted England, taking with him property to the amount of 20l. which ought by law to have been divided amongst his creditors. The prisoner, who traded in Hull, left England with a sum of money exceeding 20l., and was during his absence adjudged bankrupt. At the time he was so adjudged he was, as also at the present time, a minor. The debts proved against his estate in the bankruptcy were trade debts, and it did not appear that any debts for necessities supplied to him existed:—

Held, that the conviction could not be upheld, because the prisoner had no creditors amongst whom the said sum of money ought by law to have been divided, the trade contracts being, by the *Infants Relief Act, 1874* (37 & 38 Vict. c. 62. s. 1), void (1).

CASE reserved by the Recorder of Hull.

The prisoner was tried on an indictment under the 12th section of the *Debtors Act, 1869* (2), charging him

* *Coram* Cockburn, C.J.; Huddleston, B.; Lindley, J.; Manisty, J.; and Hawkins, J.

(1) See further *Ex parte Kibble*, 44 Law J. Rep. Bankr. 63; Law Rep. 10 Ch. App. 373; and *Re Lynch*, 45 Law J. Rep. Bankr. 48; Law Rep. 2 Ch. D. 227.

(2) 32 & 33 Vict. c. 62. s. 12: "If any person who is adjudged a bankrupt, or has his affairs liquidated by arrangement, after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England, and takes with him . . . any part of his property to the amount of 20l. or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony."

The Queen v. Wilson, C.C.R.

with having feloniously, within four months before the presentation of a bankruptcy petition against him, quitted England, and taken with him his money, to the amount of 20*l.* and upwards, which ought by law to have been divided amongst his creditors, with intent to defraud. The prisoner traded in Hull as a Baltic merchant. On the 19th of October, 1878, he drew out of his bankers' hands at Hull the sum of 128*l.* in cash, and on the 27th of the same month quitted England for Sydney, and arrived at the latter place on the 2nd of February, 1879.

On the 30th of November, 1878, within four months of the prisoner having quitted England as aforesaid, a petition in bankruptcy was presented in the local Court of Bankruptcy at Hull against him, and he was on the same day adjudicated a bankrupt. At the time the prisoner was so adjudicated a bankrupt he was on the high seas on his way to Sydney. On the 3rd of February, 1879, the prisoner was apprehended at Sydney, and charged with this offence, and he then gave up to the officer apprehending him the sum of 96*l.* in gold and notes, and confessed to him that it was part of the money he had taken with him when he quitted England.

The debts proved against the estate were all trade debts, and contracted by the prisoner in his trade as a Baltic merchant. No debts for necessities were proved against the estate, nor was it shewn that any debts for necessities existed. The file of the proceedings in the said Bankruptcy Court was put in evidence, and amongst them was the order of adjudication of the prisoner to be a bankrupt, dated the 30th of November, 1878.

On the prisoner's part it was proved before me that the prisoner was born on the 13th of March, 1859. He was consequently a minor at the time of the aforesaid adjudication of bankruptcy, and at the time when he contracted the aforesaid debts which had been proved against his estate; and it was contended on his behalf that by reason of his infancy the said proceedings in bankruptcy were void; that he had not and could not have any creditors within the meaning of the 12th

section of the Debtors Act, 1869, amongst whom the property which he took away with him ought by law to be or to have been divided, inasmuch as since the Infants Relief Act, 1874 (3), contracts by infants, except for necessities, are void; and that the prisoner was never liable at law or in equity for the said debts contracted during his infancy, and could not have creditors in respect of them.

The jury convicted the prisoner, and the question reserved for the Court was whether, under the circumstances stated, the prisoner ought to have been convicted.

Oyrl Dodd, who appeared for the prisoner, was stopped by the Court.

Gorst (The Attorney-General, Sir John Holker, with him), for the prosecution, admitted that the conviction could not be sustained, because the prisoner had no creditors amongst whom the said sum of money ought by law to have been divided, the trade contracts being by the Infants Relief Act, 1874 (3), void.

COCKBURN, C.J.—We are all agreed that this conviction cannot be sustained.

Conviction quashed.

Solicitors—The Solicitor to the Treasury, for the prosecution; E. Laverack, Hull, for the prisoner.

(3) 37 & 38 Vict. c. 62, s. 1: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

[IN THE QUEEN'S BENCH DIVISION.]
 1879. } DANBY (appellant) v. HUNTER
 Nov. 28. } (respondent).

Highways—Name of Owner of Cart, when to be painted on it—Highway Act, 1835 (5 & 6 Will. 4. c. 50), s. 76—“Cart”—Customs and Inland Revenue Duties Act, 1869 (32 & 33 Vict. c. 14), ss. 18 and 19.

A light spring cart used by the maker of agricultural implements for conveying them to market as well as for driving himself and family from place to place, and on which he paid a tax under 32 & 33 Vict. c. 14, s. 18, is not a “cart” within the meaning of section 76 of the General Highway Act, 1835 (5 & 6 Will. 4. c. 50), so as to make it necessary for the owner's name to be painted thereon.

CASE stated by justices under 20 & 21 Vict. c. 48.

At the Petty Sessions holden at the justice room in the parish of Wrawby, in and for the division of Brigg, in the parts of Lindsey, on the 3rd day of June, 1879, an information and complaint preferred by Thomas Danby (hereinafter called the appellant) against George Hunter (hereinafter called the respondent) under section 76 of the Act, 5 & 6 Will. 4. cap. 50 (1), charging for that

(1) 5 & 6 Will. 4. c. 50, s. 76:—“And be it further enacted that the owner of every waggon, cart or other such carriage, shall paint or cause to be painted in one or more straight line or lines upon some conspicuous part of the right or off-side of his waggon, cart or other such carriage, or upon the off-side shafts thereof, before the same shall be used on any highway, his Christian name and surname, or the style and title by which he is commonly designated, and the place of his trade or abode, or the Christian and surname and place of trade or abode of a partner or owner thereof at full length in large legible letters in white upon black or black upon white, not less than one inch in height, and continue the same thereupon so long as such waggon, cart or other such carriage shall be used upon any highway; and every owner of any waggon, cart or other such carriage who shall use or allow the same to be used on any highway without the name and

he, the respondent, on the 1st day of May last, at the parish of Wrawby in the parts aforesaid, then being the owner of a certain cart, unlawfully did use the same on a certain highway there situate called Wrawby Street without having then and there, and before the same was so used, his name printed thereon as required by the statute in that behalf, was heard and determined by us, and upon such hearing we dismissed the said information and complaint.

Upon the hearing of the said information and complaint it was proved on the part of the appellant and found as a fact that the respondent was the owner of a cart, and did use the same on the highway in question without having his name painted thereon, but on the part of the respondent it was contended that the cart which he so used was not such a “cart or other carriage” as was contemplated by the statutes. It was proved by the respondent and admitted that the cart was a light spring cart used by the respondent in his trade as an agricultural implement maker, and for which he paid the annual duty of 15s. imposed by the statute of 32 & 33 Vict. c. 14, s. 18 (2),

description painted thereon as aforesaid, or who shall suffer the same to become illegible, or who shall paint or cause to be painted any false or fictitious name or place of trade or abode on such waggon or cart or other such carriage, shall forfeit and pay on conviction for every such offence a sum not exceeding 40s. with or without costs as the justices before whom such conviction shall take place shall think fit.”

(2) The Customs and Inland Revenue Duties Act, 1869, 32 & 33 Vict. c. 14.

By section 18, a duty is imposed on “every carriage.”

By section 19, sub-sect. 6: “The term ‘carriage’ means and includes any vehicle drawn by a horse or mule, or horses or mules, except a waggon, cart or other vehicle used solely for the conveyance of any goods or burden in the course of trade or husbandry, and whereon the Christian name and surname and place of abode or place of business of the owner, or the name or style and principal or only place of business of the company or firm owning the same, shall be visibly and legibly painted in letters of not less than one inch in length.”

Danby v. Hunter, Q.B.

on every carriage with less than four wheels. The respondent, it was admitted, used the said cart frequently for conveying agricultural implements to markets as well as for driving himself and his family from place to place. We, however, being of opinion that the cart in question being a light spring cart, for which the respondent took out an excise license, was not a cart within the meaning of the 76th section of the statute of 5 & 6 Will. 4. c. 50, dismissed the said information and complaint.

The question of law arising on the above statement for the opinion of this Court therefore is, whether the said cart used by the respondent as above-mentioned was such a cart as comes within the meaning of the section of the statute 5 & 6 Will. 4. c. 50, and whether the said dismissal is valid or otherwise, and the Court is humbly solicited, according to the power vested in the Court by the said statute 20 & 21 Vict. c. 43, to remit the case to us, the said justices, with the opinion of the Court thereon, or to make such other order as to the Court may seem fit.

Lumley, for the appellant.—The magistrates were misled by referring to the Assessed Tax Acts; it does not by any means follow that because duty is paid on a vehicle the owner is exempted from the provisions of the Highway Act as to having his name painted on it. The object of the latter was to enable the authorities at once to discover a person who might have subjected himself to penalties under the Act. The assessed taxes were imposed on luxuries, and vehicles used solely for business purposes were exempted, but the imposition of, or exemption from, duty, is quite independent of the express requirement in the Highway Act that the name shall be on every waggon, cart or other such carriage. This was a cart used in the way of business for carrying agricultural implements; and the justices cannot, by calling it a light spring cart, take it out of the statute.

No counsel appeared for the respondent.

LUSH, J.—I think that the justices were quite right. The question is, in what sense is the word "cart" used in the Highway Act? Now section 76 is as follows (1). [His Lordship read the section.] I think that this is a description of vehicles which carry heavy goods and go slowly along the road. It cannot, in my opinion, extend to gigs, dog-carts or gentlemen's carriages. I think also that the Inland Revenue Duties Act does throw some light upon the matter, especially when we remember that under the older Acts there were certain provisions in reference to what were called tax carts. There being in section 19 an exemption in favour of carts used solely for the conveyance of goods, we have it found in the present case that this was used for the conveyance of the respondent and his family from place to place, as well as for carrying agricultural implements. The latter must have been of small dimensions, as it is also found that this was a light spring cart, and, moreover, the tax was paid on it as a carriage. I do not see why any gig or dog-cart should not be within the Act if this is, but I am of opinion that it was not a cart or other such carriage within section 76.

MANISTY, J.—I also think that the justices were right. At any rate, I cannot see that they were wrong. The Assessed Taxes Act deals with carriages, not carts, and this vehicle paid tax under its provisions.

Appeal dismissed.

Solicitors—Swann & Co., agents for Tweed,
Stephen & Co., Lincoln, for appellant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } HALL (appellant) v. HOPWOOD
Dec. 3. } (respondent).

Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, r. 1 — Insufficient Ventilation in Mine—Expense of Alteration—Information—Liability of Manager.

By the Coal Mines Regulation Act, 1872, (35 & 36 Vict. c. 76), s. 51, it is provided that, in the event of any contravention of the general rules set out in that section, the owner, agent, and manager shall be each guilty of an offence, unless he proves that he has taken all reasonable means to prevent such contravention.

The first of such general rules provides that an adequate amount of ventilation shall be constantly produced in every mine to render harmless noxious gases, so that the working places of the shaft of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein.

The respondent, who was a certified manager of a colliery mine, at a salary of 11. per week, was charged with an offence under section 51, rule 1. It was proved that the mine was improperly ventilated, and that the respondent might have improved the ventilation with the resources at his disposal, but that the requisite provision for the proper ventilation of the mine would have involved an outlay of 200l. :—Held, that the finding of the justices, that the respondent had omitted to employ the resources at his disposal for the improvement of the ventilation of the mine, disclosed an offence under section 51, for which he was liable to be convicted.

CASE stated under 20 & 21 Vict. c. 43.

At a Petty Sessions holden at Mold, on the 2nd of December, 1878, an information was preferred by the appellant against the respondent, under section 51 of the Coal Mines Regulation Act, 1872, for having, on the 12th of October, 1878, as manager of the Alyn Colliery, neglected to cause an adequate amount of ventilation to be constantly produced in the mine, so as to dilute and render harmless noxious gases, to such an extent that the working places of the shafts, levels, stables and workings of such mine, and the travelling roads to

and from such working places, should be in a fit state for working and passing therein (1).

The respondent was the certified manager of the Alyn Colliery.

The seam of the colliery in which the breach was alleged to have occurred was the main coal seam, ten feet thick, and the mine had an upcast and downcast shaft.

On the 12th of October, 1878, an inspector went underground in the main coal seam, and on inspecting the workings in the colliery noticed that the lamps hung therein were burning very dimly, and that this was caused by the presence of a large quantity of carbonic acid gas, commonly known as "black-damp." On proceeding to the working places at the bottom of the incline, a distance of from 400 to 500 yards from the pit's mouth, the ventilation was so bad with "black-damp," that it was impossible to keep a candle lighted there, and the inspector noticed that the candles of three men who were working there kept going out from the same cause, notwithstanding that the faces of these working places were

(1) By the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, it is enacted that "An adequate amount of ventilation shall be constantly produced in every mine, to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables and workings of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein. . . ."

"Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act; and in the event of any contravention of, or non-compliance with, any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance."

D

Hall v. Hopwood, Q.B.

only five or six yards from the main air current. This current was so weak from want of a proper system of ventilation as to be utterly useless for its intended purpose, the only obstacle to prevent the air which came down the downcast shaft from passing direct to the upcast shaft without passing through or ventilating the workings, being a canvas cloth hung across the main roadway. By the frequent passage of tubs through this cloth, the lower part of it was torn very much, and the air passed up by the upcast shaft instead of going round the workings.

The justices found that the requisite provision for properly ventilating the mine would have involved an outlay of 200*l.*, but that the respondent might have improved such ventilation with the resources at his disposal.

The respondent received 1*l.* a week as salary for his services in the colliery in question, and was the certified manager of another colliery in the same neighbourhood. It also appeared that a Mr. Meldram was one of the owners of the Alyn Colliery, and a director acting in the daily management thereof, and that the respondent had advised him and the other directors that a perfect system of ventilation was required, and that the cloth funnel in the main roadway was quite inadequate for the purpose of obstructing the air in a seam of coal of the thickness in question.

It was contended by the respondent that he was a mere paid servant of the company, not liable, under any circumstances, for the complaint laid, or at all events, if a manager, only to the extent of the means provided for him by his employers.

The appellant contended that the respondent, as manager, was directly liable by virtue of the Coal Mines Regulation Act, 1872, in respect of such contravention or non-compliance.

No evidence was called on the part of the respondent, whose evidence could not be taken under the Act.

The justices considered the defendant could not be held responsible for keeping the mine properly ventilated, seeing that it involved an outlay of 200*l.*, and that, as he had done his duty by complaining

to the resident managing director, the proceedings ought to have been taken against the owners of the mine; accordingly they dismissed the information.

The question for the opinion of the Court was whether, upon the above facts, the respondent had committed any offence against the Coal Mines Regulation Act, 1872.

Gorst (A. L. Smith with him), for the appellant.—The justices were wrong in dismissing the information, for their finding shews that there was a contravention of rule 1, for which the respondent was responsible. They cited *Wynne v. Forrester* (2) and *Baker v. Carter* (3).

Marshall, for the respondent.—The information was properly dismissed. Even if the respondent was a manager at all within the meaning of section 51, it was no part of his duty to provide for the proper ventilation of the mine, and the finding of the justices shews that he did all that was required of him.

COCKBURN, C.J.—I confess I think it clear, upon the facts stated, that the respondent is legally liable. One of the rules appended to the 51st section of the Coal Mines Regulation Act, 1872, provides that there shall be an adequate amount of ventilation in every mine, and there is a proviso that neglect to comply with the rule, when proved, shall render the owner, agent, and manager liable to a penalty, "unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing," the rule as a regulation of a mine. Here it is found as a fact that the ventilation was inadequate, and the only question which we have to decide is how far the responsibility rests with the respondent. No doubt it is the duty of the owner of a mine, in the first instance, to provide proper ventilation, and the manager who has to share the responsibility cannot reasonably be expected to expend his own funds. The statute, therefore, does

(2) 48 Law J. Rep. M.C. 140.

(3) 47 Law J. Rep. M.C. 87; Law Rep. 3 Ex. Div. 132.

Hall v. Hopwood, Q.B.

not render it necessary that the latter should spend his own moneys in providing the requisite machinery to secure proper ventilation. So far as that is concerned, he may claim exemption by shewing that he has pointed out the permanent alterations, or the introduction of machinery that is required, to the owners. The magistrates, therefore, are quite right in saying that the respondent was not liable for substantial alterations; but then they find that he had certain means at his disposal with which, had he so chosen, he might have improved the ventilation. Does this finding on the part of the justices render him liable? I think it does, with this reasonable qualification, that it is only with the means provided by his employer that he can be called upon to mitigate the evil. I read the case as finding this; therefore the respondent has failed to prove he was exempted under the 51st section. To that extent the justices were, in my opinion, wrong. I cannot say that the respondent ought not to be found guilty, although his offence is manifestly a very slight one. The case, therefore, must be remitted to the justices, with the opinion of this Court that it is one in which they may convict.

MANISTY, J., concurred.

Case remitted.

Solicitors—Solicitor to the Treasury, for appellant; J. P. Cartwright, Chester, for respondent.

*Queen v. Handley, 57 L.T.R. 137.
Visiter v. Hind 52 L.T.R. 94*

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN, on the prosecution
Dec. 2. { of REDFERN (respondent), v.
 { WHITE (appellant).

Public Health Act, 1875 (38 & 39 Vict. c. 55), sections 116, 117—Sale of Meat unfit for Human Food—Seizure by Inspector—Condemnation by Justice—Right of Owner to be heard.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), section 116, an inspector of

nuisances may, at all reasonable times, inspect any meat exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man (the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged), and if it appears to the inspector that the meat is unfit for the food of man, he may seize and carry the same before a justice. By section 117 if it appears to the justice that the meat seized is unfit for human food, he shall condemn the same and order it to be destroyed or disposed of; and the person on whose premises the same was found is made liable to a penalty on conviction, either by the justice who condemned the meat, or by any other justice having jurisdiction.

The appellant was convicted before two justices of having deposited meat for the purpose of sale or for the purpose of preparation for sale, found by an inspector of nuisances to be unfit for the food of man. The meat in question had been seized and carried away by an inspector, and had been ordered to be destroyed by a justice ex parte without any formal notice being given to the appellant. It was objected by the appellant that the meat could not be condemned and ordered to be destroyed by a justice ex parte and without notice to him to attend and shew cause against the same. It was also objected that the conviction was bad for duplicity:—Held, that the condemnation of the meat and order for destruction was an ex parte proceeding altogether apart from the punishment of the offender.—Held also, that the purpose for which the meat was deposited was properly charged in the alternative, and that consequently there was no duplicity.

This was an appeal to the Court of Quarter Sessions for the county of Warwick, from a conviction under sections 116 and 117 of the Public Health Act, 1875, whereby the appellant was convicted on the 13th of May, 1879, by two justices, "for that on the 3rd of May, 1879, at the parish of Willoughby in the said county, certain meat, consisting of the carcases of four sheep and two fore-quarters of another sheep were found

The Queen v. White, Q.B.

by Valentine Redfern, the Inspector of Nuisances for the Rugby Rural Sanitary Authority, in a slaughter house on the premises of the said Thomas White there, and the said meat being there and then deposited in the said slaughter house for the purpose of sale, and of preparation for sale, and intended for the food of man, was then and there inspected and examined by the said Valentine Redfern, as such inspector as aforesaid, and was by him then and there found to be unwholesome and unfit for the food of man, and was by him thereupon seized and carried away and taken before Simon Haughton Fitzroy, Esquire, one of Her Majesty's Justices of the Peace for the county of Warwick, and the said meat so seized appearing to the said justice to be unwholesome and unfit for the food of man, the same was condemned by him, and ordered to be destroyed or otherwise disposed of, and we adjudge the said Thomas White for his said offence to be imprisoned in the House of Correction at Warwick in the said county of Warwick, for the space of three months" (1).

(1) By the Public Health Act, 1875, 38 & 39 Vict. c. 55. s. 116, "Any medical officer of health or inspector of nuisances may at all reasonable time inspect and examine any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if such animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk, appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant in order to have the same dealt with by a justice." By section 117: "If it appears to the justice that any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk so seized is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be

The said Valentine Redfern was duly appointed an inspector of nuisances in 1876 by the local authority, and was authorised to institute and carry on all such proceedings as are necessary under the provisions of the Public Health Act, 1875. The said conviction was obtained by him in pursuance of the general authority given to him.

The appellant was not present when the meat was seized and carried away in order to be dealt with by the justice, and no formal notice of its seizure was given to him before it was condemned and ordered to be destroyed, although such notice could easily have been given to him. The servants of the appellant were present when the said meat was seized, and were informed by the inspector that the meat would be taken before a justice to be condemned. The inspector, after he had seized the meat and while he was conveying the same to be condemned by the justice, met the appellant. Shortly after meeting the inspector, the appellant arrived at his own premises and there saw his servants and was informed by them that the meat had been seized. The appellant did not then or at any time

destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase of fish, or piece of meat, flesh, or fish, or any poultry, or game, or for the parcel of fruit, vegetables, corn, bread, or flour, or for the milk so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

"The justice who, under this section, is empowered to convict the offender may be either the justice, who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place." By section 308 full compensation is to be made by the local authorities exercising the power of the Act, to any person who sustains damage by reason of such exercise of power.

The Queen v. White, Q.B.

appear before the justice or apply to be heard on the question of the condemnation of the meat, nor did he appeal against such condemnation in any way, except by his appeal to Sessions.

Upon the hearing of the appeal it was objected, on behalf of the appellant, that the conviction was void for duplicity and uncertainty, in that by sections 116 and 117 of the Public Health Act, 1875, three distinct offences were created, namely, first, exposing for sale; second, depositing for the purpose of sale; third, depositing for the purpose of preparation for sale of unwholesome meat intended for the food of man, but that in the conviction the appellant is adjudged guilty of two of the three offences, whereas it did not appear from the conviction which of such two distinct offences was meant.

It was also objected that the appellant could not be convicted under sections 116 and 117 of the Public Health Act, 1875, unless and until the article seized and carried away by the inspector as unwholesome has been in due form of law condemned and ordered to be destroyed by a justice, and that such condemnation and order for destruction of the appellant's property could not legally be made *ex parte* and without notice to him to attend and (if he so chooses) to shew cause against the same.

The Sessions overruled the objections and affirmed the conviction, subject to the above case (2). The case and conviction having been brought up by certiorari, and a rule *nisi* to quash the order of Sessions having been obtained by the appellants,

Vesey Fitzgerald, for the respondent in the appeal, shewed cause.—The con-

(2) A portion of the case, as stated by the Sessions, which had reference to the question whether the adjudicating justices were, as members of the local authority, interested parties, and as such incapable of acting as justices, is omitted from the report, the appellant's counsel having admitted that he could not successfully argue the point after the decision in *The Queen v. Weymouth* (48 Law J. Rep. M.C. 139).

demnation of the meat and the order of destruction is a proceeding altogether distinct from the charge against the appellant, and may be made *ex parte*. The object of the Act of Parliament is to abate a serious nuisance, and that without delay; if, therefore, proper notice had to be given to any party where meat is seized, and he had a right to be heard before the meat was condemned, the utility of the statute would be seriously imperilled. Moreover, no real injustice is done to an owner by such a summary proceeding; for any damage that is sustained full compensation can be claimed from the local authorities, under section 308. The words, in section 116, "the proof that the same was not exposed or deposited for the purpose of sale, or was not intended for the food of man, resting with the party charged," must be read with reference to the subsequent proceedings under section 117, when the party is regularly charged.

As regards the contention of the appellant, that this conviction is bad for duplicity, there are only two offences disclosed—first, exposing for sale; second, depositing for the purpose (or of preparation for sale) unwholesome meat. The purpose was therefore properly charged in the alternative, and there is no duplicity.

Channell, for the appellant, supported the rule.—A full opportunity ought to have been given the appellant of being heard before the meat was condemned. The object of the Act was to prevent the injury which might arise from meat being sold for the food of man which was unfit for that purpose. It is plain that the 116th section contemplated some notice being given to an owner before his property was seized and condemned—*Gill v. Bright* (3).

Again, the conviction is bad for duplicity. There are three offences disclosed—first, exposing for sale; second, deposit for the purpose of sale; third, depositing for the purpose of preparation and sale—unwholesome meat intended for human food, and it is uncertain, from the terms of the conviction, for which of

(3) 41 Law J. Rep. M.C. 22.

The Queen v. White, Q.B.

the latter two the appellant has been adjudged guilty.

FIELD, J.—I am of opinion that this conviction must be affirmed, and that the objections taken to it are bad. I will first of all deal with a comparatively small point, namely, as to whether the conviction is bad for duplicity. I quite agree that the law on the subject is accurately stated in *Paley on Summary Convictions*, and that the charge must be positive and certain, in order to protect a defendant from a second accusation, and in order that the judgment may appear appropriate to the offence. If, then, it had appeared that the offence was charged in the alternative, I should have had no difficulty in coming to the conclusion that the conviction could not be upheld. Now there might have been some ground for the contention if the appellant could have shewn that the section contained three distinct offences; but we think only two offences are to be found, and although there is at first blush something like an alternative air about the conviction, yet, when you come to look at its terms, the difficulty disappears, and it will be found that the defendant has been properly convicted of the offence with which he was charged.

The other point is one of greater difficulty, about which I have felt some doubts during the argument; indeed, had it not been for the 308th section, I am not at all sure at what conclusion I should have arrived. In order to see what the intention of the Legislature was, we must look at, first, the object of the Act, and secondly, the language used. Now this statute is known as the Public Health Act, and was passed to abate a number of nuisances, amongst others, the sale, or exposure for sale, of unsound meat for the food of man, which was quite unfitted for that purpose. Therefore, the object of the Legislature in passing this 116th section was the prevention of the sale of things unfit for the food of man, which was found to be a great evil, and the cause of much disease. Now let us see the mode in which the Legislature intended to sup-

press that mischievous practice. Rapidity of action in such cases was a matter of absolute necessity. In order to carry out the execution of the purposes of the Act, a public body have to be selected, and they are authorized to appoint an inspector of nuisances, and to their judgment is entrusted the appointment of a fit and proper person. Now, the inspector is clothed with extensive powers, and, so far as relates to unsound meat, his duties are as follows:—He must reasonably satisfy himself that the unsound meat is exposed or deposited for the purpose of sale, and if so satisfied, he may, without enquiry, carry away the meat to be dealt with by a justice. If such a primary cause as this entails inconvenience, and perhaps also an injustice, on the party whose property is seized, the evil, such as it is, must be undergone for the sake of the public good; moreover, an adequate remedy is provided under the compensation clause.

Now comes the question whether the inspector, having seized and carried away the meat in order to have it dealt with by a justice, is bound to give proper notice to the party before his property is condemned by a justice. In other words, must the inspector take out a summons, and the party be regularly charged, before the proceeding I have just alluded to can take place? It is but rarely that so extensive a power is given for the summary destruction of property; but the express object of the statute must be borne in mind, which was the speedy destruction of a noisome thing. If the contention on the part of the appellant was sound, a considerable time must necessarily elapse before the provisions of the statute could be put in operation, and its main object would therefore be defeated. Now is there to be anything in the shape of a hearing before the justice whose duty it is to condemn the meat? I think not, and that all he has to do is to satisfy himself that the inspector is properly qualified, and if so, the justice may condemn the meat on view, and order it to be destroyed, or so to be disposed of as to prevent it from being exposed for sale or used for the food

The Queen v. White, Q.B.

of man. Thus the evil aimed at by the Legislature is got rid of. But it is also incumbent that the offender should not escape punishment; he is accordingly to be brought up, and is made liable to certain penalties. I read the words in section 116, "proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged," as being applicable to the charge made against the man, and not against the meat. The party, when charged, may discharge himself if he can by shewing that the meat was not exposed for sale at all, and in this way the interpretation of the statute becomes intelligible, and consistent with the intention of the Legislature. The order of the Sessions, therefore, confirming this conviction, must stand.

MANISTY, J.—I am of the same opinion, and have little to add to what has already been said by my brother Field. The 117th section limits the enquiry to this single point, namely, is or is not the meat that has been seized diseased or unsound or wholesome, or unfit for the food of man? The justice who condemns the meat has nothing to do with the enquiry whether the meat in question was exposed or deposited for sale; if it concerned him, there would have been an express provision in section 117 to that effect. I think that the interpretation put on the section by my brother Field is an intelligible and reasonable one, and that the 119th section, which empowers an inspector to get a search warrant to enter premises where he believes there is kept concealed diseased meat intended for sale for the food of man, throws some light on this construction. It seems to me that the provisions, as we have construed them, are just such as we should expect to find, having regard to the subject-matter of the Public Health Act. If it is eventually found, on enquiry, that the owner is not in default, but that the inspector has made a mistake, then the owner may, under section 308, receive compensation in the manner there pointed out. Any other construction would give rise to so many obstacles

—as, for instance, if the meat is to be kept, who is the proper person to keep it, and where ought it to be kept?—as to make the Act of Parliament almost a dead letter.

Rule discharged; order of Sessions affirmed.

Solicitors—Mackeson, Taylor & Arnould, agents for Buller & Bickley, Birmingham, for appellant; Iliffe & Co., agents for E. Harris, Rugby, for respondent.

Here & Publy 50 & 1 h. 13.

[IN THE EXCHEQUER DIVISION.]

1879. { THE OVERSEERS OF ST. WERBURGH,
Nov. 28. { DERBY (appellants) v. HUT-
CHINSON (respondent).

Poor-rate—32 & 33 Vict. c. 41. s. 16—Occupier going out before the Rate discharged—Unoccupied Premises.

The 16th section of 32 & 33 Vict. c. 41 relieving the occupier who was in occupation at the time of making the rate, but who has gone out before it was wholly paid, from the rate except in proportion to the time he has occupied, applies only to the case where there is an incoming occupier, and not where the premises are left unoccupied.

CASE stated under 20 & 21 Vict. c. 43 upon an information heard on the 8th of August, 1879, preferred by the appellants, for that the respondent being the occupier of certain premises within the parish of St. Werburgh, and duly assessed in a poor-rate made on the 30th of April, 1879, for the half year ending the 29th of September, 1879, had not paid the same, although lawfully demanded.

The respondent was the occupier of certain premises in the parish in question, and was duly assessed to the said poor-rate, which had been demanded of him by the appellants. The respondent at the time of the demand was about to

Overseers of St. Werburgh, Derby, v. Hutchinson, Exch.

give up possession of the premises to his landlord, who intended to pull down the house and rebuild on its site. On the 7th of August the respondent was in actual possession of the premises, and did not in fact give up possession until the 9th of August, 1879, when he quitted them, without having paid the amount of rate at which he was assessed. No new tenant would succeed or come into occupation of the premises until they were rebuilt, which would not be until long after the 29th of September, 1879. The justices dismissed the summons.

The statute 32 & 33 Vict. c. 41. s. 16 enacts, "If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made, the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences so far as the same shall be known to them, and such occupier shall from thenceforth be deemed to be actually rated from the date so entered by the overseers, and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in like manner and with the like remedy of appeal as if he had been rated when the rate was made; and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made, and the 12th section of the statute 17 Geo. 2. c. 38 shall be repealed."

A. Glen, for the appellants.—The occupier is, under the statute of Elizabeth, liable for the whole of a rate made when he is in occupation, although he may cease to occupy before the period for which the rate is made has expired. The 16th section of the 32 & 33 Vict. c. 41 applies to the case where there are successive tenants, and not where a tenant

goes out and no one succeeds him. [He was stopped by the Court.]

A. Morley, for the respondent.—The section must be read thus: "If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged" certain things shall happen if there be an incoming occupier, and generally "an outgoing occupier shall remain liable for so much and no more of the rate as is proportionate to the time of his occupation." If the last clause was not intended to be general, but applicable only to the case where there was both an outgoing and incoming tenant, the definite article "the," not "a," would have been used. This was the intention in repealing the repealed statute.

THE COURT (1) were of opinion that the section applied to a change of tenancy, in which case the two tenants were to pay rateably; but as to the case of an outgoing tenant and a subsequent vacancy, it left the case as it found it. The words "outgoing occupier" in the last clause of the section meant outgoing occupier with a successor.

Judgment for the appellants without costs; leave to appeal.

Solicitors—Edmund Warriner, agent for W. B. Hextall, Derby, for all parties.

(1) Kelly, C.B., and Stephen, J.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN, on the prosecution of
Dec. 3. { THE GUARDIANS OF THE MEDWAY
UNION (respondents) v. THE
GUARDIANS OF THE MAIDSTONE
UNION (appellants).

Poor Law—Settlement of Pauper Lunatic—Husband and Wife—Desertion by Husband—Order of Removal—Wife's Settlement—Statutes 24 & 25 Vict. c. 55. s. 3, and 39 & 40 Vict. c. 61. s. 34.

By 24 & 25 Vict. c. 55. s. 3, a married woman who has been deserted by her husband, and who, after such desertion, has resided for three years (altered by 29 & 30 Vict. c. 11. s. 1, to one year) in such a manner as would, if she were a widow, render her exempt from removal, shall not be liable to be removed from the parish wherein she shall be resident unless her husband returns to cohabit with her.

A pauper lunatic was married to G. B. in 1840, and resided with her husband for some ten years afterwards. She committed adultery, and was eventually told by her husband to leave his house on that account. She left accordingly, and never returned to cohabit with him. From 1865 up to the time of her removal to the lunatic asylum in 1877 she resided at Chatham, and such residence was in such manner and under such circumstances as would have rendered her irremovable had she been a single woman. The husband's settlement was in the M. Union:—Held, that there had been a "desertion" of the pauper by her husband within the meaning of 24 & 25 Vict. c. 55. s. 3, and that consequently the pauper did not follow his settlement, but was irremovable from Chatham.

Whether the pauper acquired a settlement by residence at Chatham under the Divided Parishes, &c. Act (39 & 40 Vict. c. 61), s. 34, quære.

This was a case stated by the Court of Quarter Sessions for Kent, on appeal in which the guardians of the Maidstone Union were the appellants, and the guardians of the Medway Union were the respondents. The appeal was against an order of justices, made on February 18th, 1877, adjudicating the settlement of a

pauper lunatic to be in the Maidstone Union.

The sessions confirmed the order subject to a case. The order and case were brought up by certiorari, and a rule nisi to quash the order of sessions obtained.

The pauper lunatic was married to George Baldock in 1840 at Gillingham, Kent, and resided with her husband for some ten years afterwards. During that time the pauper committed adultery and left her husband's house on one occasion for about three months, but returned to him. She afterwards frequently left her husband's house for a week at a time, under the pretence that she was going to work with her sister-in-law; but the husband being informed of her misconduct accused her thereof, and the pauper thereupon admitted having committed adultery and being in the family way. Her husband on that account shewed her the door, and told her to leave his house. She left him accordingly, and was afterwards confined in the workhouse of the respondent union.

She never returned to cohabit with her husband, but cohabited with various men in Chatham, and eventually she went through the ceremony of marriage on the 5th of July, 1865, with a man named Underdown, and resided continuously with him in Chatham in the respondent union up to the time of her removal to the lunatic asylum on the 8th day of May, 1877. Such residence was in such manner and under such circumstances as would have rendered the pauper irremovable had she then been a single woman. From the time of her confinement until May 8, 1877, the pauper lunatic had never received parish relief.

It was admitted that the residence of George Baldock had been in Maidstone Union for the last thirteen years, and that he was thereby lawfully settled in such union.

The questions for the opinion of the Court were:—

1. Did the pauper lunatic acquire a settlement by residence in Chatham in the respondents' union in her own right under 39 & 40 Vict. c. 61. s. 34?

2. Was the pauper lunatic irremovable from Chatham by virtue of 24 & 25 Vict.

The Queen v. Guardians of Maidstone Union, Q.B.

c. 55. s. 3, as amended by 29 & 30 Vict. c. 11. s. 1, at the time of her removal to the said lunatic asylum, or at the time the said order adjudicating her settlement was obtained by the respondents.

If either of the above questions was answered by this Court in the affirmative, the order appealed against and the order of quarter sessions confirming the same was to be respectively quashed, otherwise the order of sessions was to stand.

Kingsford, for the appellants.—It is contended that the facts shew that the residence of the pauper lunatic was such as to give her a settlement under 39 & 40 Vict. c. 61. s. 34—see *The Queen v. The Guardians of the Leeds Union* (1), which is exactly in point.

Again, the pauper was irremovable, by virtue of 24 & 25 Vict. c. 55. s. 3, as amended by 29 & 30 Vict. c. 11. s. 1, by which a married woman who has been deserted by her husband, and who, after such desertion, has resided for one year “in such a manner as would, if she were a widow, render her exempt from removal, shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her.” No doubt it will be argued she was not deserted, and that accordingly the 24 & 25 Vict. c. 55, has no application; but the authorities which seem to favour such a contention will be found to be divorce proceedings in which married women have endeavoured to assert a desertion arising out of their own misconduct. He also cited *The Queen v. St. Mary, Islington* (2).

Winch, for the respondents.—A married woman living apart from her husband by consent follows the settlement of her husband, and if she becomes chargeable is removable to such settlement. The 23 & 24 Vict. c. 55. s. 3, does not contemplate the case of a married woman living apart from her husband by consent. In *The Queen v. The Guardians of the Leeds Union* (1) the pauper was an illegitimate

child who had been totally abandoned; here there has been no abandonment or desertion—*Thompson v. Thompson* (3).

COCKBURN, L.C.J.—I think there was such a desertion as to bring the case within the statute which provides that “where a married woman shall have been or shall be deserted by her husband, and shall have resided for three years”—since altered to one year—“in such a manner as would if she were a widow render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her.” I cannot bring myself to think that the settlement of the husband belonged to the wife, inasmuch as the latter had been living apart from him for a considerable space of time. Moreover, it is important to remember that this is not a case of a wife living apart from her husband by mutual consent. The wife is a woman who has misconducted herself on more than one occasion by committing adultery with other men, until at length she became in the family way, and thereupon her husband put her out of doors. This may perhaps not amount to a desertion in the ordinary acceptance of the term; but the meaning of the statute I have referred to is that where the wife has been residing in a different place from her husband for a prolonged period, she shall be considered for poor law purposes as not being bound by the marriage tie, and as living apart. It seems to me to make but little difference whether the husband voluntarily goes away and so misconducts himself, or goes away in consequence of the misconduct of his wife. I am of opinion, upon the facts as stated, that the residence of the husband was no longer the residence of the pauper, and that the latter became by reason of her residence irremovable from Chatham.

MANISTY, J.—I quite agree. The fair interpretation of what happened is that this woman was, rightly or wrongly, sent away from her home for misconduct by her husband, and left as a free woman. She subsequently set up an altogether separate

(3) 1 Sw. & Tr. 231; 27 Law J. Rep. P. M. & A. 65.

(1) 48 Law J. Rep. M.C. 129; Law Rep. 4 Q.B. D. 223.

(2) 39 Law J. Rep. M.C. 137; Law Rep. 5 Q.B. 448.

The Queen v. Guardians of Maidstone Union, Q.B.

residence for a period, and under such circumstances as to render her exempt from removal, her husband never having returned to cohabit with her. That is the construction to be put on 24 & 25 Vict. c. 55. s. 3, and it is not therefore necessary to consider the meaning of the 34th section of the Divided Parishes, &c., Act.

Order of sessions quashed.

Solicitors—Kingsford & Co., agents for Beale, Hoare & Co., Maidstone, for appellants; Nickenson, Prall & Nickenson, agents for Prall & Son, Rochester, for respondents.

[IN THE COMMON PLEAS DIVISION.]

1879. { KENBICK (*appellant*) v. THE
Nov. 27. { CHURCHWARDENS AND OVER-
SEERS OF THE PARISH OF
GUILDFIELD (*respondents*).

Rating—Sporting Rights—Severed from the Occupation of the Land—37 & 38 Vict. c. 54. s. 6. sub-sect. 2.

Where the owner of land occupies it himself and demises the right of sporting to another, the right of sporting is severed from the occupation of the land within the meaning of 37 & 38 Vict. c. 54. s. 6. sub-sect. 2, so as to make the lessee of the right of sporting rateable.

The Queen v. Battle, Sussex (36 Law J. Rep. M.C. 1; Law Rep. 2 Q.B. 8) distinguished.

CASE stated under 12 & 13 Vict. c. 45. s. 11.

1. By a deed dated the 2nd of April, 1877, Mrs. Curling, the owner of the Maesmawr estate, in the parish of Guildfield, in the county of Montgomery, granted to the appellant the exclusive right of sporting over the said estate, together with the use of the mansion-house and two cottages thereon and twenty-five acres of land, being part of the said estate, for a term of five years from the 25th of March, 1877, at a total annual rental of 315*l*.

2. The said estate contained about 1,750 acres; of this 707 acres consisted of

woodlands and were retained by Mrs. Curling in her own occupation (1).

3. The overseers of the poor of the parish of Guildfield rated the appellant in respect of the sporting right over the whole of the said estate.

4. The question for the opinion of the Court was whether the right of sporting over the 707 acres of woodlands retained in the occupation of the owner thereof, Mrs. Curling, was severed from the occupation of the said land within the meaning of the 37 & 38 Vict. c. 54. s. 6 (2), so as to entitle the persons making that rate to rate the appellant in respect thereof.

Witt (Gully and F. Marshall with him), for the appellant.—The right of sporting over these 707 acres is not severed from the occupation of the land within the meaning of 37 & 38 Vict. c. 54. s. 6. sub-sect. 2 (2). Under the law as it stood previous to this Act, where the land was let to one and the right of sporting to another the right of sporting could not be rated; the tenant could not be rated because he had not the right, and the owner of the right could not be rated because he was the owner of an incorporeal hereditament and did not appear on the rate-book. It was to remedy this state of things this Act was passed, but it was never intended to alter the incidence of the rate, but only to make that rateable which was not rateable before. A demise of a right of shooting, where the owner of the land occupied the land, was treated as not severed in *The Queen v. Battle, Sussex* (3).

[LORD COLERIDGE, C.J.—Under the present Act you may rate either the landlord, as in *The Queen v. Battle, Sussex* (3), or the lessee.]

Not unless the right is severed. This Act was intended to meet the case where the right of sporting is completely

(1) The remaining 1,008 acres were let to tenant farmers.

(2) 37 & 38 Vict. c. 54. s. 6 (sub-sect. 2).—“Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.”

(3) 36 Law J. Rep. M.C. 1; Law Rep. 2 Q.B. &

Kemrick v. Churchwardens, &c. of Guilfield, C.P.

severed from the occupation of the land, as in the case of manorial rights.

[LORD COLERIDGE, C.J.—In *The Queen v. Battle, Sussex* (3), the right could not have been rated if severed.]

The whole point of that case is that the right was not severed. In the present case it is likewise not severed, and therefore the lessee of the shooting is not rateable; unless it is severed, the lessee is not rateable, and we have the decision of the Queen's Bench to shew that in a similar state of things the right of sporting was not severed. In order to interpret the Act, the law as it stood formerly must be looked at, and inasmuch as in *The Queen v. Battle, Sussex* (3) the same circumstances were held not to constitute a severance, therefore there is no severance in the present case, and consequently the proper person to be rated is the owner and occupier of the land.

McIntyre (Alexander Glen with him), for the respondent, was not called on.

LORD COLERIDGE, C.J.—I am of opinion that the respondents were entitled to rate the appellant. The question is whether under this Act the lessee of the right of shooting can at the option of the persons making the rate be separately rated in respect of such right, and I am opinion that he can.

Previous to this Act various rights arising out of land were not the subject-matter of separate rating, they were not within the 43 Eliz. c. 2. The result, which was considered to be unfair was, that in many cases the right person escaped or the wrong person was rated. Parliament then passed an Act enacting that certain rights arising out of land should be the subject-matter of separate rating, and amongst them sporting rights, "when severed from the occupation of the land;" it was right to say "severed" because when joined to the occupation and the value of the occupation was thereby enhanced, they would be rated by the increase of rate which would be added to the land by reason of such enhanced value. By the Act therefore they are created rateable properties, and section 6, sub-section 2, says that when severed and let, either the owner

or lessee thereof—that is, either the owner or lessee of the right of sporting, may be rated.

The facts of the case are shortly that Mrs. Curling, who is the owner of the estate, has demised a small portion to the appellant and the separate right of shooting over the whole of the estate, and she keeps a portion of the estate in her own occupation. Is not that an instance of the right of sporting being severed from the occupation of the land? Had there been no authority, no one for a moment could have doubted this was just the sort of case the Act was intended to meet. But it is said another interpretation should be placed on these facts, because in a case in the Queen's Bench a different interpretation was placed on the word "severed." But when that case and the law as it stood at that time is considered, it does not seem to support the contention. It was a case in which the Queen's Bench was considering the right of an owner who kept the land in his own occupation, and let the right of shooting, to claim exemption on the ground that the shooting was severed from the occupation of the land. The Queen's Bench say, "Not at all, you admit you receive rent for the shooting, and therefore your land which you occupy is so much enhanced in value, and you must be rated at the enhanced value." No doubt in a certain sense the Lord Chief Justice holds there is no severance, for he holds there was no such severance as would exist in the case where the owner had let the land to one, and the right of shooting to another, a severance which would render it unfair to rate the occupier for a right which he did not possess.

But in this case we have to deal with an Act which for the time uses the word sever in a legislative sense, and we have to deal with a property which for the first time is made the subject of separate rating. The Act appears to me singularly to describe the state of facts of this case, and under these circumstances I think we are only following the express words of the Act in holding the appellant to be rateable. Our judgment must, therefore, be for the respondents,

Kenrick v. Churchwardens, &c. of Guilsfield, C.P.

LINDLEY, J.—I am of the same opinion. The question is whether the rate levied on the lessee of the right of sporting has been correctly made within the provisions of section 6 (sub-section 2). The persons making the rate have the option of rating either the owner or lessee, and we have not to decide whether they have exercised a fair discretion, but the question is one of law, and turns on the meaning of the word "severed." The appellant has the enjoyment of the right of sporting by a lease under seal for five years, and during that five years one would have thought, apart from authority, that there would be a severance. But it is said that it is not so, because under similar circumstances *The Queen v. Battle, Sussex* (3) the right of sporting was held not to be severed, but when we look at the authority the point does not seem to have been decided. The point there decided is that before this Act Mrs. Curling might have been rated. In the course of the argument the Lord Chief Justice certainly describes the right of sporting as separated from the occupation, and in the judgment he appears to treat the right as severed, though not severed as in *The Queen v. Thurlstone* (4). That case, *The Queen v. Battle, Sussex* (3), does not appear to me to be authority for holding that when the owner of the land demises the right of sporting by an irrevocable deed there is no severance.

Judgment for the respondents.

Solicitors—J. Arthur Talbot, agent for Talbot & Woosnam, of Newtown, Montgomeryshire, for appellant; Jones, Blaxland & Son, agents for W. A. Pughe, Llanfyllin, for respondents.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879. Dec. 16.	{	THE QUEEN, on the prosecution of H. CRISP, v. PEMBERTON AND ANOTHER, Justices. THE SAME v. SMITH AND AN- OTHER.*
-------------------	---	--

Pauper Lunatic in Workhouse—Where Resident—Order for Removal to Asylum made by Officiating Clergyman—16 & 17 Vict. c. 97. sect. 67; 7 & 8 Vict. c. 101. sect. 56—Practice—Appeal from Order of Sessions—Appeal from Divisional Court without Leave—Judicature Act, 1873, sect. 45.

It is provided by 16 & 17 Vict. c. 97. sect. 67, that in certain cases a pauper deemed to be a lunatic may be examined by the officiating clergyman of the parish in which he is resident, and that an order may be made by that clergyman and another person, directing him to be received into an asylum.

It is enacted by 7 & 8 Vict. c. 101. sect. 56, that for the purpose of relief, settlement and removal of poor persons, the workhouse of a union shall be considered as situated in the parish to which such poor person is chargeable:—

Held, affirming the decision of the Queen's Bench Division, that an order for the removal of a pauper lunatic under 16 & 17 Vict. c. 97 is not an order within sect. 56 of 7 & 8 Vict. c. 101, and that such an order made by the officiating clergyman of O., for the removal of a pauper then in the workhouse of O. was duly made, although the pauper did not, before entering the workhouse, reside in the parish of O.

An appeal from an order of the Queen's Bench Division, discharging a rule for a certiorari to bring up an order of justices in petty sessions, is not an appeal from an inferior Court within sect. 45 of the Judicature Act, 1873, and no leave to appeal is required.

Appeal by the prosecutor, H. Crisp, from an order of the Queen's Bench Division, discharging a rule to bring up by certiorari an order made on him by W.

* *Coram Bramwell, L.J.; Brett, L.J.; Cotton, L.J.*

(4) 1 E. & E. 502; 28 Law J. Rep. M.C. 106.

The Queen v. Pemberton (App.), Q.B.

Pemberton and J. Wilkinson, two justices of Cambridgeshire, and also an order made by G. Smith and Rev. G. Hale.

It appeared from the affidavits, that, on November 8, 1878, Mary Crisp, the wife of H. Crisp, who lived in Sheffield, was residing in the parish of Grantchester, and that on November 12 she was received into the workhouse of Chesterton Union, in which union Grantchester is situated; she was afterwards removed by an order professing to be made under the 67th section of 16 & 17 Vict. c. 97 (1), to an asylum. This order was signed by G. Smith, a relieving officer of Chesterton Union, and the Rev. G. Hale, an officiating curate of Chesterton.

On the 30th of November H. Crisp, the husband of the lunatic, was summoned before the justices, and was ordered to contribute to her maintenance, pursuant to the provisions of 13 & 14 Vict. c. 101. sect. 5, and 39 & 40 Vict. c. 61. sect. 20 (2). Two rules were then obtained at his

(1) By 16 & 17 Vict. c. 97. sect. 67, it is enacted, "That it shall be lawful for any justice, upon notice given to him . . . or upon his own knowledge, without any such notice as aforesaid, to examine any pauper deemed to be a lunatic, at his own abode or elsewhere, and to proceed in all respects as if such pauper were brought up before him, in pursuance of an order for that purpose; provided also, that in case any pauper deemed to be lunatic cannot, on account of his health or other cause, be conveniently taken before any justice, such pauper may be examined at his own abode or elsewhere, by an officiating clergyman of the parish in which he is resident, together with a relieving officer, or if there be no relieving officer, an overseer of such parish . . . and such officiating clergyman, together with such overseer, or such relieving officer, shall by an order . . . direct such pauper to be received into such asylum as herein-after mentioned. . . ."

(2) 13 & 14 Vict. c. 101, sect. 5, provides that, "Where any married woman being lunatic shall be duly removed to any asylum . . . under any of the statutes in such behalf, any two justices having jurisdiction in the place wherein the husband of such lunatic shall dwell, upon application by or on behalf of the guardians of the union, or of the parish, having separate boards of guardians, or the overseers of the parish, to which union or parish respectively such lunatic pauper shall be or become chargeable, may summon such husband to appear before them . . . and such justices may (if they think fit) make an order upon him to pay such sum weekly or otherwise, for or towards the cost of the maintenance of

instance; one, calling on the justices, and the other on G. Smith and the Rev. G. Hale, to shew cause why a *certiorari* should not issue, to bring up and to quash the two orders made by them respectively.

Both these rules were afterwards discharged. No leave to appeal was given. The prosecutor appealed.

L. Smith (with him *Cockerell*), for the respondent.—There is a preliminary objection to the hearing of the first of these appeals. The Court has no jurisdiction. It is an appeal from an order of the Queen's Bench Division, discharging a rule calling on justices to shew cause why an order of Sessions, and in this case of petty sessions, should not be quashed. This appeal is therefore within the very terms of section 45 of the Judicature Act, 1873; and as no leave to appeal has been given, the determination of the case by the Queen's Bench Division is final. Appeals from Sessions are, by section 45, and by the decision of the House of Lords in *The Overseers of Walsall v. The London and North Western Railway Company* (3), where, however, leave to appeal was given, brought within the definition of appeals from inferior Courts, and therefore this appeal, which is, in fact, an appeal brought for the purpose of reversing a decision of magistrates in sessions, cannot be brought unless leave has been given.

[BRAMWELL, L.J.—We think that we have jurisdiction to hear this appeal.]

Gully and *Graham*, for the prosecutor.—The order under which Mary Crisp was removed to the asylum is bad, and therefore the subsequent order on the husband for contribution is bad. The provisions of the statute (1) have not been followed. No reason was given why the pauper

such lunatic, as . . . shall appear to them proper."

39 & 40 Vict. c. 61. sect. 20, provides that where such an order is sought for, the justices having jurisdiction in the union or parish, the guardians whereof shall make the application, shall be empowered to issue the summons and make the order instead of the justices having jurisdiction in the place where the husband may dwell.

(3) 48 Law J. Rep. M.C. 65; Law Rep. 4 Ap. Ca. 467.

The Queen v. Pemberton (App.), Q.B.

was not taken before a magistrate; moreover, the clergyman who signed the order described himself as of Chesterton, whereas, by virtue of 7 & 8 Vict. c. 101. sect. 56 (4), this pauper lunatic must, for the purposes of relief, such as this was, be considered to be resident in Grantchester, and an order signed by a clergyman of another parish is invalid. Such an order is only a fact in the case, it is not a judicial proceeding, and therefore the justices should not have made a further order upon it until they had satisfied themselves that it was a proper and valid order, for unless they were satisfied that this married woman had been "duly removed" (2) they could have no jurisdiction to make the order for contribution.

L. Smith and Cockerell, for the respondents, were not heard.

BRAMWELL, L.J.—I think that this is a clear case, and that the appeal cannot be allowed. It is necessary to look at the actual place of abode of this woman, in order to construe the 67th section of this Act, which we have to consider. I do not think that the provisions of 16 & 17 Vict. c. 97, are to be controlled or interpreted by the language of the 56th section of 7 & 8 Vict. c. 101. The enactment in the earlier statute means that when it is necessary to consider where the settlement of a person should be, or where the burden of maintenance should fall, then, even if the person is in a workhouse, still, for such purposes, regard must be had to the place where that person's previous abode was. Those considerations do not apply here. The order of removal was duly made, the justices had jurisdiction, they proceeded legally, and the judgment of the Queen's Bench Division must be affirmed.

BRETT, L.J.—I am of the same opinion. The question under 16 & 17 Vict. c. 97,

(4) 7 & 8 Vict. c. 101. s. 56, enacts, "That for the purposes of relief, settlement and removal of poor persons, and the burial of the poor, the workhouse of any union or parish . . . shall be considered as situated in the parish to which each poor person respectively to be relieved, removed or buried, or otherwise concerned in any such purpose, is or has been chargeable." . . .

is, what was the parish in which this alleged lunatic was abiding? I think that where she was abiding there she was also residing, and if she was residing in Chesterton, where she was undoubtedly abiding, then this officiating clergyman could make the order.

I think this woman was both abiding and residing in Chesterton; it is admitted that this clergyman was an officiating clergyman of Chesterton, and therefore he could sign this order. It has been suggested that if regard be paid to the provisions of 7 & 8 Vict. c. 101, we must hold that this woman was residing elsewhere; but I am of opinion that that statute was only passed to prevent residence in a workhouse from breaking a person's right to settlement in his or her parish; and I do not think that those provisions affect the construction to be placed on the section of 16 & 17 Vict. c. 97, which we have to consider, and which was passed *alio intuitu*. This order of removal was duly made, and therefore the second question does not arise.

COTTON, L.J.—The question is whether this woman was residing in Chesterton within the meaning of section 67 of 16 & 17 Vict. c. 97. It is said that 7 & 8 Vict. c. 101 prevents her from being treated as a resident. I am of opinion that this order for removal is not an order for removal within the meaning of the earlier statute, and the removal not such a removal as was intended by that statute. The technical meaning of the word "removal" in 7 & 8 Vict. c. 101, is not the meaning which the word "removal" has in 16 & 17 Vict. c. 97, and I agree that the judgment of the Queen's Bench Division must be affirmed.

Judgment affirmed.

Solicitors—R. Davies, agent for Smith, Wednesday, for prosecutor; Montagu, Scott & Baker, agents for Barlow, Palmer & Bonnett, Cambridge, for respondents.

[IN THE COURT OF APPEAL]

(Appeal from the Queen's Bench Division.)

1879. { THE QUEEN (on the prosecution
Dec. 19. { of the Lewisham Board of
Guardians) v. THE LONDON,
BRIGHTON AND SOUTH COAST
RAILWAY COMPANY.*

Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), sect. 159—Rate—Inequality of Benefit—Exemption of, or Levy of Rate at a Lower Scale on, part of a Parish—Description of such part in Precept.

By the Metropolitan Management Act, 1855, section 158, district boards may require the overseers of parishes within their district to levy the sums which such boards may require for the execution of the Act. By section 159, district boards can exempt or rate on a lower scale parts of parishes not benefited or benefited to a less degree than other parts by such expenditure.

The overseers of L. were required, by a precept of the district board, to levy a sum for the expenditure incurred in the execution of the above Act. The precept directed that, as regards such parts of "the parish as consist of lands used as arable, meadow or pasture lands only, or as woodland, orchard, market, hop, herb, flowers, fruit or nursery market garden," the rate should be levied on a lower scale. There was a considerable quantity of such land in the parish, the whole of which was assessed at the lower scale, though it did not lie altogether, but was scattered about,—

Held (affirming the decision of the Queens Bench Division), that the rate was good, and that the precept sufficiently described the nature of the property to be rated at the lower rate.

Appeal from the decision of the Queen's Bench Division (reported 48 Law J. Rep. M.C. 116), where the case stated on appeal from Sessions, is fully set out.

The guardians of the poor of Lewisham made a rate as overseers, under the following precept:—

"The board of works for the Lewisham district, constituted by the Metropolis Management Act, 1855, in pursuance of

the provisions of the said Act, and of the Acts for amending and extending the same, hereby order and require the guardians of the poor of the parish of Lewisham to levy within the said parish the sum of 11,524*l.*, for the purpose of defraying the expenses already or hereafter to be incurred by the said board, in the execution of the said Act or Acts, and to pay the said sum to the London and Westminster Bank, bankers of the said board, by two equal instalments of 5,762*l.* each, the first on the 7th day of February, and the second on the 23rd day of March, 1876. And it appearing to the said board that the expenses in respect of which the said sum of 11,524*l.* is required, are not for the equal benefit of the said parish, the said board do further order and require, that the rate or rates to be raised in pursuance of this present precept shall, as regards all such parts of the said parish as consist of land used as arable, meadow or pasture land only, or as woodland, orchard, market, hop, herb, flowers, fruit or nursery market garden, hop, herb, flower, fruit or nursery ground, be assessed and levied in the proportion of one-fourth part only of the net value of such land."

The parish of Lewisham consists partly of land covered with houses, and partly of land under cultivation, which does not all lie together, but is scattered through the parish. All such land, whether used as arable, meadow or pasture land, or as woodland, garden, hop, herb, flower, fruit or nursery ground, was rated to the rate mentioned in the above precept at 2*d.* in the pound, and all other property was rated to the rate at 10*d.* in the pound. The property of the railway company, who appealed to the Quarter Sessions against the rate, consisted of land covered with buildings and railways, and none of it was land under cultivation; the whole of their property was rated at 10*d.* in the pound.

The rate was confirmed at Quarter Sessions, subject to the opinion of the Queen's Bench Division on two questions, first, whether the rate was good in law; second, whether such property of the railway company as consisted of lands used for the railway ought not to be rated at the lower rate.

A *certiorari* having issued, and a rule

* *Coram* Bramwell, L.J.; Brett, L.J.; Cotton, L.J.

The Queen v. London, Brighton, &c. Rail. Co. (App.), Q.B.

nisi to quash the order of sessions having been obtained, it was afterwards discharged and the order of sessions affirmed. The railway company appealed.

J. Brown and Oppenheim, for the appellants.—The first question which was raised for the opinion of the Queen's Bench Division is the only question which the case enables the appellants to raise here. The Queen's Bench Division seems to have considered *Howell v. The London Dock Company* (1) as a decision in point; but in that case it was found that the expenses levied included the expenses of paving, so that it is not decisive of the case; and it is to be observed that Erle, J., in *The Queen v. The Great Western Railway Company* (2) said that that case did not lay down any general rule, as it was decided on the special facts there before the Court. The rate levied here is without doubt levied in pursuance of the precept, but the precept is bad, and therefore the rate must be bad. It does not follow the requirements of the statute (3). It fails to describe the lands on which the lower rate is to be levied by sufficient description; it should describe them by metes and bounds, and it should not leave to the overseers the duty of ascertaining what area is to be partially exempted; it in fact delegates to others the duty which the statute imposes on the district board.

(1) 8 E. & B. 212; 27 Law J. Rep. Q.B. 177.

(2) E. B. & E. 613, note a; 28 Law J. Rep. M.C. at p. 64.

(3) The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), by section 158 empowers vestries and district boards to require overseers to levy the sums which are required for defraying the expenses of the Act.

By section 159, "Where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is . . . ordered to be levied have or has been incurred for the special benefit of any particular part of their parish or district, or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require."

VOL. 48.—M.C.

M. White and Kingsford, for the respondents.—The description in this precept is ample. The duty of the board is to state in their precept what is to be rated at a lower rate, and then it is the duty of the overseers to apply the description given in the precept to the various lands in the parish.

They were stopped by the Court.

BRAMWELL, L.J.—I am of opinion that this judgment should be affirmed. The objection taken is that the land to be exempted from the full rate, or to be assessed at the lower rate, has not been otherwise specified than by describing the use to which it has been put. It is said that no distinct area has been described to which the partial exemption can apply, that no such area has been specified by metes and bounds. I do not think that the district board is bound to give such a specification, and I think that a sufficient specification has been given by the general description in the precept, which mentions the use to which the land is put. Indeed, there is some advantage in such a description, since the partial exemption refers to the condition of the property at the time when the rate is made. I do not think in any case that it is for the appellants here to complain. Perhaps if any owner of land on which the rate is imposed thought himself aggrieved because the use of the property had changed since the rate was ordered to be levied, he might possibly appeal; but I do not think that the appellants here have any cause for complaint.

BRETT, L.J.—Cases and facts in cases of this description are always stated with reference to the question raised and intended to be raised in the case. Now only one question is raised before us, and that is, whether this rate is bad in law under the provisions of section 159 of the Metropolis Management Act, 1855. That is the only question brought before us, and advisedly so, and that is the only question on which we have to give a decision. The objection taken is an objection to the precept. The precept expressly professes to deal with parts of the parish, and it is urged that it cannot do so pro-

The Queen v. London, Brighton, &c. Rail. Co. (App.), Q.B.

perly. It is admitted that the precept might require all such parts to be assessed at a lower rate if it described such parts properly, but it is said that the precept is bad because the description of the parts to be partially exempted is a bad description.

This precept is an order which is made under section 159 of the Act, and if it sufficiently complies with the requirements of the section no objection can be made. If we look at that section, we find that the district board can levy the sums necessary to defray these expenses on part of the parish, and the section says nothing about the definition of the parts to be rated; there is no provision that they shall be described by metes and bounds, or by any special description. The section has been sufficiently followed by the precept. The levy has been made on the parts pointed out, and there is no reason why the overseers should not ascertain what those parts are. I have a clear opinion that the judgment of the Queen's Bench Division is right. With regard to the case of *Howell v. The London Dock Company* (1), I incline to agree with what was said by Erle, J., in *The Queen v. The Great Western Railway Company* (2), and I think that it cannot be cited as an authority of general application. There the Court was asked to deal with facts. A Court generally refuses to do so in such a case, but there it consented to do so. At all events it supplies us with no assistance in deciding the first question in this case. It might do so if we had to consider the second question, but as we have not to deal with that question we leave the case of *Howell v. The London Dock Company* (1) untouched.

COTTON, L.J.—We have only to consider one objection, and that is, that the precept is bad, because as is urged it leaves to the overseers a discretion which the district board ought itself to exercise. I do not think that the board has so delegated its duty. I think that it has exercised a discretion and given a direction, and all that has been left to the overseers to do was the duty of ascertaining to what part of the parish the description given in the precept applies. I think that the precept is a good precept; that it follows the

requirements of the statute; that the description of the parts to be rated at a lower rate is sufficient; and that this appeal must be dismissed.

Judgment affirmed.

Solicitors—Norton, Rose, Norton & Brewer, for appellants; S. Edwards, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1879.
Nov. 8, 15.
Dec. 18.

THE QUEEN *on the prosecution of the* CHURCHWARDENS, ETC., OF ST. MARGARET AND ST. JOHN THE EVANGELIST, WESTMINSTER (respondents) *v.* THE INSTITUTION OF CIVIL ENGINEERS (appellants).

Poor Rate—Exemption from—6 & 7 Vict. c. 36—Civil Engineers—Institution—Primary Object of Society—Purposes of Science, Literature and Fine Arts.

A society, known as "the Institution of Civil Engineers," was formed for the purpose of promoting the general advancement of mechanical science, and more particularly the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states both for external and internal trade, as applied in the construction of roads, bridges, &c., and in the art of navigation by artificial power for the purpose of commerce and in the construction and adaptation of machinery, and in the drainage of cities and towns. The bye-laws and regulations of the society stated under the head of "Objects" that the institution was established for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge

The Queen v. Institution of Civil Engineers, Q.B.

which constitutes the profession of a civil engineer. The institution consisted of three classes, namely, members, associates, and honorary members, with a class of students attached, and papers were read at the institution on various subjects:—

Held, that the primary purpose of the institution was the edification and instruction of its members and students in sundry arts, with the view of enabling them the better to practise a particular profession, and consequently that such institution was not entitled to be exempted from rates under 6 & 7 Vict. c. 36, as a society established exclusively for the purposes of science, literature or the fine arts.

Upon appeal to the Quarter Sessions for Middlesex against a poor rate made by the above churchwardens overseers and vestrymen on the 16th day of April, 1877, in which the Institution of Civil Engineers were the appellants, and the said churchwardens overseers and vestrymen were the respondents, the Court confirmed the said rate with costs, subject to the following case.

In the year 1828 Thomas Telford, a Fellow of the Royal Societies of London and Edinburgh, and others, had formed themselves into a society for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man as the means of production and of traffic in states, both for external and internal trade, as applied in the construction of roads, bridges, aqueducts, canals, river navigation and docks for internal intercourse and exchange, and in the construction of ports, harbours, moles, breakwaters and lighthouses, and in the art of navigation by artificial power for the purpose of commerce, and in the construction and adaptation of machinery, and in the drainage of cities and towns.

The said society was by royal charter dated the 3rd of June, 1828, incorporated for the purpose aforesaid by the name of "The Institution of Civil Engineers."

Power is given to the members of the

said corporation by the said charter to hold general meetings, which are empowered to make and establish and from time to time alter, vary or revoke such bye-laws as they should deem to be useful and necessary for the regulation of the corporation, for the admission of members, for the management of the estates, goods and business of the corporation, and for fixing and determining the manner of electing the president and other officers.

By the bye-laws it is provided that under no pretence whatever shall the property and effects, or the income or revenue of the institution derived from the voluntary contributions of members or otherwise howsoever be applied in making any dividend, gift, division or bonus, unto or between any of the members, and the same is thereby expressly prohibited in conformity with the fundamental law and the therein alleged invariable practice of the institution as acted upon from its first establishment, and that therefore no proposition in contravention thereof shall be entertained by the council or by any meeting, whether general or special, of the members of the institution. In conformity with the bye-law the institution has not made and does not make any dividend, gift, division or bonus except any which may from this case appear to be so made unto or between any of its members.

Although the institution derives part of its yearly income from sums invested, yet it is substantially supported by the annual contributions of its members.

The appellants occupy the house and premises mentioned in the rates and valuation list, and hereinafter called "The Institution," for the transaction of their business and for carrying into effect their purposes.

The appellants maintain a library at the institution, consisting of works bearing upon the purposes of the institution as specified in the charter, and of works bearing upon science in general. They also maintain there a reading room, wherein periodicals of a similar character are provided for the use of members. The reading-room is also supplied with the *Times*, *Standard* and *Daily News*

The Queen v. Institution of Civil Engineers, Q.B.

newspapers. The appellants have collected and continue to collect in the institution maps and engineering publications, and plans and drawings of engineering works from all parts of the world. Models are occasionally, when papers are read, exhibited at the institution, to illustrate the subjects of such papers, but there is no model room or permanent exhibition of models.

The council invite original communications or papers upon such subjects as those set forth in the annual report hereunto annexed. Those papers which the council select are read at meetings held at the institution and discussion upon them follows. The papers are afterwards printed and circulated among the members.

The institution does not regulate the etiquette or discuss at its meetings the discipline of the profession of civil engineers.

The appellants grant certificates or diplomas to all members, shewing the status of each in the institution. The following is the form of such certificates or diplomas :—

The
Institution of Civil Engineers.

Established 1818,

Incorporated by Royal Charter, A.D. 1828.

These are to certify that
is a _____ of the Institution of Civil Engineers, a society established for promoting the acquisition of that species of knowledge which constitutes the profession of civil engineer, whereby the great sources of power in nature are converted, adapted and applied for the use and convenience of man.

Witness our hands and seals at Westminster this _____ day of
187

President.

Secretary.

An institution called "The Benevolent Fund of the Institution of Civil Engineers" was established in 1864, and is conducted in accordance with certain rules, a copy whereof was annexed to and formed part of the case. Such benevolent fund is managed and the business thereof is transacted by a committee of

members of the appellant society at the institution, and the appellants' secretary is honorary secretary thereof.

The investments of the said benevolent fund amount to 25,000*l.*, and its annual income exceeds 2,000*l.* Certain petty expenses in connection with such fund are paid during each year out of the appellants' funds, and are repaid during the following year, as appears by the abstract of receipts and expenditure contained in the annual report. The Benevolent Society is a distinct body from the Institution of Civil Engineers.

The members of the institution are not obliged to contribute to the said benevolent fund, but about one-fourth of them do so contribute.

By one of the bye-laws, the council of the institution have the power to grant from time to time, as they may think fit, the use of the rooms of the institution to any persons who may be desirous of having lectures delivered on subjects connected with the objects of the institution.

Under power of the last-mentioned bye-laws the appellants lend their rooms for papers to be read at the rooms of the institution on subjects connected with its objects by members of such societies as "The Institution of Mechanical Engineers," "The Iron and Steel Institute," "The Meteorological Society" and "The Society of Telegraph Engineers." No charge whatever is made to these societies for this accommodation, nor indeed are any sums received from them to repay incidental expenses for lighting or otherwise, and the members of the appellant institution, as well as those of the particular society accommodated, have free admission to such meetings.

The only person who resides upon the premises is a housekeeper, who resides there solely for the purpose of taking care of the premises and their contents.

On the 3rd of November, 1843, the barrister appointed to certify the rules of friendly societies in England duly certified that the said institution was entitled to the benefit of the Act 6 & 7 Vict. c. 36, intituled "An Act to exempt from County, Borough, Parochial and other

The Queen v. Institution of Civil Engineers, Q.B.

local rates, Land and Buildings occupied by Scientific or Literary Societies."

The appellants duly gave notice of appeal against the rate to General Quarter Sessions of the Peace for the county of Middlesex, on the ground that they were exempt from rateability by virtue of the above-mentioned Act 6 & 7 Vict. c. 36.

The appellants then contended that the Institution of Civil Engineers was a society instituted for purposes of science, literature or the fine arts exclusively, within the meaning of 6 & 7 Vict. c. 36, and was therefore exempt from being rated to the poor rate.

The respondents contended on the other hand that the said institution was not such a society within the meaning of the said Act, and that therefore the appellants' premises were rightly included in the said rate.

The Court decided that the institution was a society established for the acquisition of all that knowledge which may be useful to the persons practising in this country the profession of a civil engineer, and not exclusively for the promotion of scientific knowledge, and that its objects and pursuits were not such as to bring it within section 1 of the 6th & 7th Vict. c. 36, and entitle it to exemption; and the Court accordingly confirmed the said rate, subject to a case for the opinion of this Court (1).

The case having been brought up by *certiorari* and a rule *nisi* to quash having been obtained,

Meadows White and *Glen*, on behalf of the respondents, shewed cause.

(1) By 6 & 7 Vict. c. 36, s. 1. No person is liable to be rated in respect of any land, house or buildings "belonging to any society instituted for purposes of science, literature or the fine arts exclusively, either as tenant or owner, and occupied by it for the transaction of its business and for carrying into effect its purposes, provided that such society shall be supported wholly and in part by annual voluntary contributions, and shall not and by its laws may not make any distribution, gift, division or bonus in money unto or between any of its members."

Sir Henry James and *Poland* (*Mead with them*), for the appellants, supported the rule.

The following cases were cited during the argument, the nature of which sufficiently appears from the judgment of the Court:—*The Queen v. Brandt* (2), *The Queen v. Pocock* (3), *Ex parte The Overseers of Birmingham* (4), *The King v. Phillips* (5), *Scott v. The Churchwardens of St. Martin's* (6), *The King v. Cockburn* (7), *The Earl of Clarendon v. St. James's, Westminster* (8), *The Queen v. Gaskill* (9), *The Governors of the Russell Institution v. The Vestry of St. Giles* (10), *Purchas v. The Churchwardens, &c., of Holy Sepulchre, Cambridge* (11).

Our. adv. vult.

The judgment of the Court was (on Dec. 18) delivered as follows:—

FIELD, J.—This is a case stated by the Court of Quarter Sessions for the county of Middlesex, and the question asked of us by the Court is whether the appellants are entitled to claim exemption from the payment of their share of the money to be raised by local taxation on the ground that they are exempted from rateability by the operation of the Act of 6 & 7 Vict. c. 36, as a society instituted exclusively for the "purposes of science, literature or the fine arts," and whether the premises occupied by the appellants were, at the time of the rate, exclusively used for any of such purposes. Upon the argument, the numerous cases in which

(2) 16 Q.B. Rep. 462; 20 Law J. Rep. M.C. 119.

(3) 8 Q.B. Rep. 729; 15 Law J. Rep. M.C. 132.

(4) 10 Q.B. Rep. 868; 18 Law J. Rep. M.C. 89.

(5) 8 Q.B. Rep. 745; 17 Law J. Rep. M.C. 83.

(6) 5 E. & B. 868; 25 Law J. Rep. M.C. 42.

(7) 16 Q.B. Rep. 480; *sub nom. The Queen v. The Churchwardens, &c., of St. Martin's*, 21 Law J. Rep. M.C. 63.

(8) 10 Com. B. Rep. 806; 20 Law J. Rep. M.C. 213.

(9) 16 Q.B. Rep. 472; 21 Law J. Rep. M.C. 102, 29

(10) 3 E. & B. 416; 23 Law J. Rep. M.C. 66.

(11) 4 E. & B. 166; 24 Law J. Rep. M.C. 9.

The Queen v. Institution of Civil Engineers, Q.B.

the statute relied upon has been the subject of judicial decision, were ably and succinctly brought before us, and although at the time of the argument I entertained very little doubt as to what my decision ought to be, I have considered it right to go carefully through the authorities before delivering my judgment. The result is to make the case, to my mind, a very plain one. The clear object of the Act, although, as has been observed, the language of it is not as definite as it might have been, is to encourage persons to associate together, and by voluntary subscriptions to raise a fund, by means of which, subjects of science, literature and the fine arts may be discussed and a knowledge of them widely diffused so as to extend and promote the general knowledge and refinement of society at large. Whether such a result should have been sought at the expense of a limited area of the body politic, rather than by imperial taxation, is not the question. The statute has said that such is to be the case, and we have only to construe its meaning. The object, however, of the enactment and its limitation exclusively to matters of science which may be useful or of advantage to the body politic at large, and not to the advantage or pleasure of any particular body or association, is shewn by the prohibition of any dividend or personal gain to the members of the society. It is further made clear when it is observed that whereas in dealing with purposes of science and literature, the language of the enactment is large enough to include all science and literature, whether abstract and pure, or applied to any particular object, yet in dealing with "art" which, without any addition, might mean either pure art, or an art or mystery, profession or handicraft, the Legislature adds the limitation "fine" to point out the limitation I have adverted to. In the case of "art," therefore, the limited object of the statute is clearly expressed, and so in the case of science and literature the same limitation ought to prevail. In the hands of the philosopher and man of science and literature, "science," although applied for the purposes of experiment and ad-

vancement of the general state of knowledge, is so applied without any material or substantial intention of advantage, or gain or of enjoyment by the individual, whereas "science" seems to me to cease to be science, within the meaning of the exemption, when it is acquired, communicated or made use of for the purpose of being applied or used for the individual object, advantage or gain of the members of the associated body. The "science" as applied by the manufacturer or engineer is, no doubt, still science generally, but is not science which the Legislature intended to exempt from local taxation. That this is so is, I think, clear upon principle, and the authorities cited, taken as a whole, bear out this view. No doubt it has been thought that the Court of Queen's Bench, in some of the earlier cases, carried the exemption at least to its furthest limits, but all the later cases are in favour of its stricter limitation. The application of the rule, therefore, becomes in each case a question of fact. What is the purpose of the institution claiming exemption? Is it instituted purely and exclusively for the purposes of "science," as I have defined it, or is it instituted primarily and substantially for the acquisition, enjoyment, advancement of or education in knowledge of the art or profession of the members composing the institution? It may be, perhaps, that the discussion of "science" in any shape is as productive of advantage to, as that of literature is of enjoyment by, the individuals who compose the institution. But if the advancement and acquisition of science taken generally is the main and substantial object of the association, then the necessary concomitant of advantage and enjoyment to the individual does not destroy the exemption. And, in like manner, if the primary and substantial purpose of the institution is the advantage and gain of a particular body of professional men, exercising a professional art by which to earn their livelihood, the fact that those objects are gained by the discussion and promotion of such science as if applied to their art will advance their individual and professional

The Queen v. Institution of Civil Engineers, Q.B.

interests, will not protect the society from taxation. For the purpose of deciding under which head the institution in question must be ranged, I have carefully considered the terms of the charter and bye-laws, and the purposes for which these premises are used, and I cannot but come to the conclusion that neither the purpose nor the use is within the meaning of the Legislature as giving exemption. I find from the charter and bye-laws that it calls itself an institution of civil engineers, of the members and intending members of which profession it is substantially composed, and the slight admixture of persons other than members of that profession or their pupils, does not destroy that limitation and distinctive character. Again, I find that all the science and literature to which the charter refers converge upon one point—the education and advancement of its members in the particular professional art of a civil engineer, in which they are engaged, and by which they earn or are to earn their living. That this is the substantial purpose of the institution, as expounded by the charter and bye-laws, is shewn by the report of the council, which also shews the purposes for which they use the rateable hereditaments, for we find that, out of a gross income of upwards of 11,000*l.*, upwards of 5,000*l.* is devoted to the advancement of professional objects and interest. I might point out various other elements of the purposes for which the society's premises are used, which seem to me to tend in the same direction, and which lead me to the conclusion that the "science" for the diffusion of which the lectures and papers serve is ancillary and subordinate to the main professional object of the institution. There was, however, one particular use of the premises, namely, that of the committee of the Benevolent Association, a body which, almost admittedly, did not come within the exemption upon which I promised to express an opinion, if my decision in favour of the respondents rested upon it. But as my judgment has so much broader a scope, I prefer not to express an opinion upon it. The result, therefore, is, that I hold the institution not to be exempt,

and give judgment in favour of the respondent parish.

MANISTY, J.—The question in this case is whether the premises occupied by the Society of Civil Engineers in Great George Street, Westminster, are exempt from local rates.

The appellants contend that civil engineering is a science within the meaning of the 6 & 7 Vict. c. 36, and that the primary object of their institution is the advancement of that science, all else which they do being incidental and ancillary to that object, consequently they are exempt from rates for the relief of the poor.

The respondents contend, first, that whether civil engineering in the abstract be or be not a license within the meaning of the Act (which they deny), the primary object of the society is the instruction of its members in various subjects in which it is useful for them to be instructed, in order that they may be the better qualified to practise the profession of civil engineering.

Secondly, they contend, that assuming the appellants would otherwise be entitled to exemption, they are not so entitled because they permit a society or institution called the "Benevolent Fund of the Society of Civil Engineers" to meet and transact their business in the premises in question.

It is well settled by a number of authorities which were cited in the course of the argument that in deciding whether any particular society is within the Act, regard must be had to the primary purpose for which it was formed.

The Court of Quarter Sessions came to the conclusion upon the facts proved that the Institution of Civil Engineers is a society established "for the acquisition of all that knowledge which may be useful to persons practising in this country the profession of a civil engineer, and not exclusively for the promotion of scientific knowledge, and that its objects and pursuits were not such as to bring it within the Act and entitle it to exemption." In that conclusion I concur. So far as the question is one of fact it would be enough

The Queen v. Institution of Civil Engineers, Q.B.

to say that there was evidence for the consideration of the justices, but I do not see how they could have properly come to any other conclusion either in fact or law, for the following reasons:—The purpose of the society is stated in their charter of incorporation to be for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production of traffic in states both for external and internal trade as applied in the construction of roads, bridges, aqueducts, canals, river navigation and docks for internal intercourse and exchange, and the construction of ports, harbours, moles, breakwaters and light-houses, and in the act of navigation by artificial power for the purposes of commerce, and in the construction and adaptation of machinery and in the drainage of cities and towns.

The bye-laws and regulations of the society state under the head of "Objects" that the institution was established for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer.

Under the head of "Constitution," they state that "the Institution of Civil Engineers shall consist of three classes, namely, members, associates and honorary members with a class of students attached." Students are defined as "persons not under eighteen years of age, who are or have been pupils of members or associates of the institution, and who have the object or intention of becoming civil engineers."

Each student who resides within ten miles of the General Post Office pays 2 guineas, and each other student pays 1½ guineas per annum. The income derived from this source in the year 1877, was 800l.

The list of "subjects for papers" in the session, 1877-78, comprises fifty subjects, including—(3). The manufacture of cements, comprising the processes fol-

lowed in different countries; (4.) The manufacture of bricks by machinery; (9.) The construction of warehouses and other buildings to resist fire; (10.) The warming and ventilation of large buildings; (14.) The benefits and expedients of irrigation in India and in other warm climates; (37.) The manufacture of mineral oils, and the lamps best adapted for their consumption in dwellings and light-houses; (38.) The output of coal in the United Kingdom compared with that of other countries illustrated by statistics shewing where coal is produced, where and how it is consumed and the relative quantities exported. Several other subjects of a similar character will be found on reference to the list.

I am clearly of opinion that a society having for its primary purpose the edification and instruction of its members and students in sundry arts (more especially if they are not fine arts) with the view of enabling them the better to practise a particular profession, is not a society established exclusively for purposes of science, literature or the fine arts, within the meaning of the Act 6 & 7 Vict. c. 36.

That such is the primary purpose of the Institution of Civil Engineers, having regard to their charter and bye-laws as well as usage, I cannot doubt.

On this ground and for these reasons, I am of opinion that judgment must be given for the respondents, consequently it is unnecessary to say anything on the second point taken on their behalf.

Judgment for respondents.

Solicitors—Hallowes, Price & Hallowes, for appellants; J. C. F. Warrington Rogers, for respondents.

[CROWN CASE RESERVED.]

1880. }
 March 6. } THE QUEEN v. CUMPTON.*

Warrant of Commitment—Backing of Warrant—Arrest by Constable—5 & 6 Will. 4. c. 76. ss. 76, 101—19 & 20 Vict. c. 69. s. 6.

O. was convicted of an assault on two police constables in the execution of their duty. The constables were members of the county police force of Worcestershire, and were apprehending O. in the city of Worcester under a warrant issued by two justices of the county of Worcestershire, for his commitment to prison for default in payment of a fine.

Worcester is a borough having a separate commission of the peace with exclusive jurisdiction and a separate police force. The warrant was not backed by any justice of the city of Worcester, and O. was not pursued from the county, but found in the city:—

Held, that the conviction was wrong, because the constables were not acting in the execution of their duty in so executing such warrant.

CASE reserved by the Recorder of Worcester:—The prisoner was indicted at the Quarter Sessions for the city of Worcester on a charge of assaulting two police constables in the execution of their duty. He was also charged with a common assault. He was convicted on both charges. The question reserved was whether the conviction on the first charge could be supported.

The assault as to which the question arose was committed on two police constables of the county police force of Worcestershire, who were apprehending the prisoner within the city of Worcester, under a warrant issued by two county justices for his commitment to prison for default in payment of a fine. Worcester is a city and county, having a separate commission of the peace, with exclusive jurisdiction and a separate police force. The warrant was not backed by any city justice. The prisoner was not pursued

from the county of Worcestershire, but found in the city.

It was contended for the prisoner that the constables had no authority to arrest him within the city, and were therefore not assaulted in the execution of their duty.

The question for the opinion of the Court was whether the conviction on the charge of assaulting the police in the execution of their duty was supported by the facts.

J. J. Powell (*Patrick Evans* with him), for the prisoner.—Previous to the Municipal Corporations Act, Worcester was governed by a charter granted by King James I., which declared that thereafter Worcester should be a county of itself, and no parcel of the county of Worcester.

[LORD COLERIDGE.—It is also a borough specified in schedule A. of the Municipal Corporations Act, 1835 (5 & 6 Will. 4. c. 76), to which therefore by sec. 1 of that statute certain provisions of the Act apply, notwithstanding any previous charter.]

The prosecution rely on 19 & 20 Vict. c. 69. s. 6, which enacts that county constables shall have in every borough situate wholly or in part within such county, or within any county in which they have authority, all such powers and privileges, and be liable to all such duties and responsibilities as the constables appointed for such borough have and are liable to within any such county. That enactment does not apply, because Worcester is a separate county, not a borough situate in Worcestershire.

If, however, that section does apply, and Worcester is to be treated as a borough, it only gives Worcestershire county constables the same powers in Worcester that Worcester borough constables have in Worcestershire. The powers of borough constables, as defined by 5 & 6 Will. 4. c. 76. ss. 76, 101, do not extend to executing warrants of commitment in the county. The county justices have no jurisdiction within the borough of Worcester, and their warrant unbacked does not run there. 5 & 6 Will. 4. c. 76. s. 111, enacts that no part of any borough in and for which a separ-

* *Coram* Lord Coleridge, C.J.; Grove, J.; Pollock, B.; Field, J.; and Stephen, J.

VOL. 49.—M.C.

The Queen v. Crompton, C.C.R.

ate Court of Quarter Sessions shall be holden, shall be within the jurisdiction of the justices of any county from which such borough was exempt before that Act. And moreover by Jervis's Acts (11 & 12 Vict. c. 42. s. 11, and 11 & 12 Vict. c. 43. s. 3), warrants of commitment must be backed before being served outside the jurisdiction of the justices issuing such warrants.

H. Matthews (R. H. Amphlett with him), for the prosecution, was requested by the Court to confine his argument to the point whether a warrant of commitment can be executed in a borough without the authority of a borough justice.

H. Matthews.—At Common Law the parish constable was the proper officer to enforce warrants, and his jurisdiction was limited to the parish. He was not bound to go out of his parish, *Case of the Village of Chorley* (1), but if the warrant was directed to him by name he might execute it in any place in which such warrant ran.

The warrant issued in this case was a proper and lawful command to arrest the defendant, who was an offender against the peace within the meaning of 5 & 6 Will. 4. c. 76. s. 76. By 5 & 6 Will. 4. c. 76. s. 76, borough constables are to apprehend offenders against the peace within the county in which the borough is situate, and to have all the powers and duties of constables at common law within their constableness within such county, and to obey all lawful commands of justices having jurisdiction within any county in which they shall be called on to act as constables. Therefore a Worcester borough constable might execute a warrant of commitment in the county. If so, then 19 & 20 Vict. c. 69. s. 6, which gives county constables the same powers in boroughs within the county as borough constables have in such county, renders it lawful for a warrant to be executed by a county constable in the borough.

Section 101 of 5 & 6 Will. 4. c. 76, deals only with four documents, and empowers borough justices to order them

to be executed in the county. Such documents are all precedent to the order or conviction, therefore section 101 does not, as to warrants of commitment, cut down the effect of section 76.

It is perfectly reasonable for the Legislature to have drawn a distinction between a warrant to apprehend on a charge and a warrant to commit to gaol after a conviction, and to have given a greater latitude for the service of warrants of commitment than for other warrants. On the other hand it would be absurd to place a warrant of commitment in a less advantageous position than a warrant of apprehension, which would be the result of giving effect to the defendant's contention.

LORD COLERIDGE, C.J.—The question reserved in this case is purely one of jurisdiction.

Now it is the fact that Worcester is a borough and also a county of a city, and it was contended that something turned upon the peculiar constitution of Worcester, it being a county of a city. We, however, think that nothing does turn upon such fact, and our judgment is based upon a statute which makes no difference between counties of cities and other boroughs.

It was argued on behalf of the appellant that, inasmuch as the constables were county constables acting under the authority of county justices, it could not be said that they were acting in obedience to the lawful commands of any of the justices of the peace having jurisdiction in the borough under section 6 of the 19 & 20 Vict. c. 69. the borough of Worcester not being within the county of Worcester, and having a jurisdiction of its own.

On behalf of the prosecution it was argued that Worcester is a borough situated within the county of Worcestershire, and therefore the county constables have, under that section, the same powers as the constables for the borough, and have the same right to execute the warrant in the borough of Worcester as they would undoubtedly have in the county. Even if that section stood alone I think it would be doubtful whether the

(1) 1 Salk. 175.

The Queen v. Cumpton, C.C.R.

execution of a warrant of commitment issued by a justice not having authority within the jurisdiction where it was to be executed, came within the "powers and privileges" or "duties and responsibilities" mentioned in the section referred to; but when we look at the provisions of this section as expounded by the Municipal Corporations Act (5 & 6 Will. 4. c. 76) the matter becomes quite clear. The section in question is, in its affirmative provisions, the same, *mutatis mutandis*, as section 76 of the Municipal Corporations Act, but section 101 of that Act provides that the borough police may execute certain specified orders beyond the jurisdiction of the person issuing them, although not "backed." It is admitted that a warrant of commitment is not one of the orders specified in that section. By inference the police have no power to execute unbacked warrants outside their jurisdiction in cases other than those specified, and the warrant in this case is therefore not one which the borough justices could authorise the borough police to execute in the county. Now it is admitted that the later Act only empowers the county justices to authorise the execution within the borough of such process, as the borough justices could authorise the execution of it within the county. Therefore in this case the constables were not acting in the execution of their duty, and the conviction must be quashed.

GROVE, J.—I think this conviction cannot be sustained without unduly straining the words of the statutes. This warrant is clearly not one of those specified in section 101, for the prisoner cannot be said to be a person "charged with any offence," nor is that section in any way enlarged by section 76, which relates to the duties of constables only.

POLLOCK, B.—I think that it would be impossible to affirm this conviction without disregarding all the sound rules which should guide the Court in the construction of statutes. I think that section 76 is intended to define the protection to which the constable is entitled in the discharge of his duties, and does not relate to the manner in which he is to carry out a lawful command, such as the

execution of a warrant. Section 76 being then silent on this point, we find section 101 expressly dealing with cases where the duties of constables in the execution of certain specified warrants are pointed out; and it being admitted that this warrant is not one of those specified in section 101, I think the conviction must be quashed.

FIELD, J.—I am of the same opinion. In this case it lies on the prosecution to make out that the constable has the power contended for, and in this I think they have failed. In my opinion section 76 relates rather to the *status* of the constable than to the question of jurisdiction; while the particular warrant in this case does not bring it within section 101, for the prisoner cannot be said to be a person "charged with any offence."

STEPHEN, J.—I have come to the same opinion, though not without considerable regret and doubt. I will only add one observation to what has been said, and that is as to section 76. The effect of section 76 seems to me to be this, that the borough constables are to have within certain enlarged local limits all the powers and duties of other constables, and that within the same limits they are to obey all the lawful commands they may receive, but it does not shew what the conditions are which render such commands lawful. To find out what they are we have to look at section 101 and the enactments as to backing warrants in Jervis's Acts. The effect of which is, that if warrants are to be executed outside the jurisdiction of the justices issuing them they must be backed, except in the cases enumerated in section 101. This case is not one of those enumerated; therefore the general rule applies, and the warrant not having been backed is void.

Conviction quashed.

Solicitors—Bolton, Robbins and Busk, agents for Curtler & Davis, Worcester, for the prosecution; Church, Sons & Clarke, agents for Southall, Worcester, for prisoner.

[CROWN CASE RESERVED.]

1880. }
Feb. 28. } THE QUEEN v. CRAMP.*

Abortion, Attempt to procure—Noxious Thing—24 & 25 Vict. c. 100. ss. 58, 59.

A "noxious thing" within 24 & 25 Vict. c. 100, ss. 58, 59, means anything which is harmful as administered, although not necessarily harmful per se.

The prisoner, with intent to procure miscarriage, gave V. an ounce bottle of oil of juniper, telling her to take it in two doses of half an ounce each. She took one such dose, which caused violent sickness. There was evidence that the bottle given by the prisoner contained 500 to 600 drops of oil of juniper; that oil of juniper in small quantities of from five to twenty drops is commonly used without any bad effect as a diuretic, but that taken in a dose of half an ounce it acts as a powerful stimulant and irritant, and produces violent purging and vomiting, which would have a tendency to produce miscarriage by reason of the shock to the system and the straining of the parts consequent upon the purging or vomiting; and that a dose of half an ounce of oil of juniper would be a very dangerous dose to administer to a pregnant woman, and that such danger would consist in the high probability of its causing miscarriage:—

Held, that there was evidence that the half ounce of oil of juniper was a "noxious thing" within the meaning of the section.

CASE reserved by Denman, J.

The prisoner was tried and convicted on an indictment, which alleged that he "feloniously and unlawfully did cause to be taken by one Ellen Elizabeth Verrall a certain noxious thing, to wit a large quantity, to wit half an ounce of oil of juniper, with intent feloniously to procure the miscarriage of the said Ellen Elizabeth Verrall, against the form of the statute, &c."

The statute referred to is the 24 & 25 Vict. c. 100. s. 58 (1).

* *Coram Coleridge, C.J.; Denman, J.; Pollock, B.; Field, J.; and Stephen, J.*

(1) 24 & 25 Vict. c. 100. s. 58:—"... whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken

It was proved that the prisoner did, with intent to procure the miscarriage of Verrall, who was with child by him, give her an ounce bottle full of oil of juniper, and tell her that she must take it, half of it at a time, in two doses. She accordingly, on the following morning, took half the contents of the bottle, which caused violent sickness, of which she informed the prisoner, who told her not to mention that he had given it, or he might be transported, and said that she would not now have a child. She did not, in fact, miscarry, but was with child at the time of the trial.

There was evidence that the bottle given by the prisoner contained 500 to 600 drops of oil of juniper, that oil of juniper in small quantities of from five to twenty drops is commonly used without any bad effects as a diuretic and otherwise; but that taken in a dose of half an ounce, it acts as a powerful stimulant and irritant, and produces violent purging and vomiting, which would have a tendency to produce miscarriage by reason of the shock to the system and the straining of the parts consequent upon the purging or vomiting; and that a dose of half an ounce of oil of juniper would be a very dangerous dose to administer to a pregnant woman, but the danger would consist in the high probability of its causing miscarriage, which is always more or less dangerous to a woman, and not in the probability of any mischief of any other kind.

It was contended for the prisoner that there was no evidence of the prisoner having caused "a noxious thing" within the meaning of the statute to be taken, as evidence only shewed that oil of juniper would be noxious when taken in excess. The learned Judge told the jury that if they were satisfied that the prisoner had given the prosecutrix the full ounce bottle of oil of juniper, and told her to take half with the intent of causing her to miscarry, and if they thought that such a dose of oil of juniper was a noxious thing, as being calculated to injure the health of the prosecutrix by

by her any poison or other noxious thing ... shall be guilty of felony."

The Queen v. Cramp, C.C.R.

causing her to miscarry, they might find him guilty, which they did.

D. Kingsford (F. Mead with him), for the prisoner.—The question to be decided is, what is the meaning of the words “noxious thing” in section 58 of the Act? They mean something *ejusdem generis* with poison, and are merely words of description. In *The Queen v. Isaacs* (2), Pollock, C.B., said: “We are all of opinion that the thing intended by the statute must be noxious in its nature.” *The Queen v. Hennah* (3); *The Queen v. Blakeman* (4); and *The Queen v. Perry* (5), were also cited.

A. B. Kelly, for the prosecution, was not called upon.

LOED COLERIDGE, C.J.—The case is within the statute, and therefore the conviction ought to be affirmed. The intent with which the oil of juniper was given was proved, and also that it was noxious as administered. A poison is defined to be that which when administered is injurious to health or life. Some things administered in small quantities are beneficial, which, when administered in large quantities, are noxious. In the present case the oil of juniper as administered was noxious.

In the case of *The Queen v. Isaacs* (2) the drug was not shewn to be capable of doing harm. In *The Queen v. Perry* (5) and *The Queen v. Hennah* (3) the things taken were not noxious in the form taken.

DENMAN, J., and POLLOCK, B., concurred.

FIELD, J.—The statute speaks, first of poisons; secondly, of other things. If the thing administered is a recognised poison the offence may be committed, though the quantity given is so small as to be incapable of doing harm. In the present case the thing administered was such an amount of oil of juniper as was proved to be noxious. It was, therefore, a “noxious thing” within the meaning of the statute.

STEPHEN, J.—This case stands on the

- (2) L. & C. 220; 32 Law J. Rep. M.C. 52.
- (3) 13 Cox 547.
- (4) 12 Cox 463.
- (5) 2 Cox 223.

same principle as *The Queen v. Hennah* (3). With regard to the meaning of the term “poison” there are certain things which have acquired the name of poisons, and as to these possibly, if a small quantity only were administered, the administration might come within the statute.

Conviction affirmed.

Solicitors—Cripps & Son, Tunbridge Wells, for prosecution; De Jersey, Micklem & Son, agents for J. G. Langham, Uckfield, for prisoner.

[CROWN CASE RESERVED.]

1880. } *THE QUEEN v. BISHOP.**
Feb. 28. } *County of Le Cocq 53d M 6*
Lunatics—Reception of Lunatics in an
Unlicensed House—Honest Belief—8 & 9
Vict. c. 100. s. 44. 126

8 & 9 Vict. c. 100. s. 44 makes it an offence for any person to receive two or more lunatics into any house, unless such house shall be an asylum or hospital registered under the Act or a house duly licensed under the Act.

Held, that to constitute such an offence, knowledge or absence of knowledge of the person receiving lunatics as to their lunacy is immaterial.

The defendant was convicted under such Act, but it was specially found by the jury that though the persons so received were lunatic, the defendant honestly, and on reasonable grounds, believed that they were not lunatic.

Held, that such belief was immaterial and that the conviction was right.

CASE reserved by Stephen, J.

The defendant was tried on an indictment charging her with an offence against the 44th section of 8 & 9 Vict. c. 100 (1), by receiving into her house

* *Coram* Lord Coleridge, C.J.; Denman, J.; Pollock, B.; Field, J.; and Stephen, J.

(1) “. . . it shall not be lawful for any person to receive two or more lunatics into any house, unless such house shall be an asylum or an hospital registered under this Act, or house for the time being, duly licensed under this Act, or one of the Acts hereinbefore repealed; and any person who shall receive two or more lunatics into

The Queen v. Bishop, C.C.R.

two or more lunatics, such house not being an asylum or hospital registered under the Act or a house duly licensed under the Act.

It was proved on the trial that the defendant received into her house several young women, for the purpose of medical treatment. Her stepdaughter, who was called as a witness on her behalf and who took part in the management of the house, described them as patients suffering from "hysteria, nervousness and perverseness," and it was proved that she advertised in newspapers for patients so described. She had, besides these patients, one inmate, who was admitted to be a lunatic, with regard to whom she had complied with the requisitions of section 90 of the same Act.

There was conflicting evidence upon the question whether any of the other patients were lunatics or not, and as to the nature and degree of restraint to which they were subjected, and there was strong evidence to shew that the defendant believed in good faith and on reasonable grounds that no one of them was a lunatic, but that they were all suffering only under hysteria, nervousness or perverseness.

The learned Judge read to the jury the interpretation of "lunatic" given in section 114: "Lunatic shall mean every insane person and every person being an idiot or lunatic or of unsound mind," and told them that in his opinion these words would include every one whose mind was so affected by disease that it was necessary, for his own good, to put him under restraint.

The learned Judge also told them that in his opinion the words "receive one or more lunatics," meant, "receive as lunatics, and in order to be treated as lunatics are treated in asylums," and he gave them this direction: "In order that the defendant may be convicted, the jury must be of opinion that at least one other patient in the house besides the admitted lunatic, was either an insane person or an idiot or a lunatic or of unsound mind

any house other than a house for the time being duly licensed as aforesaid, or an asylum or an hospital duly registered under this Act, shall be guilty of a misdemeanour."

when received; and that such person was received into the house to be treated as a lunatic is treated in an asylum."

The learned Judge further told them that he was of opinion, that if one other such person, besides the admitted lunatic, was so received, an honest belief on the part of the defendant that that person was not a lunatic, would be immaterial, but at the request of the counsel for the defendant he asked them, if they convicted the defendant, to find specially whether she believed honestly and on reasonable grounds that any person so received was not a lunatic.

The jury found the defendant guilty, but they found that she did honestly and on reasonable grounds believe that no one of her patients was a lunatic (except, of course, the admitted lunatic).

The learned Judge directed the defendant to enter into her own recognisances to come up for judgment if called upon, in order that she might have an opportunity of complying with the provisions of the Act, but he reserved for the determination of the Court for Crown Cases Reserved, the question whether his direction to the jury was right, in order that if it was wrong the conviction might be set aside.

No counsel appeared for the defendant.

Mellor and R. Harris, for the prosecution.—The jury found that the defendant did receive more than one lunatic into her house to be treated as a lunatic was treated in an asylum. It is immaterial whether the defendant did or did not know that the persons she so received were lunatics. Knowledge is not an ingredient of the offence. The object of the Act was to prevent persons of doubtful sanity being received into any but licensed houses. The object of licensing houses is that a system of restraint shall not be applied without the knowledge of the Commissioners in Lunacy.

LORD COLERIDGE.—We are precluded by the finding of the jury from considering what evidence there was that the persons so received by the defendant were lunatics. Very grave and serious consequences might arise if every person

The Queen v. Bishop, C.C.R.

who was hysterical and nervous, and who might very properly be taken care of, were to be considered a lunatic. It must therefore be understood that the judgment we pronounce is simply and solely on the question whether knowledge of the fact was an ingredient in the case. I am of opinion it was not, and, therefore, that the conviction was right.

DENMAN, J., concurred.

POLLOCK, B.—I also agree that in this case the conviction ought to be sustained, and I wish it to be thoroughly understood that we affirm the direction of my brother Stephen, when he told the jury that the word "lunatic" would include every one whose mind was so affected by disease that it was necessary for his own good to put him under restraint," in the sense that by "restraint" is meant restraint *ejusdem generis* with that applied to lunatics in asylums. With regard to the point whether the knowledge, or absence of knowledge, of the keeper is material, I am clearly of opinion it is not.

FIELD, J., concurred.

STEPHEN, J.—I am of the same opinion. —I may say upon the mere question whether knowledge on the part of the defendant is essential to the offence under this Act I entertained no doubt at the trial, and I certainly do not now, and for the reasons which have been stated. I reserved the point because I understood that the Commissioners in Lunacy considered the case as one of great importance, and that they wished to obtain as solemn a judicial decision on the meaning of the Act as could be had. With regard to what has been referred to as my definition of a lunatic, I may say I do not think, upon reflection, that the case which I submitted contained quite as much as it ought to have done of what I said to the jury on the subject. I read to them the interpretation of lunatic given in section 114, and I then told them that in my opinion those words were sufficiently wide to include every person who was, by reason of mental disease, in such a condition that it was necessary, or advisable at any rate, for his or her own good, to subject him or her to the restraint of a lunatic asylum.

I added that that was said not by way of a legal definition, which bound them, it was not a positive direction to them, but that upon the whole it was the best construction which I could place upon the words of the Act, which are very general indeed; because it says that "lunatic" shall mean every insane person, and every person being an idiot or lunatic or of unsound mind.

In other words, "lunatic" shall mean not only lunatic, but insane and idiot, and a person of unsound mind; and I said that I thought that if there was any difference between a lunatic and an insane person and a person of unsound mind, persons of unsound mind, not being lunatics, must be persons whom it was necessary for their own good to subject to that kind of restraint, which is exercised in lunatic asylums over persons afflicted with lunacy.

Conviction affirmed.

Solicitor—Vandercom, Law & Hardy, for the prosecution.

Parsons v. Bishop 57 L. J. 649

[IN THE QUEEN'S BENCH DIVISION.]

1880. } WILLIAMS AND ANOTHER (appellants) v. ELLIS (respondent).
Feb. 19. }

Turnpike Toll—Carriage drawn by Steam or other Power—Bicycle.

A private Act (3 Will. 4. c. lv.) imposed a toll of 5s. on every carriage of whatever description, drawn, impelled or set in motion by steam or by any other power or agency, than being drawn by horses or beasts of draught:—Held, that a bicycle was not a "carriage" within the meaning of the Act, which was clearly intended to apply only to carriages impelled by mechanical power.

Taylor v. Goodwin (48 Law J. Rep. M.C. 104), distinguished.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions of the peace holden in and for the division of Gloucester, in the county of Gloucester, on the 23rd of August, 1879, the appellants were convicted of having, on the 12th of August, 1879, as collectors of tolls at a certain

Williams v. Ellis, Q.B.

turnpike gate, unlawfully demanded and taken from the respondent the sum of 5s. for the toll of a bicycle, on which he was then riding and which was exempt from toll, by reason of such bicycle not being a carriage, in respect of which toll was authorised to be demanded and taken.

At the hearing of the information it was proved on the part of the respondent that on the 12th of August, 1879, he drove a bicycle on the Over turnpike road in the county of Gloucester, through the toll gate there situate, kept by the appellants, and that the latter demanded of him the sum of 5s., as and for the toll for the said bicycle, which the respondent refused to pay; that the appellants then detained the bicycle.

It was admitted by the appellants that the tolls to be taken at the said turnpike gate were prescribed by the Local Act (3 Will. 4. c. lv.), and were as follows:—

“For every horse, mule or other beast drawing any coach, sociable, chariot, berlin, landau, vis-a-vis, phaeton, curricule, calash, chaise, chair, gig, whiskey, caravan, hearse, litter or other such carriage, the sum of 6d.

“For every horse, mule or ass laden or unladen and not drawing, the sum of 1½d.; and

“For every carriage of whatever description and for whatever purpose, which shall be drawn or impelled or set or kept in motion by steam or any other power or agency, than being drawn by any horse and horses or other beast or beasts of draught, the sum of 5s.”

The justices adjudged the toll to be illegal, and fined the appellants with costs, but stated the above case for the opinion of the Court.

A. P. Stone, for the appellants.—A bicycle is a carriage drawn or impelled and kept in motion by a power or agency other than horse power, and was, therefore, liable to the toll demanded by the appellants. He cited *Taylor v. Godwin* (1).

W. A. Raikes, for the respondent, was not called upon to argue.

(1) 48 Law J. Rep. M.C. 104; Law Rep. 4 Q.B. D. 228.

LUSH, J.—I think that the decision which the justices arrived at in this case was perfectly right, and that the word carriage in the statute does not include a bicycle. The words, no doubt, are very general, but in order to determine the question raised before us we must look at the object of the statute and the purpose for which it was passed. In *Taylor v. Godwin* (1), for instance, it was properly held that a bicycle was a carriage within 5 & 6 Will. 4. c. 50. s. 78, which was a section manifestly inserted to protect the public from being injured by furious driving. But it by no means follows that because it has been held that a bicycle is a “carriage” within the meaning of the statute I have just referred to, it is necessarily also a “carriage” within a section of a statute which deals with the amount of toll payable for the use of a road. I think that the term “carriage” as used in the latter part of the clause of the Local Act was intended to apply only to carriages of a heavy description which both wear the road and are impelled by some mechanical power. A bicycle is in my opinion no more a “carriage” within the meaning of that portion of the Local Act which has been relied upon, than a wheelbarrow or a perambulator would be. It would be absurd, indeed, to hold that the latter were liable to pay a toll of 5s., while a carriage drawn by a horse would admittedly only have to pay 6d.

BOWEN, J.—I am of the same opinion, and for the same reasons.

Judgment for respondent.

Solicitors—Milne, Riddle & Mellor, for appellants; Morley & Shirreff, agents for Jones & Co., Gloucester, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1880. { THE QUEEN (*on the appli-*
March 20. { *cation of the Vestry of St.*
 Mary, Islington) *v.* PRICE.

Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49)—Court of Summary Jurisdiction—Proceedings for the Recovery of Poor Rates—Distress Warrant.

A justice of the peace sitting to issue a warrant of distress for the recovery of poor rates is not a Court of summary jurisdiction within the meaning of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and the provisions contained in that statute in no way affect or apply to proceedings for the recovery of poor rates.

In this case a rule *nisi* had been obtained for a writ of mandamus directed to Mr. John Blant Price, justice for the county of Middlesex, calling upon him to shew cause why he should not issue his warrants of distress for the levying of certain poor rates.

The material facts were as follows:—

Three ratepayers of the parish of St. Mary, Islington, had refused or neglected to pay certain instalments of rates exceeding in each case the sum of 20s., to which they were properly assessed, which rates were made on the 1st of August, 1879, but not demanded until subsequent to the 1st of January, 1880. Accordingly on the 28th of February, 1880, a complaint was made upon oath against them by the collector pursuant to the provisions contained in the Islington Local Act (20 & 21 Vict. c. cxviii.) under which proceedings for the recovery of rates have always been taken. The summonses were duly issued by a justice commanding them to appear on the 10th of March, 1880, to answer the complaint, but they severally refused or neglected to do so. Thereupon after proof of the service of the summonses and non-payment of the rates due and demanded, application was made to the said John Blant Price to grant warrants of distress pursuant to the provisions contained in section 14 of the local Act (20 & 21 Vict. c. cxviii.) by which it is enacted that "in all cases where such rate and assessment shall not be paid before

VOL. 49.—M.C.

the return of such summons, it shall be lawful for the police magistrate or justice who shall have signed and issued such summons, or who shall have directed such summons to be signed and issued as aforesaid, or for any other police magistrate, or justice of the peace for the said county, and he is hereby authorised and required upon oath made before him of the due service of such summons by the person who shall have served the same, and proof on oath that such rate or assessment is actually due and owing, to grant a warrant under his hand and seal, authorising or directing any such person appointed to collect such rate or assessment, or any constable or other person as aforesaid to levy such rate or assessment, and all arrears thereof, &c., by distress of the goods and chattels of the person so neglecting or refusing."

The said John Blant Price refused to grant the warrants upon the ground that such several sums having been demanded since January 1, 1880, and each of such sums exceeding in amount the sum of 20s. respectively, he had no power to make an order for the payment of the said sums or adjudicate upon the application for the issue of either of such warrants by reason of the provisions contained in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

A rule *nisi* for a writ of *mandamus* was obtained on March 15, 1880, on behalf of the vestry of St. Mary, Islington, against which

Poland shewed cause. The provisions contained in the local Act are almost identical with those contained in a general Act (12 Vict. c. 14), and the question is whether the ordinary process by warrant of distress for non-payment of rates is still in existence, or whether the old system of procedure has been superseded by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). The magistrate was of opinion that his jurisdiction to deal with these rating matters was taken away by 42 & 43 Vict. c. 49. Before that statute came into operation the practice relating to the recovery of the poor rate was clear. The poor rate being allowed by the justices, the

H

The Queen v. Price, Q.B.

summons was issued in the usual way, calling upon the ratepayer who had not paid to shew cause why he had neglected or refused to pay the rate. Upon the return of the summons, the rate being allowed by the justices and being good in form, the liability accrued unless good cause was shewn to the contrary. The justices could not go behind the rate, that being purely a matter of appeal, but there are certain matters which it is submitted he would have to determine, as for instance when a man denied that he was the occupier.

[COCKBURN, C.J.—If not the occupier, that would be a matter entering into the rate. Is not the jurisdiction limited to the identity of the person?]

It is submitted that the magistrate's duty is not purely ministerial, but is to some extent judicial. The matter was originally regulated by 43 Eliz. c. 2. s. 4, which gave power to the justice to issue a writ of distress against the offender's goods and chattels if he had not paid the rate, and in default of distress, imprisonment until payment. Then, by 12 Vict. c. 14. s. 2, the period of imprisonment for non-payment of a poor-rate is limited to three calendar months. In the schedule to the statute the form of complaint is given, and then a form of summons, and then a form of the distress warrant. There is no order made by the magistrate to pay the rate, but it is in the nature of an execution. The rate is the order, the summons is simply a complaint that the money has not been paid, and then a distress warrant issues by way of execution—see *Sweetman v. Guest* (1). Although in the case of poor-rates there is no order of magistrates, under the Public Health Act (38 & 39 Vict. c. 55), s. 256, in respect of general rates made under that Act, the magistrate, on non-payment, is to make an order for the payment of the money. It is necessary, in construing the provisions contained in the Summary Jurisdiction Act, 1879, to bear in mind that there are some rates in respect of which the magistrate is to make an order for the payment of the rate; others, as non-

payment of the poor-rate, where he has to issue a warrant of distress for execution without any order. Under the Summary Jurisdiction Act, 1879, s. 6, "where under any Act, whether past or future, a sum claimed to be due is recoverable on complaint to a Court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a Court of summary jurisdiction, shall be recovered in the manner in which a sum declared by this Act to be a civil debt, recovered summarily, is recoverable under this Act, and not otherwise." With reference to this section it will not be disputed that a rate is "recoverable on complaint, and not on information. Then, by section 47, "the provisions of this Act with respect to a sum adjudged to be paid by an order shall apply, as far as circumstances admit, to a sum in respect of which a Court of summary jurisdiction can issue a warrant of distress without an information or complaint under the Summary Jurisdiction Act, 1848, in like manner as if the said sum was a civil debt," &c.

[LUSH, J.—To bring the case within the 47th section it must be shewn that the warrant of distress could issue under Jervis's Act; unless, therefore, it be shewn that Jervis's Act applies to warrants of distress for poor-rates, how is it brought within section 47?]

The first forty-six sections have been dealing with two things—first, orders for the payment of money; second, cases where there have been conviction and fines. Then, having dealt with those cases up to section 46, the Legislature intended by section 47 to apply the Act to all cases which had not been dealt with before. Application for a distress warrant for non-payment of a poor-rate is an application to a justice to issue a distress warrant without information or complaint under the Summary Jurisdiction Act.

[LUSH, J.—Jervis's Act had nothing to do with poor-rates, which were dealt with by a later Act, 12 & 13 Vict. c. 14.]

He also referred to 42 & 43 Vict. sections 20, 35; and section 50.

The Solicitor-General (Sir H. Giffard),

(1) 37 Law J. Rep. M.C. 59; Law Rep. 3 Q.B. 262.

The Queen v. Price, Q.B.

Sir Henry James, and Lush Wilson, in support of the rule, were not heard.

COCKBURN, C.J.—I confess I think this case is not arguable. The 47th section presupposes that the matter is something in which a Court of summary jurisdiction, as defined by section 50, can issue a warrant of distress without an information or complaint. It refers to a Court of summary jurisdiction. Now it is not *qua* a Court of summary jurisdiction that the magistrates grant a distress warrant in the case of a poor-rate. Jervis's Act regulated the procedure in cases in which justices were sitting and acting judicially as a Court of summary jurisdiction. The 47th section refers to the issue of warrants of distress by a Court of summary jurisdiction under Jervis's Act. Now this is not a case in which a Court of summary jurisdiction, under Jervis's Act, could issue a distress warrant; it is not competent to them to do so; it is not within their jurisdiction. The jurisdiction is that of a magistrate sitting, not as a Court of summary jurisdiction, but as a simple justice. The obligation and power to issue a distress warrant under the circumstances were quite independent of Jervis's Act, and come under the statute of Elizabeth. Therefore, inasmuch as the 47th section, in absolute, positive and unmistakeable terms, applies to cases in which the warrant is issuable under Jervis's Acts, and as the warrant of distress for the poor-rate is not issuable under Jervis's Acts, it is as clear as possible that the 47th section does not apply. The same observations apply to the 6th section; the money has been made recoverable practically by the making of the rate; it is not recoverable through an order of a Court of summary jurisdiction, but through a distress warrant. The rule had better be drawn up in the form of an order under Jervis's Act, instead of for a *mandamus*.

LUSH, J., and BOWEN, J., concurred.

Rule accordingly.

Solicitors—John Layton, for applicants; W. T. Ricketts, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { DE MORGAN (appellant) v.
Feb. 25, 28. { THE METROPOLITAN BOARD
OF WORKS (respondents).

Common—Metropolitan Commons Supplemental Act, 1877—Validity of Bye-laws—Right of Public Meeting—Common dedicated to Use and Recreation of Public.

A common was by Act of Parliament dedicated to the use and recreation of the public, and directed to be regulated and managed by the Metropolitan Board of Works, who were empowered to frame bye-laws and regulations for, among other things, the preservation of order on the common. A bye-law made under this power prohibited the delivery of any public speech, lecture, sermon or address of any kind, except with the written permission of the Board first obtained, and upon such portions of the common and at such times as might by such written permission be directed and sanctioned by the board:—

Held, that the bye-law was valid, not being ultra vires as repugnant to the laws of England or the intention of the particular Act, and that it was a reasonable mode of regulating the user of the common to require previous information of the object and character of any meeting proposed to be held thereon.

This was a case stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

On the 30th of July, 1879, the appellant appeared in answer to a summons at the instance of the Metropolitan Board of Works, charging that he did, on the 29th of June, 1879, unlawfully deliver a sermon or address on Clapham Common without having first obtained the written permission of the board to do so, contrary to the bye-laws made by the board under the powers of the Metropolitan Commons Supplemental Act, 1877.

The bye-law in question was made under the second schedule attached to the Act, Article No. 5:—"The Board shall frame bye-laws and regulations for the prevention of nuisances and the preservation of order on the common."

The appellant admitted the act complained of, but said the public had a

De Morgan v. Metropolitan Board of Works, Q.B.

right to hold meetings on the common, and that being a place of public resort, it was contrary to public policy to put down these meetings unless a breach of the peace was occasioned, and that, to make a bye-law which empowered the Board of Works to prohibit or permit them, was beyond the powers conferred by the Act in question on the board.

Clapham Common is of about 200 acres in extent, and there are ancient rights of pasturage belonging to the commoners. There was also a lord of the manor, with certain rights and interest in the common, until, under the recent Act, his right and interest in the common was conveyed to the Board of Works. Under the local Act, 40 & 41 Vict. c. cci., and the scheme for the management of Clapham Common which is made part of the Act, the common "is dedicated to the use and recreation of the public as an open and unenclosed space for ever, and shall, for the purposes of the scheme, be regulated and managed by the Metropolitan Board of Works."

It was provided that no bye-laws framed under the powers of the Act should be repugnant to the laws of England or the provisions of the scheme, and no such bye-laws should, as against any person "entitled to any estate, interest or right of a profitable or beneficial nature in, over or affecting the common, operate or be construed so as to take away or injuriously affect such estate, right or interest." Under this scheme, as authorised by the said Act, bye-laws were made by the Board of Works and duly confirmed, in which certain acts and things are prohibited, and declared to be offences, and subject to penalties, among them, under clause 27, "delivering any public speech, lecture, sermon or address of any kind or description whatever, except with the written permission of the board first obtained, and upon such portions of the common, and at such times as may, by such written permission, be sanctioned by the Board."

It was proved, and indeed admitted, by the defendant that he did preach a sermon on the day named to a considerable assemblage without having obtained

the permission of the board. Some evidence was given of public meetings being held without remonstrance on the part of the commoners or of the lord of the manor. Such evidence, though scarcely going back for twenty years, was probably true. But even so, although it might shew that no steps were taken to prevent those meetings, and therefore, perhaps, acquiescence in a trespass to that extent, it was not strong enough to prove a positive right on the part of the public—a right of user which would be inconsistent with the beneficial user of the common for quiet pasturage. Such a right could scarcely, I thought, be claimed on any common, though possibly it might be on some particular spot, by long and ancient prescription.

The question, then, appeared to come to this—"Is the bye-law a reasonable one for the preservation of order?" It appeared to me that it was.

[The magistrate then stated various arguments and reasons, and concluding that the board had discretion to refuse the appellant permission to preach a sermon, stated that he fined the appellant 20s. and 3l. 3s. costs.]

The opinion of the Court is, therefore, requested upon the point whether, under the circumstances stated, the Metropolitan Board of Works had power to make the bye-law in question, and whether the conviction of the appellant under it was justifiable?

The appellant in person argued against the validity of the conviction.

As in fact public meetings had before taken place without interruption on this common, that was in exercise of a right enjoyed by the public which could not come within the bye-laws. The bye-laws may be for the preservation of order, that is, they may regulate public meetings but not prohibit them; and it is expressly enacted that no bye-law is to take away or injuriously affect any right or interest of any person in or over the common. Then the section enumerates the various things which may be prohibited, these being the deposit of rubbish, the cutting of turf and trees, &c.; and it is contended that the words "preservation of order" are to be read by the light

De Morgan v. Metropolitan Board of Works, Q.B.

of those prohibitions. Then it cannot be said the bye-law requiring permission to be previously given is necessary for preserving order, because the 2nd Bye-law authorises the removal of persons behaving in a disorderly manner or using improper language without warrant by the officers of the board. The 27th Bye-law really gives the board the power of prohibiting meetings altogether, and this is beyond the intention of the Act. A similar bye-law in reference to Wimbledon Common was held to be *ultra vires*, and the decision was not appealed against.

It would be enough for the preservation of order if the board set apart a portion of the common for holding meetings.

Biron, for the respondents.—We admit that this bye-law gives the power to the board of prohibiting meetings, but we say that that power is essential for the preservation of order. It is all important to know who is the person who is to make the address, so as to judge whether disorder is likely to be caused or not.

As to Bye-laws 2 and 5, they merely declare the law, as those offences can be dealt with by law without the bye-laws. The appellant's argument throughout assumes that there is a right of holding public meetings which has been interfered with, but this is found by the magistrate not to exist; and then section 13, which deals with existing estates, interests and rights, has no reference to any such supposed right as this.

The Wimbledon Common case is not in point, because in that Act public meetings were recognised and authorised, and a special power of regulating them was conferred on the Board of Conservators. It was held that this power did not entitle the conservators to make a bye-law prohibiting them altogether; but the present is quite different, as no such right is recognised.

The appellant in reply.

Cur. adv. vult.

The judgment of the Court (1) was (on the 28th of February) delivered by

(1) Lush J., and Manisty, J.

LUSH, J.—This is a case stated by way of appeal against a conviction by a metropolitan police magistrate, whereby Mr. De Morgan was convicted in the penalty of 20s. and 3l. 3s. costs, for infringing a bye-law of the Metropolitan Board made under the Metropolitan Commons Supplemental Act, 1877.

The bye-law in question is one of a series of bye-laws for the regulation and management of Clapham Common. It prohibits the "delivery of any public speech, lecture, sermon or address of any kind or description whatever, except with the written permission of the board first obtained, and upon such portions of the common and at such times as may by such written permission be directed and sanctioned by the board."

The appellant admitted that he had delivered a sermon on the common without having obtained the permission of the board, but contended that the bye-law was *ultra vires* and void, and this is the question which is submitted for our decision.

As the common was purchased under the authority of Acts of Parliament which we had not the opportunity during the argument to examine, we took time to consider our judgment.

The appropriation to public use of this and other commons within the metropolitan district, was made under the authority of the Metropolitan Commons Act, 1866.

By this Act the enclosure commissioners were prohibited from entertaining an application for the enclosure of a metropolitan common, and were authorised on a memorial by the lord of the manor or by the commoners or the local authority to prepare a scheme for the establishment of local management with a view to the expenditure of money on the drainage, levelling and improvement of a metropolitan common, and to the making of the bye-laws and regulations for the prevention of nuisances and the preservation of order thereon.

The scheme was to be laid before Parliament, and to have no operation until confirmed by Act of Parliament.

The scheme for Clapham Common, which was confirmed by the 40 & 41 Vict.

De Morgan v. Metropolitan Board of Works, Q.B.

c. cci. (Metropolitan Commons Supplemental Act, 1877), recommended the Metropolitan Board to carry into effect certain preliminary agreements whereby the lords of the manor agreed to sell the fee simple of the common to the board, subject to all such rights of common, commonable rights, rights of way and water as any person, other than the conveying parties, may have therein, and provided that after the completion of the purchase, the common should be dedicated to and for the use and recreation of the public, as an open and unenclosed space for ever, and should be regulated and managed by the board. The board were empowered to drain, plant, ornament and improve the common as might be necessary; but no houses were to be erected thereon, except such lodge or other buildings as might be necessary for the maintenance or management of the common.

The power to make bye-laws is in these terms—"The board shall frame bye-laws and regulations for the prevention of nuisances and the preservation of order on the common, and particularly for preventing the deposit of rubbish on, and the illegal taking, cutting, felling and sale of turf, sod, bog earth, gravel, sand, loam, clay, gorse, furze, fern, brushwood, trees and the like from the common, and regulating the user of the common or any parts thereof for the exercise of horses thereon, or for riding purposes, also for the regulation of bathing in the several ponds on the common." There is the usual proviso that "no bye-laws shall be repugnant to the laws of England or the provisions of the scheme, and further, that no bye-laws shall, as against any person entitled to any estate, interest or right of a profitable or beneficial nature in, over or affecting the common, which shall not be purchased or acquired by the board, operate or be construed so as to take away or injuriously affect such estate, interest or right."

In pursuance of the power thus conferred, the board framed and published a code of bye-laws which were duly confirmed by Her Majesty's first Commissioner of Works, one of which bye-laws is the one in question.

The appellant who argued the case

before us in person impeached the validity of the bye-law on two grounds—1st. He contended that the public had acquired a right to hold meetings on the common prior to the passing of the Act, and that it was therefore repugnant to the scheme to put any restriction upon the exercise of that right.

The magistrate reports to us that some evidence was given of public meetings being held without remonstrance on the part of the commoners or of the lords of the manor, though scarcely going back so long as twenty years, but finds that such user did not constitute a right or prove anything more than an excused or licensed trespass. In this opinion we entirely concur. The common was the soil of the lord of the manor, and the only rights over it were rights of pasture and other commonable rights of the commoners, and perhaps private rights of way. These are the rights, which not having been purchased by the board are preserved. No such right as that claimed by the appellant on behalf of the public is known to the law. This ground of objection, therefore, entirely fails. 2nd. He contended that the common having been "dedicated to and for the use and recreation of the public as an open and unenclosed space for ever," the board could not prevent the public from assembling there whenever they pleased for the purpose of hearing sermons, or lectures, or addresses on any subject, religious, political or otherwise. If this argument were sound, it would follow that any number of public meetings might be held at the same time in various parts of the common, even to the extent of monopolising the whole area, to the disturbance of the neighbourhood and the exclusion of that portion of the public who desired to use it for the purpose of recreation. We are satisfied that such was not the intention of the scheme which Parliament has sanctioned. Its object was to secure in perpetuity the common as a place which the public might use as of right for the purpose of recreation; and in order that all classes may at all times share in its enjoyment, the user of the common is necessarily placed under regulation. Bye-laws are

De Morgan v. Metropolitan Board of Works, Q.B.

a code of restrictions. Modes of user, which if enjoyed without limitation as to time or place would unduly interfere with the comfort of others, such as riding, boating, cricketing, bathing and the like, are put under reasonable restrictions. It is equally necessary that the holding of public meetings on the common should be also put under regulation. And what can be a more reasonable mode of regulating such meetings than to require information beforehand what the object and character of the meeting are in order that the board may be able to judge whether it is such as ought to be allowed on the common, and if so, to prescribe reasonable limits as to time and place. Mr. De Morgan contends that order may be sufficiently preserved by the arrest and punishment of persons who by becoming riotous or committing a breach of the peace violate the law. These, however, are retributive measures which operate only indirectly, whereas the Act contemplates and requires precautionary and preventive measures tending directly to secure the comfortable enjoyment of the common by all classes.

We are, therefore, of opinion that the bye-law is valid and consequently the conviction must be affirmed with costs.

Conviction affirmed.

Solicitor—Appellant in person; Reginald Ward,
for the Metropolitan Board of Works.

[IN THE QUEEN'S BENCH DIVISION.]

1879. }
Dec. 3. } THE QUEEN v. PADBURY.

Bastardy Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4—Order of Affiliation—Mistake in drawing up Order—Omission of Words "Maintenance and Education"—Amendment—12 & 13 Vict. c. 45. s. 7.

By the Bastardy Amendment Act, 1872, s. 4, the justices who adjudge a man to be the father of a bastard child may make an order upon him for the payment to the

mother of a sum of money weekly for the "maintenance and education" of the child:—Held, that an order purporting to be under section 4 for the payment of a weekly sum to the mother absolutely, and which contained no direction for the application of any part thereof for the "maintenance and education" of the child was bad, and could not be amended by the Court under 12 & 13 Vict. c. 45. s. 7.

This was a Special Case stated by the Court of Quarter Sessions for the county of Warwick, and was an appeal against an order of affiliation, which after the usual recitals adjudged the appellant "to pay unto Emily Hannah Smith, the mother of the child, so long as he shall live and shall be of sound mind, and shall not be in any gaol or prison or under sentence of transportation, or to the person who may be appointed to have the custody of such child under the provisions of an Act passed in the eighth year of the reign of her present Majesty, intituled 'An Act for the further amendment of the laws relating to the poor in England,' a sum of two shillings per week from the 25th day of January last, being the day upon which such application was made, until the said child shall attain the age of thirteen years or shall die."

The child in question was born on the 25th of December, 1878; the application was made on the 25th of January, 1879, and the order of affiliation on the 8th of February, 1879.

At the hearing of the appeal it was objected that the order was bad, on the grounds—1. That the order could only be made from the date of birth or from the date of the order. 2. That the payment contained no direction for the application of any part of the said sum for the maintenance and education of the bastard child, in accordance with the provisions of the Bastardy Laws Amendment Act, 1872, and the statutes amending the same. The Court of Quarter Sessions overruled the objections, and confirmed the order of the justices, but stated the above case for the opinion of this Court.

The case and order having been brought

The Queen v. Padbury, Q.B.

up by *certiorari*, and a rule *nisi* to quash the order of Sessions having been obtained by the appellant—

Soden, for the respondent in the appeal, shewed cause.—The question arises under 35 & 36 Vict. c. 65. s. 4, by which the justices who adjudge a man to be the father of a bastard child may proceed to make an order on him “for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child, under the provisions of 7 & 8 Vict. c. 100, of a sum of money weekly, not exceeding five shillings, for the maintenance and education of the child . . . and if the application be made before the birth of the child or within two calendar months after the birth of the child, such weekly sum may, if the justices think fit, be calculated from the birth of the child.” The appellant raised two objections to the order of affiliation, first, that the justices had no power to make an order from the date of the application, and, secondly, that the order was bad because payment was to be made to the mother absolutely and it contained no provision for maintenance and education. As regards the first point there is nothing in the statute which makes it illegal to date the payment from the date of the affiliation, and the discretionary power given to the justices to have the payment under an affiliation order calculated “from the birth of the child” is quite consistent with the interpretation put upon the statute by them. The other side will rely on *The Queen v. Tomlinson* (1), but in that case there was an admitted mistake on the part of the justice, and the only question argued was whether the order could be amended under 12 & 13 Vict. c. 45. s. 7.

As regards the second objection it is contended that the order is on the face of it sufficient to comply with the provisions of 35 & 36 Vict. c. 65. It follows Form 8 to 8 & 9 Vict. c. 10.

[COCKBURN, C.J.—That statute did not contain the words “maintenance and education.”]

(1) 42 Law J. Rep. M.C. 1; Law Rep. 8 Q.B. 12.

Lastly, even if either of the objections taken by the appellant at the sessions is sound, the power to make the necessary amendment is conferred upon the Court by 12 & 13 Vict. c. 45. s. 7, by which it is enacted that, “if upon the return to any writ of *certiorari*, any objection shall be made on account of any omission or mistake in the drawing up of an order or judgment, and it shall be shewn to the satisfaction of the Court that sufficient grounds were in proof before the justices or justices making such order or giving such judgment, to have authorised the drawing up thereof free from the said mistake or omission, it shall be lawful for the Court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment and to adjudicate thereupon as if no such omission or mistake had existed.”

Vesey Fitzgerald, for the appellant, was not called upon to argue.

COCKBURN, C.J.—I am of opinion that this order has not been made conformably with the provisions contained in 35 & 36 Vict. c. 65. The order must, under this Act, be an order for the payment of money for the maintenance *plus* the education of the bastard child, and I think that the omission of the words from the order is fatal to its validity. I am sorry for the result, particularly as this is a mistake in substance as distinguished from a mistake in form, so that there is no power to amend under 12 & 13 Vict. c. 45. s. 7.

MANISTY, J., concurred.

Rule absolute to quash the order.

Solicitors—Routh & Co., agents for Lane, Stratford-on-Avon, for appellant; R. H. Davies, agent for E. V. Nicoll, Shipston-on-Stour, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1880. { THE QUEEN, on the prosecution
Feb. 21. { of SIR JAMES TAYLOR INGHAM,
KNT. (respondent), v. TRUELOVE
(appellant).

*Obscene Books—Order for Destruction—
Death of Complainant before Order—Lapse
of Proceedings—20 & 21 Vict. c. 83.*

In an appeal to sessions against an order made by a magistrate under Lord Campbell's Act (20 & 21 Vict. c. 83), for the destruction of certain books found on the appellant's premises, it was proved that the complainant had died after the summons was issued, but before the order appealed against was made. Thereupon it was contended by the appellant that the proceedings lapsed, as there was then no person in the position of a prosecutor:—Held, that inasmuch as the proceedings were quasi criminal in their nature, the death of the complainant created no lapse, and that it was the duty of the magistrate, having once issued his summons on the information, to proceed.

This was an appeal to the Quarter Sessions for the county of Middlesex, against an order, dated the 4th day of October, 1878, and made by virtue of 20 & 21 Vict. c. 83, by Sir James Taylor Ingham, Knight, one of the magistrates of the police courts of the metropolis sitting at the police court, Bow Street, within the Metropolitan Police District, and in the county of Middlesex, whereby it was adjudged and ordered that 1,212 copies of a pamphlet entitled, *Individual Family and National Poverty*, and 292 copies of a pamphlet entitled *Moral Physiology*, all found on the premises of the said Edward Truelove, should be destroyed at the end of seven days.

This order was confirmed, subject to the opinion of the Queen's Bench Division of the High Court of Justice on the following Case.

CASE.

1. On the 15th day of May, 1877, James Vaughan, Esq., one of the magistrates of the police courts of the metropolis, sitting at the police court, Bow Street, in the county of Middlesex, and within the Metropolitan Police District, upon

Vol. 49.—M.C.

the complaint of one John Green, granted a special warrant under the statute, 20 & 21 Vict. c. 83. s. 1, directed to Henry Wood, one of the inspectors of the metropolitan police, to search the premises of Edward Truelove, of 256, High Holborn, in the county of Middlesex, and seize all obscene books, papers or writings found on his premises.

2. On the said 15th day of May, 1877, the said Henry Wood, by virtue of the said warrant, entered the premises and therein seized 1,212 copies of a pamphlet, entitled, *Individual Family and National Poverty*, and 292 copies of a pamphlet, entitled *Moral Physiology*.

3. On the 16th of May, 1877, the said Sir James Taylor Ingham, Knight, one of the magistrates of the police courts of the metropolis as aforesaid, sitting at the said police court, Bow Street, granted a summons requiring the said Edward Truelove as occupier of the said premises to appear on the 22nd day of May, 1877, at the said police court, Bow Street, to shew cause why the said pamphlets, seized on his premises, should not be destroyed.

4. On the 22nd day of May, 1877, the said summons came on to be heard at the said police court, and the hearing thereof was adjourned from time to time until the 3rd day of October, 1878, when the said Edward Truelove shewed cause.

5. The hearing of the summons was adjourned from the said 3rd day of October, 1878, until the following day, when the said Sir James Taylor Ingham, Knight, made an order, adjudging the said pamphlets to be obscene, and ordering that all the said pamphlets be destroyed within seven days.

6. On the 10th day of October, 1878, the said Edward Truelove duly gave notice in writing of appeal to the said Sir James Taylor Ingham, Knight, against the said order, and duly entered into recognisances to prosecute the appeal before the next general or quarter sessions for the county of Middlesex.

7. On the 21st day of October, 1878, at the quarter sessions holden for the county of Middlesex, it was ordered that the hearing of the appeal should be adjourned to the 18th day of January, 1879, and on the said 18th day of January

The Queen v. Truelove, Q.B.

the hearing was further adjourned until the next quarter sessions holden for the said county.

8. The said appeal came on to be heard on the 26th day of April, 1879.

9. It then appeared in evidence that the said John Green, the complainant, died on the 25th day of May, 1877.

10. At the close of the respondent's case, the counsel for the appellant made the objection that after the death of the said complainant, John Green, all proceedings against the appellant lapsed, as there was then no person in the position of prosecutor. The counsel for the respondent contended that the proceedings did not lapse, and that even if they did the Court could not give effect to the objection as it was not included in the grounds of appeal. The appellants replied, that in the absence of a prosecutor or complainant, the Court of Quarter Sessions had no power to deal with the order, and the objection, therefore, being one to jurisdiction, it was not necessary for it to be included in the grounds of appeal.

11. The learned Assistant Judge then asked the appellant's counsel whether an application had been made to the magistrates who made the order to substitute another prosecutor for the said John Green deceased. On being answered in the negative, the learned Assistant Judge was clearly of opinion that the appellant's objection was a good one, and the Court of Quarter Sessions thereupon so decided, but held that they could not give effect to it as it was not included in the grounds of appeal.

12. The Court thereupon heard the appellant's counsel upon the merits, and being of opinion that the said pamphlets were obscene within the meaning of the Act, affirmed the order with costs, subject to the above case.

The questions for the Court are:—

1. Whether the proceedings against the appellant lapsed upon the death of the complainant, John Green.

2. Whether, if they did so lapse, the fact that the question was not included in the appellant's grounds of appeal precluded the Court of Quarter Sessions from giving effect to the said objection.

If the Court should be of opinion that the proceedings did lapse upon the death of John Green, and that it was not necessary that the objection should appear in the grounds of appeal, then the order to be quashed.

If the Court should be of opinion that the proceedings did not so lapse, then the order to be affirmed.

If the Court should be of opinion that the proceedings did so lapse, but that the objection should have been a ground of appeal, then the order to be affirmed (1).

(1) By 20 & 21 Vict. c. 83. s. 1—"It shall be lawful for any metropolitan police magistrate . . . upon complaint made before him upon oath that the complainant has reason to believe, and does believe, that any obscene books . . . are kept in any house, shop, room or other place . . . for the purpose of sale, or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath, that one or more articles of the like character have been sold, distributed, exhibited, lent or otherwise published as aforesaid, at or in connection with such place so as to satisfy such magistrate . . . that the belief of the said complainant is well founded, and upon such magistrate . . . being also satisfied that any of such articles so kept for any of the purposes aforesaid, are of such a character and description, that the publication of them would be a misdemeanour and proper to be prosecuted as such, to give authority by special warrant to any constable or public officer into such house, shop, room or other place . . . to enter in the daytime, and to search for and seize all such books . . . found in such house, and to carry all the articles so seized before the magistrate issuing the warrant . . . and such magistrate shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered, by virtue of the said warrant, to appear within seven days before such police stipendiary magistrate, to shew cause why the articles so seized should not be destroyed . . . and if such occupier or some other person, claiming to be the owner of the said articles, shall not appear within the time aforesaid, or shall appear and such magistrate . . . shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them are kept for the purposes aforesaid, it shall be lawful for the said magistrate . . . to order the articles so seized . . . to be destroyed . . . unless notice of appeal to be given."

By section 4—"Any person aggrieved by any determination of such magistrate . . . may appeal to the next sessions . . . giving to the magistrate . . . whose act or determination shall be appealed against, notice in writing of such appeal and

The Queen v. Truelove, Q.B.

On the case being brought up by *certiorari*, and a rule *nisi* to quash having been obtained,

Mead shewed cause.—This was a criminal proceeding, and therefore as the Crown was the real prosecutor, it did not abate on the death of the complainant, who had no interest in the matter.

[He was stopped by the Court.]

Hunter (J. M. Davidson with him), on behalf of the defendant, supported the rule.—The informer is a necessary party to the proceedings.

[LUSH, J.—How do you make his continued existence material?]

It becomes very material as regards the costs of an appeal, inasmuch as no costs can be recovered against the justices, but against the informer, as the "party appealed against"—*The King v. Hants* (2). It is admitted that in the present case no one was substituted for the original complainant upon his death. The objection therefore taken at the sessions was valid and fatal to the jurisdiction, and need not therefore appear in the grounds of appeal.

Mead, in reply.—The death of the party complaining does not abate a proceeding of this kind—*The Queen v. The Justices of Leicestershire* (3). If the order made was void for want of jurisdiction, it should have been brought up by *certiorari*, to be quashed on that ground. But here the defendant has, by appealing to the sessions, recognised the jurisdiction to make the order. He cited *Waller v. Taylor* (4), and *Ex parte Bradlaugh* (5).

of the grounds thereof . . . and entering within seven days into a recognisance . . . to appear and prosecute such appeal, and to abide the order and pay such costs as shall be awarded by such Court of Quarter Sessions . . . and such Court, upon hearing and determining such appeal, shall and may, according to their discretion, award such costs to the party appealing against as they shall think proper . . . provided always that it shall not be lawful for the appellant on the hearing of any such appeal to go into or give evidence of any other grounds of appeal against any such order, act or determination than those set forth in such notice of appeal."

(2) 1 B. & Ad. 654.

(3) 15 Q.B. Rep. 88; 19 Law J. Rep. M.C. 209.

(4) 2 Bulst. 261.

(5) 47 Law J. Rep. M.C. 105; Law Rep. 3 Q.B. D. 510.

LUSH, J.—I am of opinion that there is no valid objection to the confirmation of the order made by the magistrates. I cannot at all agree with Mr. Hunter's contention that the death of the informant caused a lapse in the proceedings. The information is laid on behalf of the public, and under the provisions of a public statute. The proceedings are of a *quasi* criminal nature, and the presence of the party who made the complaint upon oath, as directed by the statute, is not required. It would be very prejudicial to the administration of justice if the presence of the complainant was required, otherwise the party laying the information might or might not proceed as he thought proper, a result which would be very injurious in the case of a prosecution instituted upon public grounds and for the protection of the public. It seems to me that it was the duty of the magistrate, when once put in motion by a proper information, to proceed with the prosecution, and make the necessary order, whether the informant continues to prosecute or not. This being a *quasi* criminal proceeding, I can find nothing whatever in the terms of the statute to require that the complainant should be a party. [His Lordship read section 1.] After certain preliminaries have been duly gone through, the magistrate is to issue a summons, calling upon the party to appear within seven days, to shew cause why the articles seized should not be destroyed. The magistrate is then required, if satisfied that the offence has been proved, to order the articles seized under his warrant to be destroyed. Not a word is said in the section about any further interference on the part of the informer being necessary. The magistrate when once properly put in motion is bound to proceed. Then comes the appeal clause, by which any person aggrieved by any act or determination of the magistrate, may appeal to the sessions, upon giving to the magistrate a proper notice in writing. There is no machinery whatever provided for giving any notice of the appeal to the complainant. Then due notice of the appeal having been given to the magistrate, as well as the grounds of the appeal, the

The Queen v. Truelove, Q.B.

party appealing is required, within a specified time, to enter recognisances to appear and prosecute the appeal, and to abide the order of, or pay such costs as shall be awarded by the sessions, who have power to award "such costs to the party appealing or appealed against as they shall think proper." Mr. Hunter has laid stress on these latter words, as shewing that the presence of the complaining party is necessary, as being the party appealed against; but I fail to see why, when the magistrate goes on, he should not be the party appealed against. Who that party may be is, no doubt, a matter to be ascertained; but it need not necessarily be the complainant. The proceedings are throughout of a criminal rather than of a civil nature, and stand on the footing of ordinary criminal cases which do not lapse by the death of a prosecutor. The magistrate's duty in such a case was to proceed; here he did proceed and made the order, and, in my judgment, the objection taken at the sessions cannot be sustained.

MANISTY, J.—I agree with everything that my brother Lush has said as to the proceedings not having lapsed by the death of Green. It is therefore unnecessary for us to answer the second question.

Rule discharged.

Solicitors—The Solicitors to the Treasury, for the prosecution; Harper, Broad & Battcock, for defendant.

[IN THE COMMON PLEAS DIVISION.]
1880. } WHITE (*appellant*) v. FOX AND
Feb. 27. } ANOTHER (*respondents*).

Justices—Summary Jurisdiction—Ouster of Jurisdiction—Mens rea—Assault and Battery—24 & 25 Vict. c. 100. ss. 42 and 46.

The question as to property which will oust the jurisdiction of justices to determine a charge of assault under 24 & 25 Vict. c. 100. s. 42, must be a question as to real property.

Where two persons who were gamekeepers in the employ of a landlord of a farm to whom the right to game and rabbits was reserved, were charged before the justices by the tenant of such farm, under 24 & 25 Vict. c. 100. s. 42, with assaulting and beating him, and the acts complained of were done in a scuffle to take from the tenant whilst on his farm his bag, in which were rabbits claimed as the landlord's property:—

Held, that the fact that the justices were of opinion that the gamekeepers acted under a bona fide belief that they had a right to do the acts complained of did not oust the jurisdiction of the justices, no question having arisen as to title to any interest in land within the meaning of section 46 of 24 & 25 Vict. c. 100.

CASE stated under 20 & 21 Vict. c. 43 by the justices for the county of Dorset.

On the 8th of November, 1879, a complaint was preferred by the appellant against the respondents, under section 42 of 24 & 25 Vict. c. 100, charging them with assaulting and beating the appellant.

At the hearing of the said complaint it was admitted by the respondents that the appellant rented Notton and Throop farms, in the parish of Maiden Newton, consisting of about 500 acres, of one Richard Brinsley Sheridan, Esq.

It was proved by the appellant that no lease of the said farm, or any agreement or document under seal, reserving the game and rabbits to the said landlord or any one else, or reserving any right to or for anyone to enter or be on any such lands in search or pursuit of game or rabbits, had ever been executed; but he admitted that he had made and signed proposals for a

White v. Fox, C.P.

lease, not under seal, of the said farms, which had also been signed as accepted by one Peter Cox, as agent for the said Richard Brinsley Sheridan, and that under the head of exceptions contained in such proposals were the words, "also all waterfowl, fish, game and rabbits, and liberty to hunt, hawk and shoot fish and fowl."

It was also admitted by the appellant in his evidence, that he had from time to time applied to the steward of the said Richard Brinsley Sheridan for permission to kill rabbits on his farms, and that on receiving the same had expressed his obligation for the permission when so granted.

It was also proved that the appellant, as such tenant, had been assessed to and paid the poors' rate in respect of the sporting rights on his farm, which he subsequently claimed of and had been allowed by the said Richard Brinsley Sheridan as a disbursement and deduction from his rent.

It was also proved that about noon on Monday, the 13th day of October last, the appellant and his son, and two men in his employ, were on his said farm with nets and ferrets belonging to the said appellant, engaged in ferreting for rabbits, and that whilst in the middle of one of his fields, and having in his possession his said nets and some rabbits which had been caught by him, the two respondents came upon the said land where the appellant then was, took hold of a bag containing such nets and rabbits, and endeavoured to take the same away from the said appellant, and in so doing dragged the said appellant some sixty paces. In the scuffle so arising the hat of the said appellant was knocked or fell off, and the clothes of the said appellant were torn, and thereby the said appellant was assaulted.

It was admitted that the respondents were gamekeepers in the employ of the said Richard Brinsley Sheridan, and were acting under his orders and authority.

The respondents' solicitor, whilst admitting the facts before stated, contended that the said respondents, being such gamekeepers in the employ of and acting under the orders of the said Richard

Brinsley Sheridan, their master, who claimed the sole and exclusive right to the game and rabbits on the said farm, were acting in the execution of their duty, as such servants to the said Richard Brinsley Sheridan, so claiming to exercise his reserved rights to the game on the farms referred to, or acting in the *bona fide* belief of having such rights, and that in consequence the jurisdiction of the justices was ousted.

The appellant's solicitor contended that, it being proved by the appellant and admitted by the respondents' solicitor, that inasmuch as there was no lease, agreement or document under seal in existence, as was necessary to reserve a right to take and kill game and rabbits to any other person than the occupier of the land, there could not be and there was no question of title in dispute, and no reasonable grounds for a *bona fide* belief that the respondents, as such servants of the said Richard Brinsley Sheridan, had a right to take or attempt to take the bags, nets and rabbits complained of, and that even if there had been a legal reservation of the game, that would not justify the assault complained of, and so oust the jurisdiction of the justices to adjudicate thereon, and if deemed right, convict the respondents thereof.

The solicitor for the respondents, however, contended that, as in the proposals for lease, although not under seal, the game and rabbits were expressly reserved, they belonged exclusively to the landlord (the said R. B. Sheridan), and that the respondents, as his servants, were justified in taking the bags, nets and rabbits from the appellant, and did so under a *bona fide* belief that they were justified in so doing, and that as the question in dispute was one arising out of land, or some interest therein or accruing therefrom, the jurisdiction of the justices was ousted.

No other evidence having been offered, the justices were of opinion that the respondents acted under a *bona fide* belief that they had a right to do the acts complained of, and that the jurisdiction of the justices was ousted, and they accordingly dismissed the summons.

The question for the Court was, whether, under the facts above detailed, the

White v. Fox, C.P.

justices were right in dismissing the summons on the ground stated.

Bompas, for the appellant.—Assuming that there was a legal reservation of game to the landlord, that would not justify the respondents, the landlord's servants, in assaulting the appellant, who was a tenant farmer on his own land.

Arthur Charles (Pitt Lewis with him), was then called upon to support the respondents.—The game being the landlord's, the appellant had in his possession what was the property of his landlord, and the respondents only endeavoured to take their master's property, and it does not appear from the case that in doing so they used more violence than was necessary. The respondents acted in the *bona fide* belief that they were justified in doing what they did, and a *bona fide* claim of right under ordinary circumstances suffices to render a conviction by justices for any criminal offence improper. *Watkins v. Major* (1). In that case the Court thought that the claim of right which was set up in answer to the charge of killing a rabbit contrary to 1 & 2 Will. 4. c. 32. s. 30, was an impossible one in point of law, and that therefore the person so charged might be properly convicted, but otherwise a *bona fide* belief in a right to do what was done would, as Lord Coleridge, C.J., said in delivering judgment in that case, "suffice to render a conviction for any criminal offence improper, for it is well established that justices cannot try the existence of a right *bona fide* set up in answer to a criminal charge brought before them—see *Paley on Convictions*, pp. 47, 137, &c." "But," said Lord Coleridge, C.J., "it has been decided more than once that a person may be convicted under the statute with which we have now to deal and other game statutes, although he had no *mens rea*, and believed that he was not a trespasser." In the present case the charge against the respondents is under section 42 of 24 & 25 Vict. c. 100 of unlawfully assaulting the appellant, and to support such charge there must be a

mens rea, and in *Blades v. Higgs* (2) it was held to be a good defence to an action for an assault, that it was committed in an attempt to take from the plaintiff dead rabbits which he had refused to give up, and which he held without the consent of the defendant's master to whom they belonged.

[LORD COLERIDGE, C.J.—There the killer of the rabbits was a trespasser on the land where he killed them.]

Where sporting rights are reserved, the tenant may become a trespasser on his own land, and at all events the respondents would have good reason to believe he was so in the present case. In *Coleman v. Bathurst* (3) the conviction was under 1 & 2 Will. 4. c. 32. s. 12, which makes it an offence for the tenant to take game upon the demised land where the right to the game is reserved to the landlord, and the conviction there was held wrong because the Court were of opinion that in that case there was upon the true construction of the agreement of tenancy no reservation of the game. Where the claim of a right is one which cannot exist at law as a claim as one of the public to fish in a non-navigable river, the claim does not oust the justices of their jurisdiction, *Hudson v. M' Rae* (4). But otherwise, as shewn in *Legg v. Pardoe* (5) a *bona fide* claim is enough to oust the jurisdiction of the justices.

Bompas in reply.

LORD COLERIDGE, C.J.—In my opinion the justices were wrong in dismissing the summons, as I clearly think they had jurisdiction. Two persons assault another, and it is not suggested that they had any right to do what they did. They dragged him several paces along the ground, knocked his hat off, tore his clothes, and took from him, besides the rabbits, which for the present purpose I

(2) 10 Com. B. Rep. N.S. 713; 30 Law J. Rep. C.P. 347; on appeal 11 H. L. Cas. 621; 34 Law J. Rep. C.P. 286.

(3) 40 Law J. Rep. M.C. 131; Law Rep. 6 Q.B. 366.

(4) 4 B. & S. 585; 33 Law J. Rep. M.C. 65.

(5) 9 Com. B. Rep. N.S. 289; 30 Law J. Rep. M.C. 108.

(1) 44 Law J. Rep. M.C. 164; Law Rep. 10 C.P. 662

White v. Fox, C.P.

will assume were the property of the landlord, what was certainly his own property, and they did all this whilst he was on his own land. All this was before the justices, and they say they have no jurisdiction to decide the matter, because in their opinion these two persons (the respondents), *bona fide* thought that they had a right to assault the appellant, and to take his property. We were referred during the argument to several cases respecting *mens rea*, which are important when that question arises, but this is a proceeding under 24 & 25 Vict. c. 100. s. 42, which enables the justices to hear and determine the offence of an assault or battery, and section 46 explains under what circumstances the jurisdiction of the justices is ousted. It states that the justices are not to hear and determine any case of assault or battery "in which any question shall arise as to the title to any lands, tenements or hereditaments, or any interest therein or accruing therefrom." In the present case no question of title to any lands arose, but it has been suggested that a question of title to property arose. I am astonished to find that a mere assertion of a title to property being in question should be said at once to oust the jurisdiction of the justices, but without deciding what statement is sufficient, I am of opinion that the question as to property must be a question as to real property. That is the view which has always been taken of old, and is the view taken by *Paley on Convictions*, where when he speaks of the title to property which will oust the jurisdiction (see 5th edit., p. 137), he means a title to land, and in the first case, which he gives from 1 Lord Raym. 583, the question was as to the title to land. So also in the case of *Williams v. Adams* (6), where the complaint before the justices was for leaving rubbish on a highway, and the defendant claimed the soil as his, subject only to a private right of way, the Court of Queen's Bench held that no question of title to land was in dispute, but only a question as to what should be done on the land, and that therefore the jurisdiction of the justices was not ousted.

(6) 2 B. & S. 312; 31 Law J. Rep. M.C. 109.

I am of opinion, therefore, that the justices must exercise their jurisdiction in the present case, and say whether an assault has been committed on the appellant, and if it has, they must adjudge the punishment. The question of *bona fides* may most properly and rightly be considered in awarding the punishment, and I observe that Paley makes that distinction where in his work on Summary Convictions, 5th edit., p. 139, he says, "Where there must be a *mens rea* to constitute an offence, the fact of a man having acted under a claim or notion of right, if established, will form a defence against a criminal proceeding, and must be taken into consideration by the justices, not as a question of title, but as a question of *bona fides*. When, however, the object is to oust the jurisdiction of the justices on the ground that title comes in question, then the claim must be of such a nature as, if substantiated, would afford a defence to an action." That plainly distinguishes between an assertion of a mere right to do what has been done, and a claim of title. No such claim was made here, and the decision of the justices was wrong.

LINDLEY, J.—I am of the same opinion. The charge before the justices was a charge of assault, and it was made under 24 & 25 Vict. c. 100. s. 42, and the 46th section states that the justices are not to have jurisdiction when any question as to the title to any lands shall arise. Now the justices do not find that any such question was involved in this inquiry, but what they find is that the respondents acted under a *bona fide* belief that they had a right to do what they did. Clearly there is nothing in that to oust the jurisdiction of the justices, and there is nothing like a finding of the circumstances stated in the 46th section which would deprive the justices of their jurisdiction to hear and determine the charge.

Decision reversed.

Solicitors—Lovell, Son & Pitfield, agents for R. N. Howard, Weymouth, for appellant; J. R. MacArthur, agent for M. C. Weston, Dorchester, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1880. }
 May 5. } THE QUEEN v. HUTCHINS.

Public Health—Paving Private Street—Highway repairable by the Inhabitants at large—Decision of Justices as to Character of Street conclusive—Res Judicata—38 & 39 Vict. c. 55 (Public Health Act, 1875), s. 150—Dismissal of Complaint, Evidence of—11 & 12 Vict. c. 43. s. 14.

A decision of justices, unappealed against, on a summons under the Public Health Act against an owner of premises abutting on a street, for payment of the expenses incurred by the board in paving, &c., such street is final and conclusive as to the street being or not being a highway repairable by the inhabitants at large.

Where such a summons had been dismissed by justices in 1874, and no certificate of dismissal had been required or given under section 14 of 11 & 12 Vict. c. 43:—Held, that upon a fresh summons in 1879, the former adjudication was sufficiently proved by the entry in the justices' note book, and when so proved was binding and conclusive.

This was a case stated by the Court of Quarter Sessions for the hundred of Salford, on the hearing of an appeal by one Hutchins against an order made upon him by justices in petty sessions whereby he was ordered to pay to the urban authority of Bradford, in Lancashire, a sum of 442*l.*, being his share or proportion of the expenses of paving and levelling a certain street called Mill Street within the district of the aforesaid urban authority.

Hutchins was the owner of property abutting on Mill Street, and in the year 1873, he received notice from the local board to sewer and channel such part of the said street as his property abutted on, and there being no compliance on his part with such notice, the local board did the work themselves and summoned him for payment of the expenses incurred by them in so doing. On the hearing of the summons, which was in 1874, Hutchins contended that he was not liable, because Mill Street was a highway repairable by the inhabitants at large, and the justices

dismissed the summons, thus affirming his contention. Hutchins did not require the justices to make an order of dismissal, nor to give him a certificate of dismissal in the form provided by 11 & 12 Vict. c. 43. s. 14. sched. forms, L. & M. (1), but the book kept by the magistrates' clerk contained an entry of the names of the parties, the information and summons, the nature of the complaint and a memorandum that the summons was dismissed on the ground that Mill Street was a highway.

There was no appeal by the board against such dismissal, but, in 1877, having determined to level and pave the same street, the board again gave notices to Hutchins and the other owners of property in the street to do the work, and on their default, the board having done it themselves, summoned Hutchins again for payment of the expenses. This summons came on for hearing in 1879, when the magistrates heard evidence as to the nature of the street, and reversing their former decision found that it was not a highway repairable by the inhabitants at large, and ordered Hutchins to pay 442*l.* as above-mentioned. Against this order Hutchins appealed to the Quarter Sessions, and among his grounds of appeal stated that Mill Street was a highway repairable by the inhabitants at large.

On the hearing of the appeal it was contended on his behalf that the matter was *res judicata*, and on proof of the previous adjudication as evidenced by the magistrates' book that the order must be quashed.

It was objected to this that the point of *res judicata* was not raised by his grounds of appeal, and that even if it were, there was no estoppel created by the previous decision so as to preclude the board from coming again with ad-

(1) 11 & 12 Vict. c. 43. s. 14. "If the said justice or justices shall dismiss such information or complaint, it shall be lawful for such justice or justices, if he or they shall think fit, being required so to do, to make an order of dismissal of the same (L.), and shall give the defendant in that behalf a certificate thereof (M.) which said certificate afterwards upon being produced, without further proof, shall be a bar to any subsequent information or complaint for the same matter respectively against the same party."

The Queen v. Hutchins, Q.B.

ditional evidence to establish what they had failed before to prove.

The Quarter Sessions refused to allow any amendment of the grounds of appeal. They upheld the order of the justices below, and dismissed the appeal, subject to the following questions stated for the opinion of the Court:—

1. Was it open to the appellant upon the grounds of appeal delivered by him against the order made in 1879, to contend that the matter was *res judicata*?

2. If not, ought the Quarter Sessions to have allowed him to amend his grounds of appeal so as to include that contention?

3. Was the adjudication made upon the summons against the appellant in 1874 conclusive of the question arising upon the summons against him in 1879?

Hopwood, in support of the order of Sessions.—The grounds of appeal ought to have given specific notice that the appellant relied on an estoppel. But even if the previous decision could be urged in support of the contention that this street was a highway repairable by the inhabitants at large, the appellant was not in a position to make use of it as a conclusive decision. To enable him to do this he ought to have obtained a certificate of dismissal under Jervis's Act, and there can be no estoppel until such certificate has been granted. But the granting a certificate is in the discretion of the magistrates, which shews that the first hearing was not necessarily a final decision. It was in the nature of a non-suit, and it would be very hard to decide an important question involving public rights upon a possibly hurried hearing with insufficient evidence.

[FIELD, J.—There was an opportunity for an appeal if the board thought the decision hasty, or if they had additional evidence.]

The Court will not reject the fact that after hearing further evidence the justices have reversed their previous finding.

Ambrose, contra, was not called on to argue.

LUSH, J.—I am of opinion that this rule must be made absolute. It stands upon a principle of the highest impor-

VOL. 49.—M.C.

tance, namely, that when a matter affecting the rights of property has been decided by a competent authority the decision should be conclusive especially when it is a question raised again between the same parties. The Act of Parliament provides that the local board may require owners and occupiers of premises, fronting, adjoining or abutting upon any street, not being a highway, to sewer, level, pave, flag or channel the same, and upon their default may execute the works and charge them with the expenses; and in the year 1874, the present appellant, Hutchins, was summoned to pay his contribution towards the expenses incurred by the local authority for sewerage and channelling this street, and it was alleged that it was a street which had not then become a highway repairable by the inhabitants at large. This question had to be decided at that time by the justices, for if the street were a highway the inhabitants must repair, and the expense could not be thrown on the individual owners.

The summons was duly heard and the justices decided that the present appellant was not liable because the street was a highway. That was a conclusive acquittal of him as regards the claim then made until or unless reversed. The Board might have appealed if, as has been suggested now in argument, the decision was a hasty one, and have had it reviewed by the Quarter Sessions. They did not appeal, but acquiesced till 1879, when having done some further work to the street, notwithstanding that much of the property might have changed hands meanwhile, and much money might have been spent on the faith of there being no liability on the owners to repair, the board took out another summons for payment of a sum of 442*l.* against the same person, and this came on to be tried.

Now I am of opinion that the first decision was binding on the local board. It is true that the appellant had not obtained a written certificate of dismissal, but that is not of the essence. I take the written certificate to be an artificial but convenient mode of proving the dismissal provided by the Act, but not necessary to the validity of the decision

K

The Quo en v. Hutchins, Q.B.

Pronounced. I should compare it to the convenient mode of proving a previous conviction by a certificate signed by the clerk of assize. Here the note-book of the magistrates was produced shewing the summons, the names of the parties, the nature of the complaint, the hearing, and the decision that the summons was dismissed on the ground that the street in question was a highway.

The entry does not say in words "a highway repairable by the inhabitants at large," but that is obviously and necessarily the meaning.

I think, therefore, that the adjudication in 1874 was sufficiently proved at the hearing in 1879.

The justices, however, found upon other evidence in 1879, just the contrary to their finding in 1874, and an appeal being had to the Quarter Sessions, the later finding was affirmed, subject to the points raised in this case.

Now, as to these, it is said, first, that the objection to the finding now relied on is not included in the grounds of appeal.

The ground stated is—"That the street is a highway repairable by the inhabitants at large." It is true this does not in terms say that the question has been adjudicated upon before, but I think it sufficiently gives notice of the point to be relied on. That being so, the previous adjudication was admissible in evidence to support that point, and being so admissible and being an adjudication of a competent authority as to the character of the street and made between the same parties, it was, I think, conclusive and binding—*The Queen v. Haughton* (2). I am, therefore, of opinion that there was no need to amend the grounds of appeal; the justices ought to have received the evidence tendered; when received it was binding as a decision of a Court of competent jurisdiction under the circumstances I have stated, and the justices were therefore not at liberty to find as they did in contradiction of it.

FIELD, J.—I am of the same opinion. The Court of Quarter Sessions have stated a case raising three questions for our determination. First, whether it was

open to the appellant on the ground of appeal delivered by him to contend that the matter was *res judicata*. I quite agree with my brother Lush that it was so open. I do not think that grounds of appeal should be construed as if they were pleadings with excessive strictness. It is enough if the point is fairly within the language used, but if it were thought not to be, I should not have the slightest doubt as to amending the grounds of appeal so as to include it, and that is the second question asked us. Here the particular point had been raised before the justices in petty sessions and so was well known to all parties at Quarter Sessions.

The last question is whether the adjudication made in 1874 is conclusive. This is not a mere question of estoppel against which, as such, Courts very properly lean. But this is an adjudication of a Court of justice, of a Court entrusted with very large powers for deciding these and similar matters of great importance. It is a good general rule upon which I always act, that if a competent Court within its jurisdiction has decided a question, its decision should be held to be right until the contrary is proved. What is there to shew that the adjudication in 1874 was not fair? The question then was whether this property was on a highway, and we know that it is a very valuable incident of property to abut on a highway, and the point was investigated, and I do not doubt carefully considered and was decided. There was no appeal from that decision, it remained in force unreversed in 1879. But Mr. Hopwood says the adjudication is not conclusive because a certificate was not drawn up to be put in evidence. That objection has been fully answered by my brother Lush, and I will not repeat his words. Nothing then occurs from 1874 until in 1879 the Board seek to re-open the same question. I am clearly of opinion that they cannot.

Order of sessions quashed.

Solicitors—Gregory & Co., agents for A. & G. W. Fox, Manchester, for the prosecution; Norris, Allens & Co., agents for Diggles & Ogden, Manchester, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } THE QUEEN v. THE JUSTICES OF
May 13. } ESSEX.

Bastardy—Appeal—Absence of Appellant—Order quashed not upon Merits—Second Order—Jurisdiction of Justices.

Upon an appeal coming on for hearing to the sessions against an order adjudicating the appellant to be the putative father of a bastard child, it appeared that the respondent, the mother of the child, and the witnesses on her behalf, were not in attendance, owing to some mistake. The Court refused to adjourn the appeal, and quashed the order:—Held, that as the order had been quashed in the absence of all evidence, there had been no decision by the sessions on the merits so as to be final, and that a fresh order could be applied for to the justices at petty sessions by the respondent against the appellant.

The Queen v. Glynne (41 Law J. Rep. M.C. 58) distinguished.

This was a rule calling upon certain justices for the county of Essex, to shew cause why a writ of prohibition should not issue to prevent them from entertaining a bastardy summons for want of jurisdiction under the circumstances herein-after stated.

It appeared from the affidavits that on the 19th of October, 1879, an order had been made by the justices in question, on the application of Ellen Phillips, adjudging one James Frost to be the father of her bastard child, and ordering him to pay the mother a certain sum weekly for the maintenance and education of the child. From this order there was an appeal, which came on for hearing in due course at the Epiphany Quarter Sessions holden at Chelmsford on the 6th of January, 1880. The respondent and her witnesses through some inadvertence not being in attendance at the sessions when the appeal was called on, an application was made on her behalf to have the appeal adjourned till the following day. The application, however, was refused by the magistrates, who thereupon allowed the appeal and quashed the order with costs.

On the 6th of March, 1880, the said

Ellen Phillips applied for and obtained a fresh summons under 35 & 36 Vict. c. 65. s. 3, whereupon a rule nisi for a writ of prohibition was obtained.

It further appeared from the affidavits that no part of the costs of the appeal to the sessions, which had been taxed at 19l. 19s., had been paid by the respondent as directed by the Court.

W. W. Wood shewed cause against the rule.—It cannot be disputed that where an application for a bastardy order has been dismissed by justices sitting at petty sessions, the mother can renew her application. It must also be admitted that where an order has been made on the putative father and appealed against, the decision of the sessions is final, and bars further proceedings in cases where there has been a hearing on the merits—*The Queen v. Glynne* (1). [He also cited on this point *The King v. Jenkin* (2), *Pridgeon's Case* (3), *The King v. Tenant* (4), *The Queen v. Harrington* (5), *The Queen v. Machen* (6), *The Queen v. Bridgman* (7).]

Here there was no appearance on the part of the mother, and no witnesses to give evidence, consequently there was no decision on the merits. The decision of the sessions is only conclusive when they "hear the evidence."—See *Pritchard's Quarter Sessions*, citing *The Queen v. Glynne* (1). If the question had been entered upon at all perhaps that might have been a decision on the merits; but here no evidence whatever was offered. A proceeding like this comes within the principle of an order quashed for want of form. See 8 & 9 Vict. c. 10. s. 2. It is analogous to a *nonsuit*.

[LUSH, J.—A Court of Appeal cannot nonsuit; the only question here is, what is the legal effect of an order quashed for want of evidence to support it?]

Appeals to sessions are in the nature

(1) 41 Law J. Rep. M.C. 58; Law Rep. 7 Q.B. 16.

(2) Ca. t. Hard. 301.

(3) Cro. Car. 341.

(4) Str. 716; Ld. Raym. 1423.

(5) 3 N.R. 463; 12 W.R. 420.

(6) 14 Q.B. Rep. 74; 18 Law J. Rep. M.C. 213.

(7) 15 Law J. Rep. M.C. 44.

The Queen v. Justices of Essex, Q.B.

of a fresh hearing; the respondent has to begin and tender her evidence. See 8 & 9 Vict. c. 10. s. 6. When this has been done, there has been a "hearing" and the merits cannot be gone into again. If a proceeding like the present were held to be conclusive against all parties, not only the mother would suffer, but the parish authorities who are empowered in certain cases to get a bastardy order against a putative father. See 35 & 36 Vict. c. 65. s. 8. *Ex parte Harrison* (8) is a direct authority in favour of the fresh order being granted when an appeal is dismissed "not upon the merits." See the note to that case in *The Queen v. Glynn* (1).

C. E. Jones supported the rule.—The decision of the sessions is final—*The Queen v. Glynn* (1). *Ex parte Harrison* (8) was a case where an appeal was dismissed for some "technical informality," as appears from the report of *Re Glynn* (1). The justices had power to adjourn the appeal, but they declined to do so. If it is held that the proceedings at sessions do not operate as an estoppel, very great hardship will be inflicted on an appellant, particularly when, as in this case, an appeal is rendered abortive through the act of the respondent, and the costs of the appeal have not been paid. Where a fresh order is made, and a fresh appeal becomes necessary to the sessions, precisely the same state of things may occur again, and the appellant may be thus subjected to unreasonable annoyance and expense.

LUSH, J.—The question raised here is one of very considerable nicety, and I have hesitated a great deal before coming to the conclusion that this rule ought to be discharged. It is well established that if a woman fails in her application for a bastardy order before the justices at petty sessions, she may, if she so chooses, apply again, because no appeal is given by the statute, and the decision of the justices at petty sessions is not final. But when an order has been made on a putative father, the statute gives him a right of appeal. On the appeal

he can question the validity of the order, which can only be made on the evidence of the mother, corroborated by other evidence. The appeal given to the sessions is in the nature of a rehearing, and the statute contemplated that justices at sessions should go into the merits, and that their decision should be final between the parties. The 8 & 9 Vict. c. 10. s. 6, expressly provides that upon trial of the appeal, the justices "shall hear the evidence of the mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the said appeal in other respects according to law; but shall not confirm the order so appealed against, unless the evidence of the said mother shall have been corroborated in some particular by other testimony." When these preliminaries have been observed, there can be no question that the decision on the appeal is final. *The Queen v. Glynn* (1) sets forth distinctly the principles applicable to a case of this description. There the Court of Quarter Sessions arrived at a decision on the merits. No case has been decided which speaks of the justices' decision at quarter sessions being final where not on the merits. An order quashed for any formal defect is not conclusive. See 8 & 9 Vict. c. 10. s. 2. What is the meaning of the words "on the merits?" They must mean on the evidence produced before the justices. Here the order was quashed because no evidence was forthcoming. If the woman had purposely absented herself, I would refuse, if possible, to give her any relief; but it appears she was not in attendance at the proper place and time by a mere accident, and that the Court had refused to adjourn the appeal, and had quashed the order, in the absence of all evidence. In my judgment it is necessary that the judgment of sessions, in order to create an estoppel, should be made on some evidence. I feel, therefore, that we are bound to come to the conclusion that the decision of the sessions in this matter ought not, under the circumstances, to be held an estoppel by the justices at petty sessions.

We do not desire to intimate any

(8) 19 Law Times, 114; 16 Jurist, 726.

The Queen v. Justices of Essex, Q.B.

opinion as to the action the justices should take on the determination of the summons. They may fairly take into their consideration all the facts of the case, one of which is that the costs of the abortive appeal, ordered to be paid by the respondent, have not been paid. We give no direction to the justices which can in any way limit their discretion. All we hold is that they are not justified in refusing to go into the matter afresh, for the reason that the decision of the sessions was not on the merits. This rule will therefore be discharged.

MANISTY, J.—I am of the same opinion, and entirely agree with everything which has fallen from my brother Lush.

Rule discharged.

Solicitors—E. Doyle & Sons, agents for H. Jones, Colchester, for applicants; Digby & Jones, agents for Digby & Evans, Maldon, for defendants.

Smith & Lusketh 51 & 52, The C. 109.

[IN THE QUEEN'S BENCH DIVISION.]

1880. { SPEAR (appellant) v. THE GUARDIANS OF THE BODMIN UNION
May 4. { (respondents).

Poor Rate—Liability to be Rated—Market—Occupier of Stall.

The appellant rented two stalls in Bodmin market year by year at a rent payable weekly. The stalls in question had been put up to auction and were bought by the appellant and used by him on market-days. The stalls thus rented were capable of being removed, and there was no agreement that they should always stand on the same identical spot, though the appellant had a right to retain the same relative position in the row:—Held, that there was no such occupation of the stall as rendered the appellant liable to be rated under 43 Elis. c. 2, he having acquired only the right to a given stall in a given row, and not the right to place one on any definite portion of ground.

At the Easter Quarter Sessions held in and for the county of Cornwall, 1879, the appellant appealed against a certain rate

for the relief of the poor made by the respondents.

On the said appeal coming on to be heard, the only question between the parties being one of law, it was ordered that the appeal should be respited, and the following case stated for the opinion of the Court under 12 & 13 Vict. c. 45. s. 11:—

1. The appellant, James Spear, is a butcher, carrying on his business at Bodmin, in the county of Cornwall.

2. The respondents are the guardians of the poor for the Poor Law Union of Bodmin. The Bodmin Market House hereinafter mentioned is situate within the respondents' Poor Law Union.

3. The rate for the relief of the poor, in respect of which this appeal is brought, was made by the respondents and duly allowed in February, 1879. The appellant was rated in respect of two stalls situated in the Bodmin market.

4. By an Act of Parliament passed in the 55th year of the reign of his late Majesty King George 3, being 55 Geo. 3. c. 85, the mayor, aldermen and burgesses of the borough of Bodmin were authorised and empowered to erect a market-house within the said borough.

5. The mayor, aldermen and burgesses of Bodmin, shortly after the passing of the said Act, in pursuance of the powers which such Act conferred upon them, duly erected a market-house in the borough. Such market-house consists of a large open space, room or hall, which for convenience is hereinafter called the market-house, and is of a rectangular shape open to the roof, which is of wood and slate and lighted by glass windows in the roof, the roof being supported by pillars. This room, or hall or market-house, is enclosed by four walls, with three large iron gates in the southern wall and three smaller ones in the northern wall. Its floor is of stone from the southern wall to within thirty feet of the northern wall, where it is then made of wood the whole width of the house right up to the northern wall; at the junction of the stone and wooden floors a stone staircase about ten or twelve feet wide and a flight of twelve or fifteen steps leads to an open space beneath the room, hall or market-

Spear v. Bodmin Union, Q.B.

house. This open space below is co-extensive with the wooden portion of the flooring in the market-house, and is about fifty feet broad, thirty feet long, and about fifteen feet high, and is used for a fire-engine house. It also contains a urinal, &c. The whole of such space underneath the floor is within the walls of the market-house. The market-house itself now contains no fixed articles of any description except the pillars above-mentioned. The floor (when the stalls hereinafter mentioned and a balustrade placed around the wall of the stone staircase are taken away) is clear and almost level.

6. The market-house does contain, however, a number of stands or stalls, the larger proportion of which were originally intended for the use of butchers, but some of them are now used by other tradesmen who also use other stalls or standings specially set apart for them. The butchers' stalls, which consist of wooden frames with iron stays and hooks for suspending meat, were originally fixed to the granite flooring by means of iron cramps run in with lead, but on or about the 14th day of June, 1872, these cramps were cut off for the purpose of removing the stalls on account of some public entertainment, and they have not since been restored. The stalls stand on the floor and occupy the same relative position in the house now as they did before they were severed. Some of the stalls are let by the year subject to certain conditions (1), but

(1) The following were the material conditions of auction sale for letting the butchers' stalls referred to in the case:—

"1. The butchers' stalls to be let by auction as heretofore by the council, from the 24th of August, 1878, to the 23rd of August, 1879.

"2. Every occupant of a stall at a rental of not less than 6*l.* a year to have the preference of his stall at the same rental, he taking the next adjoining stall at the same rental of not less than 6*l.*

"3. The council will not receive a greater or less rent than 2*s.* 7*d.* per week from an occasional occupier of a butcher's stall or standing, nor a greater yearly rent than 6*l.* nor less than 5*l.* 1*s.* for each butcher's standing, except the weekly sum of fourpence, for lighting and cleaning the market-house and weighing at the town scales.

"4. No butcher to use any other stalls than those allotted to him by the collector of rents.

"5. The town council reserve to themselves free liberty to use the said market-house and

others are set apart for casual occupiers. Any stranger may apply for and the mayor may grant to him the use of any of the stalls so set apart for casual occupiers for the market-day of any particular week, but the right of a casual occupier to a stall so taken by him only extends to one Wednesday and one Saturday, a distinction (among others) which exists between a yearly and a casual or weekly occupier being that, whereas the former always occupies a stall standing in the same place relatively to the other stalls in the market-house on each succeeding market-day during the year for which it is let to him, the latter cannot insist on doing so as he hires the stall for use on the market-days of one week only. The mayor for the time being, by virtue of one of the borough charters, is clerk of the market (not of the market-house), and on his accession to the mayoralty is sworn faithfully to discharge the duties of his office; and since the passing of the Act referred to in paragraph 4 of this case, he has, with the sanction of the town council, carried out the duties and exercised the rights respectively imposed upon and reserved to them by virtue of that Act with respect to the market-house. The rents payable by the several occupiers of the stalls taken by the year, as well as the tolls paid by the casual stall holders, are collected every Saturday by a person who is appointed and paid by the council for this and for other services, and who is locally known as the mayor's servant.

7. On market-days the stalls stand in rows in the market-house. All the butchers' stalls are of the same construction and pattern, and nearly of the same size, and when on any particular occasion they have become intermixed, the specific stall theretofore occupied by any one butcher has not of necessity been restored to him, but his right to the stall has been deemed to be satisfied by his retaining the same relative position in a certain row of stalls which he theretofore occupied, the mayor, as the representative of the council, determining all questions that arise between the stall holders themselves or butchers' stalls other than on market days, in such manner and for such purposes as the mayor for the time being shall think fit."

Spear v. Bodmin Union, Q.B.

between any individual stall holder and the town council. The appellant and the other stall holders in the same trade renting stalls for a fixed period of a year have, however, a right to retain the same relative positions or order of standing, and the rentals of the stalls vary according to these relative positions, so that, for instance, a butcher who rents the first stall in a row pays more than the one who rents the last stall in the same row, and is entitled to be placed accordingly. It frequently happens that the market-house is required for purposes other than the market purposes, such as bazaars, concerts and other public entertainments, and on such occasions the stalls can, if necessary, be removed and the floor cleared, though should the stalls be required they are used on such occasions. In instances where the stalls are removed for any such purposes as these, they are by the next market-day placed back on the same part of the market-house as they usually occupy, but since they were severed from the floor they have not always, after removal for the purpose of public entertainments, been restored to exactly the same position (to within a few inches) from which they were removed. The use of the market-house on occasions such as these (on days other than Saturdays only) has hitherto been granted or refused by the mayor, as the representative of the town council, without any reference whatever to the stall holders. Subject to the rights of the stall holders, complete possession of the market-house is retained by the mayor for the time being, as the representative of the council, the so-called mayor's servant keeping the keys, opening the market-house at 7 A.M. on days on which it is in use, closing it at 10 P.M., and allowing no one to remain in it after that hour, and cleaning it and keeping it in proper order.

8. The stalls occupied by the appellant were butchers' stalls, and were let to him on the 24th of August, 1878 (subject to the conditions contained in the appendix, which were read at the auction or public letting held on that day) for the term of one year, from the 24th of August, 1878, to the 23rd of August, 1879. The market days are on Wednes-

days and Saturdays, the latter being the only day on which the market-house is regularly used by the stall holders. On occasions when any butcher has failed to attend on one of the market days, the mayor, as representing the council, has occasionally assumed the right to let his stall to another person for that day. The stall holders are precluded by the conditions of letting, which are set out in the appendix, and are to be taken as forming part of this case, from underletting their stalls; but on a recent occasion, when a stall taken by the year has been underlet, the mayor caused the goods of the underlessee to be removed from and refused to allow him to occupy such stall (1).

The question for the Court was, whether, on the above facts, the appellant was liable to be rated.

Pitt Lewis, for the appellant.—The authorities are all in one direction, and go to shew that the appellant is not rateable. He cited *The London and North Western Railway Company v. Buckmaster* (2), *Handcock v. Austin* (3), *The Queen v. St. Pancras* (4), and *The Queen v. Morrison* (5).

[He was then stopped by the Court.]

Petheram, for the respondent.—The appellant is liable to be rated in respect of this stall. The test is, whether the ground was let to him so as to create a demise. Here there was an exclusive possession of the stall, and the lessee, in case of a reletting, had the right to have the stall put on substantially the same piece of land.

[He cited *The Queen v. St. Martin's* (6), in which the lessee of a private box of a theatre was held to be rateable for the relief of the poor.]

Pitt Lewis.—*The Queen v. St. Martin's* (6) turned on the construction of a local Act, which contained the words "possess or enjoy." In *Holledge's Case* (7) it was

(2) 44 Law J. Rep. M.C. 180.

(3) 14 Com. B. Rep. N.S. 634; 32 Law J. Rep. C.P. 252.

(4) 46 Law J. Rep. M.C. 243; Law Rep. 2 Q.B. D. 581.

(5) 22 Law J. Rep. M.C. 14.

(6) 3 Q.B. Rep. 204; 11 Law J. Rep. M.C. 112.

(7) 2 Robert. Rep. 238.

Spear v. Bodmin Union, Q.B.

holden that a man was not liable to church rates for a stall in a market town, of which he was lessee, and to which he came once a week to sell his wares, then leaving the town, and taking such goods as remained unsold with him. The Court said that they might as well rate any other persons who came to the market to sell their wares.

LUSH, J.—I am of opinion that this appeal must be allowed. The question is, whether this stall holder is an occupier, so as to render him liable to be rated. In other words, whether he has the exclusive occupation of any defined portion of property. Now the facts of the case, in my judgment, altogether negative such an occupation. It appears that the corporation of Bodmin have under the powers of their local Act the right to let the stalls contained in the market-place, which may be either by way of demise or by way of temporary use only. On that point the terms of the statute throw no light. What they have been in the habit of doing with these butchers' stalls, of which the appellant rented one, is to have them put up to auction, giving a certain preference to the old occupiers. The stalls are moveable, and on market-days stand in rows in the market-house. The stalls are of the same construction and pretty much the same size, and when on any particular occasion they have become intermixed, the identical stall occupied by any one butcher has not of necessity been restored to him, but his right to the stall has been deemed to be satisfied by his retaining the same relative position in a certain row of stalls theretofore occupied by him. The appellant and other butchers renting stalls for a fixed period of a year have, however, the right to retain the same relative position or order of standing, and the rentals of the stalls vary according to their relative position, e.g., a butcher who rents the first stall in a row pays more than the one who rents the last stall in the same row, and is entitled to be placed accordingly. Sometimes the market is used between the market-days for various kinds of entertainments; on these occa-

sions the stalls are removed or remain according to circumstances. If they are removed, they are, before the next market-day, placed back on the same part of the market-house as they usually occupy, but they are not always restored to exactly the same position. If stalls are not removed, but are required for use, as at bazaars, the use of the stalls is at the disposal of the town council.

The above are the substantial facts to be found in the 7th paragraph of the Special Case, from which it appears that the right purchased by the appellant is the right to have a given stall in a row of stalls, but not to have his stall placed in any defined portion of the market. There is here nothing like an occupation such as is required by the statute. *The Queen v. St. Martin's* (6) does not at all favour Mr. Petheram's contention. There it was held that the lessee of a private box at a theatre was liable to be rated for the relief of the poor in respect of it, under the terms of a local Act which contained much larger words. Our judgment must be for the appellant.

FIELD, J.—I am of the same opinion. The only question is, whether the facts disclose an occupation such as is required by the statute of Elizabeth, and I think they do not. No right is given to any definite portion of the ground, with a right to exclude anybody else. All that appears is, that the appellant is in the habit of coming on market days to the place or spot. But without the exclusive right he does not become the occupier. I quite agree that this is not a case in which the appellant is liable to be rated.

Judgment for appellant.

Solicitors—Cooda, Kingdon & Cotton, agents for R. P. Edyvean, Bodmin, for appellant; G. E. Philbrick, agent for P. J. Wallis, Bodmin, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1880. { GOLDSTRAW (*appellant*) v.
March 23. { DUCKWORTH AND ANOTHER
(*respondents*).

Public Health—Highway—Construction of Local Act—Projection “over or upon” Pavement—Oriel Window not Interfering with Traffic.

An Act “for the protection of the health of the inhabitants of Liverpool, and the better regulation of buildings in the borough,” enacted (among other provisions dealing entirely with footways) that “no projection of any kind should be made in front of any building over or upon the pavement,” with certain exceptions in favour of shop fronts and doorways:—Held, that an oriel window, which projected over the pavement of a street, but did not interfere with the use of the footpath, but only with the access of light and air to the street, was not within the above provisions.

CASE stated under 20 & 21 Vict. c. 43.

Upon the information of the appellant the respondents were summoned for that they, being architects employed in the erection of a certain building, to wit, an hotel in the borough of Liverpool, did not within three months last past truly observe the provisions and regulations contained in an Act of Parliament intituled “An Act for the protection of the health of the inhabitants of the borough of Liverpool, and the better regulation of buildings in the said borough,” by having built an oriel window in the said hotel, which projected over the pavement of the street contrary to the said Act.

On the hearing of the information it was proved that the respondents were the persons employed in the building referred to in the information.

It was also proved that the projection complained of was an oriel window of stone work, which measured from the bottom to the top eleven feet, and projected over the footpath two feet six inches, and that the distance between the lowest part of the window and the footpath was from fourteen to fifteen feet, and that such oriel window was not in the nature of a shop front, doorway, cornice

VOL. 49.—M.C.

or pilaster; and it was also proved that the land over which the window projected was, to the extent of two feet six inches, part of the public highway, being in fact the foot pavement of the street.

It was, however, proved that the window was not any nuisance or obstruction, except only so far as any such projection necessarily interfered with the access of light and air to the street, and with the regularity of the line of buildings in the street, and that it did not interfere with the present use of the footpath.

The magistrate was of opinion that the 67th section of the Building Act only prohibited projections which were either placed upon the pavement or in such manner over it as to prevent the free passage along it, and that it did not apply to projections in the upper part of buildings; accordingly he dismissed the information.

The question of law arising upon the case was, whether the 67th section of 5 Vict. sess. 2. c. xliv., prohibits projections which, though not obstructing or resting upon any part of the footpath, project from the upper part of buildings over the footpath (1).

R. S. Wright, for the appellant.—The magistrate was wrong in dismissing this information. The facts shew that there was a nuisance or obstruction by the interference with the access of light and air such as to make the respondents liable.

The respondents did not appear.

Cur. adv. vult.

The judgment (2) of the Court (3) was delivered by

LUSH, J.—The respondents in this case were summoned for neglecting to observe the provisions and regulations contained in a local Act (5 Vict. sess. 2. c. xliv.), intituled “An Act for the promotion of the health of the inhabitants of the borough of Liverpool, and the better regulation of buildings in the said borough.” The act

(1) This section will be found set out along with others in the judgment of Lush, J.

(2) The judgment was not written.

(3) Cockburn, C.J.; Lush, J.; and Manisty, J.

Goldstraw v. Duckworth, Q.B.

complained of was the building of an oriel window of stone work, which projected over the pavement of the street to the extent of some two feet six inches; but it was proved that the window was not any nuisance or obstruction except so far as any such projection necessarily interfered with the access of light and air to the street and with the regularity of the line of buildings of the street. Under these circumstances the magistrate dismissed the information, being of opinion that the 67th section of the Building Act, to the terms of which I shall presently call attention, only prohibited projections upon or over the pavement such as would prevent free passage along it; and the question reserved to us is, whether the section in question prohibited a projection from the upper part of buildings over the footpath, even though such projection may not obstruct or rest upon any part of the building.

Now the Act in question, though intitled a sanitary Act, had, amongst other objects, the regulation of footways. The 67th section, upon which the present question turns, is one among a number of sections having reference to footways and keeping them clear. The 63rd section enacts that "no water shall be permitted to flow from any building upon the footway of any street, but all such buildings shall be drained by pipes or tunnels where practicable below the surface or flagging of the footway, and where impracticable on account of the level of the street, by channels formed in the pavement or flagging of the footway; nor shall any water be pumped up or discharged from any building upon the footway of any street, but the same, when necessary to be so pumped up and discharged in consequence of any tempest or flood, may be conveyed over or under the footway by spouts or trunks to the drain or channel of the street." The 64th section directs how that is to be carried out. The 65th section prohibits the discharge of smoke or steam from the front of buildings. The 66th section enacts that "the cellar entrances, windows or openings of all buildings to the front of any street, and the coal and other vaults under the footways of any such street,

and the entrances or openings thereto from the footway," are to be secured according to the directions of the commissioners of paving or surveyors of highways. Then comes the 67th section, which is in these terms: "And be it enacted that no projection of any kind shall be made in front of any building over or upon the pavement of any street, except for shop fronts or for doorways, and no part of such shopfront or doorway in streets under ten yards wide (measuring from house to house at right angles, with the front brick or stone work of the said buildings) shall project more than six inches, except the cornice, which may project fifteen inches; and in streets more than ten yards wide, measuring as aforesaid, no shopfront or doorway shall project more than twelve inches, except the cornice, which may project eighteen inches, the tops of such projecting cornices in no case to exceed in height more than three feet above the ceiling of such shop, and being in all cases covered with lead, copper, zinc, iron, slate, stone or other incombustible material." Then comes the following proviso: "Provided always, that it shall be lawful for any person, with the consent in writing of the council, . . . and also with the consent of the said commissioners for the better paving and sewerage of the town of Liverpool, . . . to build with, or add to . . . any building fronting any street any projecting pilaster which shall not project more than six inches, or in streets more than ten yards wide, measuring, as aforesaid, more than *twelve* inches from the perpendicular line of the front brick or stone work of the building where it fronts such street; provided also, that the erection of such pilaster shall not entitle the owner of such building at any future period to bring forward or advance the front wall of such building in a line with the front of such pilaster; and in the absence of any evidence to the contrary on the part of the owner, the presumption shall be that, save as hereby expressly allowed, the right of such owner was limited to the line of such front wall without such pilaster or cornice."

Now it was contended that the words "over or upon" the pavement apply to

Goldstraw v. Duckworth, Q.B.

any projection at any part of a building. If, therefore, the contention be sound, any owner of premises would be prevented from having any verandah or other place erected for the most innocent purpose, such as for flowers, which extended any distance over the vertical line, and could not even put a lamp in front of his house. Such an absurd result the Legislature could never for one moment have intended. The object of the 67th section was, as it seems to me, to keep the pavements clear for passenger traffic, and to prohibit anything which was likely to cause an obstruction to passengers; the word "over" being used to prevent the intention of the statute being frustrated by projections which, though not upon a pavement, would interfere more or less with the traffic. The exceptions in favour of shopfronts and doorways under certain conditions point to the same conclusion, and shew that the Legislature never intended to prevent projections at any part of the house. We are therefore of opinion that the magistrate came to a right conclusion, and that the section in no way was intended to deal with the free passage of air, but only with the free passage of traffic along the pavement. As therefore it was proved that the projection in question did not interfere with the present use of the footpath, the information was properly dismissed, and our judgment must be for the respondents.

Judgment for respondents.

Solicitors—F. Venn & Son, agents for J. Rayner, Liverpool, for appellant.

[IN THE QUEEN'S BENCH DIVISION.]

1880. } TOMBS (appellant) v. MAGRATH
May 4. } respondent).

Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 21, sub-sect. 1—Administrative Battalion—Dismissal of Member—Commanding Officer—Regulations of 1878.

By the Volunteer Act, 1863, s. 21, sub-sect. 1, the commanding officer of a Volunteer corps may discharge from the corps any volunteer for breach of discipline. By sub-section 2, a volunteer belonging to a corps or administrative regiment who is guilty of misconduct while under arms or on march or duty is liable to arrest at the order of the officer then in command of the corps or regiment.

The appellant was a member of the W. Corps, which consisted of two companies, of which the defendant was captain, commandant and commanding officer. Whilst the two companies were assembled in camp, they formed, together with certain other companies an administrative battalion, the whole of the companies in camp being under the command of M., the commanding officer of the first administrative battalion. On parade of the appellant's corps, forming part of the administrative battalion in camp, the appellant was dismissed from the corps for breach of discipline by the respondent, who was present superintending the company drill of the corps:—Held, that the respondent was the commanding officer on the occasion when he dismissed the appellant within the meaning of section 21 of the Volunteer Act, 1863, and that the power of the commanding officer of the administrative regiment was limited to arrest for the period during which the regiment was collectively under his control.

CASE stated under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant under the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 27, for having on the 1st day of July, 1879, at Leamington, unlawfully failed, after demand, to pay a certain subscription due from the appellant (as a late non-efficient member) to the funds of the 10th Warwickshire Rifle Volunteer

Pembles v. Magrath, Q.B.

Corps, amounting to 1*l.* 5*s.*, contrary to the provisions of the Act.

It was proved that the appellant for some time previous to the 14th day of June, 1879, when the Administrative Battalion went into camp, and on the 19th day of June, 1879, was a member of the above mentioned corps, which consisted of two companies, of which the respondent was captain, commandant and commanding officer, and whose head quarters were at Leamington. On the 19th of June, 1879, the two companies were assembled in camp, in Stoneleigh Park, Warwickshire, forming, together with the other companies, the 1st administrative battalion of the Warwickshire Rifle Volunteers, the whole of the companies in camp being under the command of Lieutenant-Colonel Machen, the commanding officer of the said administrative battalion. On parade of the 10th Warwickshire Rifle Volunteer Corps, forming a part of the said administrative battalion in camp on the 19th of June, 1879, the respondent being present and superintending the company drill of the corps, the appellant, for some breach of discipline, was dismissed from the corps by the respondent.

It was admitted that there was due from the appellant if properly dismissed by the respondent, the sum of 1*l.* 5*s.* as subscription to the corps for 1879.

The justices made an order for the payment of the above sum, but reserved for the opinion of this Court the question whether the respondent was the commanding officer of the corps on the occasion when he dismissed the appellant, within the meaning of section 21 of the Volunteer Act, 1863, and the Volunteer Regulations, 1878 (1).

(1) Section 21 of 26 & 27 Vict. c. 75 (Volunteer Act, 1863), enacts that:—"With respect to the discipline of officers (other than officers of the Volunteer Permanent Staff) and volunteers, the following provisions shall take effect and be in force while they are not on actual military service:—

"1. The commanding officer of a volunteer corps may discharge from the corps any volunteer, and strike him out of the muster roll, either for disobedience of orders by him while doing any

Underhill (*Stubbins* with him), for the appellant.—This information ought to

military duty with his corps, or for neglect of duty, or misconduct by him, as a member of the corps or for other sufficient cause, the existence and sufficiency of such causes respectively to be judged of by the commanding officer. The volunteer so discharged shall, nevertheless, be liable to deliver up in good order, fair wear and tear only excepted, all arms, clothing and appointments, being public property or property of his corps, issued to him, and to pay all money due or becoming due by him, under the rules of his corps, either before or at the time or by reason of his discharge. But nothing herein shall prevent Her Majesty from signifying her pleasure in such manner, and giving such directions with respect to any such case of discharge, as to Her Majesty may appear just and proper.

"2. If any such officer as aforesaid, or any volunteer, while under arms or on march or duty, with the corps or administrative regiment to which he belongs or any portion thereof, or while engaged in any military exercise or drill with such corps or regiment, or any portion thereof, or while wearing the clothing or accoutrements of such corps or regiment, and going to or returning from any place of exercise or assembly of such corps or regiment, disobeys any lawful order of any officer under whose command he then is, or is guilty of misconduct, the officer then in command of the corps or regiment or any superior officer under whose command the corps or regiment then is, may order the offender, if an officer, into arrest, and if not an officer, into the custody of any volunteer belonging to the corps or regiment, or of any non-commissioned officer of the volunteer permanent staff, but so that the offender be not kept in such arrest or custody longer than during the time of the corps or regiment, or such portion thereof as aforesaid, then remaining under arms, or on march or duty, or assembled or continuing engaged in any such military exercise or drill as aforesaid."

Section 27 says:—"If any person belonging or having belonged to a volunteer corps or administrative regiment neglects or refuses to pay any money subscribed or undertaken to be paid by him towards any of the funds or expenses of such corps or regiment . . . such money or fine shall (without prejudice to any other remedy) be recoverable from him, with costs, at any time within twelve months after the same becomes due and payable, as a penalty under this Act is recoverable."

Tombs v. Magrath, Q.B.

have been dismissed, inasmuch as the respondent was not the commanding

By paragraph 63 of the Regulations for the Volunteer Force, 1878:—"Whenever it is practicable, corps of volunteers, which are not of sufficient strength to constitute by themselves a regiment, brigade or battalion, are united with others of the same arm to form an administrative regiment, brigade or battalion, herein called an administrative regiment."

By paragraph 64:—"The object of this administrative organisation is to unite separate corps under a common head, to secure uniformity of drill among them, and to afford them the advantage of the instruction and assistance of an adjutant; but it is not intended to interfere with their constitution or financial arrangements, with the operation of their respective rules, or with the powers specially conferred on their commanding officers by Act of Parliament, or to require them to meet together for united drill in ordinary times except with their own consent."

By paragraph 73:—"Subject to the powers conferred by the law upon the commanding officer of each corps, the officer commanding an administrative regiment will have the general charge of the drill and instruction of the several corps under his command. He will inspect them from time to time, and will take notice of, and, if necessary, report any infraction of the provisions of the law, or of the orders or regulations of the Secretary of State. He will also be responsible that uniformity in drill is preserved throughout the force under his command. When present at the drill or parade of any of the corps, he will invariably be in command."

By paragraph 74:—"No officer of a corps forming part of an administrative regiment has any authority over the other corps of which it is composed in consequence of their administrative union; but whenever the several corps, or any number of them, meet together for drill, the senior officer present assumes the command."

By paragraph 427:—"When a volunteer has been dismissed for offences in uniform, a notification of the fact, with the cause of dismissal, will be inserted in regimental orders."

By paragraph 878:—"Each corps of volunteers will be inspected annually, and the presence of each man at the inspection (unless he shall have been enrolled subsequently to the date of inspection, or shall be absent on leave specially granted by the commanding officer, or through sickness duly certified) is necessary to qualify him for efficiency under Her Majesty's Order in Council."

officer of the corps within the meaning of the Volunteer Act, 1863, section 21, and the Volunteer Regulations at the time when the appellant was dismissed from the corps. The appellant's corps being joined with other corps in camp, was under the command of Lieutenant-Colonel Machen, who, as commanding officer, had alone the power to dismiss the appellant. They referred to 26 & 27 Vict. c. 75. ss. 21, 27, and to the Volunteer Regulations, 1878.

Bigham, for the respondent, was not called upon to argue.

LUSH, J.—I am of opinion that the decision arrived at by the magistrates was right, and that consequently this appeal must be dismissed. The appellant was sued in the form of an information for the non-payment of a subscription due from him as a late non-efficient member to the fund of the 10th Warwickshire Rifle Volunteer Corps. It is admitted that the appellant's liability to pay this subscription depends on the question whether he was properly dismissed. Now the facts are as follows:—The appellant was a member of the 10th Warwickshire Volunteer Corps, which consisted of two companies, of which the respondent was captain, commandant and commanding officer, and whose headquarters were at Leamington. In June last, whilst the appellant was a member of the corps, the two companies were assembled in camp and formed, together with certain other companies, the first administrative battalion of the Warwickshire Rifle Volunteers, the whole of the companies in camp being under the command of Lieutenant-Colonel Machen, the commanding officer of the administrative battalion. On parade of the 10th Warwickshire Rifle Volunteer Corps which formed a part of the administrative battalion in camp, the appellant was dismissed by the respondent, who was at that time present superintending the company drill of the corps, for some breach of discipline. The objection taken is that as the corps to which the appellant belonged was joined with other corps in camp, Lieutenant-Colonel Machen was the commanding officer at that time, and

Tombs v. Magrath, Q.B.

consequently that he was the only person entitled to dismiss the appellant. Now I confess it appears to me very plain that, on the construction of the statute to which our attention has been called, and also the regulations, the sole power to dismiss was vested in the captain of the corps. The commanding officer of the corps, alluded to in 26 & 27 Vict. c. 75. s. 21, is undoubtedly the respondent. The commanding officer of the administrative regiment has no power save of arrest at the period during which the regiment is collecting under his control, and the power of dismissal is, by section 21, sub-section 1, expressly given to the commanding officer of the corps and him only. The regulations shew that the commanding officer of a regiment has nothing to do with the constitution of the corps, but is responsible only for their good conduct during drill. Consequently our judgment must be for the respondent.

FIELD, J.—I am of the same opinion. The only question before us is whether the appellant was properly dismissed. He was a member of a company forming with another company a corps, and it is indisputable that the respondent was the commanding officer of that corps. Therefore, unless under exceptional circumstances, it must be conceded that the respondent was the person properly authorised to dismiss. The lieutenant-colonel had no authority to discharge. His power is limited to that of arrest. For the performance of certain duties the lieutenant-colonel was doubtless the commanding officer, but I see nothing to take away from the commanding officer of the corps the duty imposed upon him by section 21, sub-section 1 of the Act of 1863.

Appeal dismissed.

Solicitors—Field, Roscoe & Co., agents for Bodington, Warwick, for appellant; Burton & Co., agents for Overell & Son, Leamington, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]
1880. } ORDER (*appellant*) v. SCOTT
May 4. } (*respondent*).

Sale of Food and Drugs Act, 1875, ss. 6, 12, 13—Adulterated Article—Purchaser—Inspector acting by Deputy—Information.

The respondent was summoned upon an information laid by the appellant, the inspector appointed under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), for having sold to the prejudice of one Toy, certain coffee which was not of the nature and quality of the article demanded by such purchaser, contrary to the provisions of section 6.

It appeared that Toy went as the appellant's assistant, and asked for some best coffee for which he paid. On being analysed, the coffee purchased was found to contain a large proportion of chicory. The justices dismissed the information on the ground, amongst others, that the proceeding having been instituted by the appellant in his official capacity, he and not Toy should have personally purchased the article and dealt with the same:—Held upon the above facts, that Toy might be treated as an ordinary purchaser, and that the justices had acted wrongly in entertaining the objection.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions of the peace holden at Wolverhampton, on the 10th of November, 1879, the respondent was charged in and by a certain summons (issued upon an information laid by the appellant, one of the inspectors of weights and measures for the county of Stafford and also the inspector duly nominated and appointed under the Sale of Food and Drugs Act, 1875, for the said county), for that the respondent on Saturday, the 27th day of September, at Bushby, in the said county, did unlawfully sell to the prejudice of one Samuel Toy, the purchaser, a certain article of food, to wit, coffee which was not of the nature, substance and quality of the article demanded by such purchaser, contrary to 38 & 39 Vict. c. 63. s. 6. It was proved before the justices that Toy was the assistant to the appellant under the Food and Drugs Act, and that acting on

Horder v. Scott, Q.B.

behalf of the appellant he went to the respondent's shop and purchased two ounces of coffee from the respondent. The respondent asked if the best was wanted. Toy replied in the affirmative, and was charged 2½d. for it. Toy then told the respondent that it was to be analysed by the county analyst, and divided the sample into three parts, leaving one part sealed and labelled and numbered. Before leaving the shop the respondent mentioned that it was a mixture of coffee and chicory. The appellant was not present when the purchase was made, but the sample was delivered to him, and by him sent to the analyst.

The appellant was called to prove the receipt of the sample from Toy on the day of the purchase, one part of which was delivered to the county analyst, and was found to contain forty-one per cent. of chicory.

The justices determined that (1) as the proceedings were instituted by the appellant in his official capacity as inspector, and he had laid the information, he, and not Toy, should have personally purchased the article and dealt with the same pursuant to section 14 of the Act; (2) that as Samuel Toy was the purchaser and so described in the summons, he and not the appellant should, pursuant to the requirements of section 14, have submitted the article purchased to the county analyst, and should have laid the information against the respondent; (3) that the mode in which the article purchased was dealt with by Toy was not in accordance with either sections 12 or 14 of the Act (1).

(1) By 38 & 39 Vict. c. 63.—“ No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*.”

By section 8, articles of food may in certain cases be mixed with any matter or ingredient not injurious to health, “ if at the time of delivering such article the seller shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article, to the effect that the same is mixed.”

By section 12, “ any purchaser of an article of

Accordingly they dismissed the summons. The question of law was whether or not the justices were correct in their determination.

A. R. Jelf, for the appellant.—The real question here is whether an inspector can act by deputy; the justices thought he could not, and also took objection to the form of the information. The offence is committed under 38 & 39 Vict. c. 63. s. 6; it is submitted that the justices adopted a mistaken view of the statute. [He cited sections 12, 13 and 14 and was then stopped by the Court.]

The respondent did not appear.

LUSH, J.—I think that the justices arrived at a wrong conclusion and that this case must be remitted in order that it may be determined upon its merits. The information was against the seller of an article for selling as best coffee, what was found on an analysis to contain a very large proportion of chicory, to the prejudice of one Samuel Toy the purchaser. To act thus is made an offence under the Sale of Food and Drugs Act, 1875. It is

food is entitled upon payment of a certain fee to have such article analysed, and to receive from the analyst a certificate of the result of the analysis.”

By section 13, “ An inspector of weights and measures may purchase any sample of food at the cost of the local authority, suspected by him to have been sold contrary to the provisions of the Act, and have it analysed, and a certificate is to be given by the analyst specifying the result of the analysis.”

By section 14.—“ The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analysed, to the analyst.”

Harder v. Scott, Q.B.

quite true that Toy was an agent of the inspector, and bought, as such agent, the article in question for the purpose of analysis. Before the Act of last session, there was a difference of opinion as to the construction to be put on certain words of the Act of 1875 between this Court and one of the Scotch Courts, but that difference is no longer of importance (2). Toy may be treated as an ordinary purchaser, who went and ordered some best coffee and received an article which turned out to be a mixture of coffee and chicory.

Under those circumstances the justices dismissed the information, for reasons which appear to me to be quite erroneous. The first ground on which the information was dismissed was, that as the proceedings had been instituted by the inspector in his official capacity, and he had laid the information, he should have personally purchased the article. But it really does not in the least signify whether his was the hand that purchased it or that of his assistant. The second ground on which the information was dismissed was, that Toy, being the purchaser, should have himself submitted the article purchased to the county analyst, and should have laid the information against the respondent. There, again, I think the justices were wrong. The 12th section of the Sale of Food and Drugs Act, 1875, empowered "any purchaser of an article of food" to have it analysed upon payment of a certain fee, and to receive from the analyst a certificate of the result of his analysis. The 13th section permits an inspector to procure any sample of food suspected to have been sold contrary to the provisions of the Act and to have it analysed at the cost of the local authority, and have a certificate of such analysis given to him. That is only a mode of ascertaining the genuineness of an article, and does not go to the substance of the offence. The inspector is authorised to do nothing but what an ordinary purchaser would have the right

to do. It merely provides a manner in which the provision of the statute is to be carried out in certain cases. The third and last objection taken by the justices was, that the mode in which the article purchased was dealt with was irregular and not in accordance with either the 12th or 14th section of the Acts. I confess I don't at all understand the meaning of the third objection. The evidence was that the sample was delivered to the inspector, and by him forwarded to the analyst. But what does that signify? The 12th section only intended to point at a mode of ascertaining whether an article of food was genuine or not; and the provision contained in the 14th section seems to have been substantially fulfilled. The case really lies in a nutshell; a person goes into a shop to buy some coffee; he asks, and pays, for best coffee and gets a mixture of coffee and chicory. Then the only defence the seller makes is that he informed the purchaser before leaving the shop that there was some chicory mixed with the coffee. But a mere verbal notice is not sufficient to bring the seller within the protecting clauses of the Act, the 7th section requiring a distinct notice by a written or printed label to the effect that the article sold is a mixture. On these grounds I am of opinion that the objections taken by the justices are not tenable, and that the case must be remitted back to the justices to be decided on the merits.

FIELD, J.—I am entirely of the same opinion. The inspector appointed under the statute must have multifarious duties; and if we were to hold that these objections were valid it would greatly lessen the benefit intended to be conferred by the Act.

Case remitted.

Solicitors—Thos. White & Sons, agents for Hand, Blakiston & Co., Stafford, for appellant.

(2) See *Hoyle v. Hitchman* (48 Law J. Rep. M.C. 97) differing from *Davidson v. McLeod* (Court of Justiciary), 4th sess. vol. v. part 22, page 1, and also 42 & 43 Vict. c. 61. s. 2,

[IN THE QUEEN'S BENCH DIVISION.]
1880. } THE QUEEN v. PEARCE AND
March 22. } OTHERS.

*Statute 4 & 5 Will. 4. c. 76. s. 38—
Guardians ex officio—County Justices—
County of a Town.*

By 4 & 5 Will. 4. c. 76. s. 38 every justice of the peace residing in any parish and acting for the county, riding or division in which a union is situated, is made an ex officio guardian, and is entitled to act as such:—

Held, that the term "county" in the above section included the county of a town.

This was an information in the nature of a *quo warranto*, calling upon certain justices for the borough of Poole to shew cause why they exercised the office of poor law guardians for the Poole Union.

The proceedings arose out of an election to fill the office of collector of poor rates for the parish of St. James, Poole, by the guardians of the Poole Union, for which office the relator was a candidate. The question raised was whether the borough justices for the town and county of Poole had the right to vote at the elections as an *ex officio* magistrate, it being admitted by the relator that his right to be declared duly elected to the office could only be established in the event of their having no such power.

At the election in question a majority of the elected guardians voted in favour of the relator, but eleven of the justices for the borough of Poole claimed to be entitled to vote as *ex officio* guardians by virtue of being acting magistrates for the county, riding or division in which the union was situated, pursuant to 4 & 5 Will. 4. c. 76. s. 38.

It appeared that under an old charter of Elizabeth, the town of Poole was constituted an entire county, distinct and altogether separate from the county of Dorset, under the title of the town and county of Poole, with a separate sheriff and Court of quarter sessions presided over by a recorder. The area of the corporate town and county of Poole is co-extensive with the parish of St. James's which is small compared with the area of the municipal borough of Poole, and still

more so compared with the area of the Union of Poole, which was constituted in 1835 and included several other parishes beyond the limits of the municipal borough and situate in the county of Dorset.

It appeared from the affidavits that there was only one justice for the county of Dorset who resided within the district of the Poole Union.

Arthur Charles (*Budge* with him), shewed cause against the rule.—The sole question is whether the justices for the county of the town of Poole had a right to vote as *ex officio* guardians at the election under 4 & 5 Will. 4. c. 76. s. 38, by which any justice of the peace residing in any parish forming part of a union and "acting for the county, riding or division in which the same shall be situated shall be an *ex officio* guardian, . . . and shall, until such board shall be duly elected and constituted . . . receive and carry into effect the rules, &c. . . and after such board shall be elected and constituted . . . every such justice shall *ex officio* be and be entitled, if he think fit, to act as a member of such board in addition to and in like manner as such elected guardians." The interpretation clause (section 50) says, that the words "justice or justices of the peace" shall be construed to include "justices of the peace of any county, division of a county, riding, borough, liberty, division of a liberty, precinct, county of a city, county of a town, cinque port, or town corporate unless where otherwise provided by this Act." It is contended on the other side that section 38 does otherwise provide, which has given rise to the present controversy. They cited *Evans v. Stevens* (1).

Wills and *Pollard* supported the rule.—The words used in the 38th section, "justice of the peace acting for any county, riding or division," are words of limitation to the general meaning under the interpretation clause. These words were intended to apply only to counties at large and not to counties of towns; consequently the justices in ques-

(1) 4 Term Rep. 224.

The Queen v. Pearce, Q.B.

tion had no right to vote at the election of guardians for the Poole Union.

COCKBURN, C.J.—I am clearly of opinion that this rule must be discharged. The interpretation clause does not apply at all; it was only inserted to qualify and control the term "justice of the peace," where those words occur without anything more and without reference to their jurisdiction. We are left, therefore, to interpret section 38 without reference to the interpretation clause. It has been contended that the word county is used in the sense of a county capable of having ridings or divisions and must be so held as distinguished from a county of a town. But I think that the words riding or division have been used for the purpose of presenting a possible contention that "riding or division" were not included in the term "county." Now when we have to interpret the term "county" along with the words "riding and division," what good reason is there for holding that a "county of a town" is not a "county?" The object of the section was to give justices residing within any of the parishes forming part of a union a share in the management of the affairs of the union. I see nothing to cut down the meaning of the term "county" as used in section 38, and consequently these gentlemen were, in my judgment, well qualified to vote at the election in question.

LUSH, J.—I am of the same opinion. If it were not for the interpretation clause no difficulty whatever would have arisen. Now an interpretation clause can only be used to interpret words which are ambiguous or equivocal, not to upset clear language. The object of the 38th section was to provide for the supply of persons to act as guardians during any period when there would otherwise have been none. It contemplates the failure from one cause or another of the elected guardians, in which case, but for the supply of *ex officio* guardians, there would be no administrators of the poor law in existence. Now what would be the consequence of our adopting the construction contended for? Why, that if the supply of the elected guardians failed there would be no person left to transact their busi-

ness. It so happens that in this case there is one justice for the county of Dorset living within the district of the Poole Union, but had there been no such person there would, according to the relator's construction, be nobody within the county of the town of Poole who was qualified to administer the poor law pending the election of a new set of guardians. If the word "justices" alone had been used in the section it would, of course, have included a justice of Devonshire; hence the words "and acting for the county, riding or division in which a union is situated." These words qualify the words of the interpretation clause in order that only those who were justices of the county within whose precincts the Union was situated should be *ex officio* guardians and qualified to act as such.

BOWEN, J.—I am of the same opinion.

Rule discharged.

Solicitors—Peacock & Goddard, agents for H. T. Trevanion Poole, for relator; Crowder, Anstie & Vizard, agents for P. E. L. Boyle, Poole, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1880. } ARKWRIGHT (*appellant*) v.
Feb. 27. } EVANS (*respondent*).

Mines—Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77)—Fencing Shaft of Abandoned Mine—Owner—Person interested in Minerals.

The appellant was lessee of a lead mine and of all the duties arising therefrom, under a lease from the Duchy of Lancaster, by which he had to pay to the duchy, by way of rent, all he might annually receive in respect of the mine, with an additional yearly rent of five shillings. The mine was demised to him subject to a custom by which all the subjects of the realm have a right to search there for veins of lead ore, upon paying certain duties, and the appellant had no pecuniary interest in the mine or in the minerals thereof.

Section 13 of the Metalliferous Mines

Arkwright v. Evans, C.P.

Regulation Act, 1872 (35 & 36 Vict. c. 77), requires the owner of an abandoned mine to which the Act applies and every other person interested in the minerals of the mine, to cause the top of the shaft to be fenced, and section 41 states that the term "owner" means any person "who is the immediate proprietor, or lessee, or occupier of a mine," "and does not include a person who merely receives a royalty rent or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant or license for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine":—

Held, that the appellant was neither owner of the mine nor a person interested in its minerals within the meaning of section 13, and, therefore, upon the mine being abandoned he was not liable to cause the top of its shaft to be fenced as required by that section.

Quære, whether the statute applies to a mine which belongs to the Duchy of Lancaster.

CASE stated by the justices of Derby under 20 & 21 Vict. c. 43.

The appellant was convicted by the said justices and fined 1s. and costs of the offence mentioned in an information preferred against him, that he being a person interested in the minerals of the mines at Ible Wood, in the parish of Wirksworth in the said county, did fail or neglect to cause the tops of the shafts from the surface of the said mines to be kept securely fenced for the prevention of accidents contrary to the Metalliferous Mines Regulation Act, 1872.

The case as stated was as follows:—

Upon the hearing of the said information it was proved on the part of the respondent and found as a fact that the top of the shaft of a mine in Ible Wood in the parish of Wirksworth, was not fenced as in the said information is mentioned.

It was also proved or admitted that the mine in question had been abandoned for many years, and that such mine was within fifty yards of a public footpath.

It was also proved or admitted that the appellant was the lessee under the Duchy of Lancaster of the mineral dues

payable in respect of the minerals arising from all the mines within the wapentake of Wirksworth, which comprises the mine in question, for a term of twenty-one years, commencing on the 25th of March, 1879, but that he had to account for and pay over to the duchy all sums received in respect of such mineral dues, and that the appellant had no pecuniary interest in the said mines or in the minerals thereof.

A copy of the said lease was annexed to and to be taken to form part of the case (1).

(1) The copy of the lease referred to in the case was that of a lease made on the 9th of June, 1879, between the Queen's Most Excellent Majesty of the one part and Frederick Charles Arkwright, therein described, of the other part. By it Her Majesty, by and with the advice of her Chancellor and Council of her Duchy of Lancaster, demised unto the said Frederick Charles Arkwright, his executors, administrators and assigns, "all those mines of lead with their appurtenances within the soke and wapentake of Wirksworth, parcel of Her Majesty's Duchy of Lancaster in the county of Derby, subject to the custom of working the same," "all those duties called lot and cope within the said soke and wapentake of Wirksworth," and "all and all manner of perquisites and profits arising and growing, happening or becoming due or payable or appertaining of, from or to the Barmote Courts within the said soke and wapentake." To hold the same from the 25th of March, 1879, for the term of twenty-one years. The rent reserved was the following: "the yearly rent of five shillings and in addition thereto a sum by way of further rent equal to the full amount received in each year by the lessee from or in respect of the demised premises or by reason of the demise hereinbefore made thereof to be payable on the 25th day of March and the 29th day of September in each year without any deduction except such deductions as are specified in clause 1 of the fourth schedule." The clause 1 of the fourth schedule was the following:

"1. The lessee may from time to time deduct from the reserved rents—

Arkwright v. Evans, C.P.

It was thereupon contended by the appellant's solicitor that the appellant having no pecuniary interest in the minerals of the said mines was not a person interested in the minerals of the said mines within the meaning of section 13 of the Metalliferous Mines Regulation Act, 1872, and therefore not liable to fence the top of the said shaft. The appellant's solicitor also contended that if the justices considered the appellant

a person interested in the minerals of the said mines within the meaning of the said section, and as such liable to fence the top of the said shaft, evidence must be given that minerals were still to be found in the said mine, and no such evidence had been given, and it might be presumed that the mine had been abandoned in consequence of there being no minerals therein. The solicitor for the respondent contended that it was enough if the appellant had any interest whatever in the said mines or in the minerals thereof. That it was not necessary that the appellant should have a pecuniary interest. That it was not necessary for the respondent to prove that minerals still existed in the said mines.

The justices being of opinion that the appellant as such lessee (although having no pecuniary interest) was a person interested in the minerals of the said mine within the meaning of section 13 of the said Act gave their determination against the appellant in manner before stated.

The question of law for the opinion of the Court was whether or not, upon the evidence above stated, the said justices were justified in so convicting and fining the appellant.

"(1) Any sum or sums not exceeding in the whole in any one half-year 100*l.* which the lessee may, during the same half year, have expended in respect of salary to the steward of the said soke and wapentake, or the barmaster of the said soke and wapentake, or either of them and in respect of the holding of the said barmote Courts.

"(2) Any sums which the lessee shall, during the half year for which the reserved rents are payable, have properly paid under the provisions of clause 2 of the third schedule." The third schedule (which contained the lessee's covenants) stated in clause 2 that "the lessee shall during the term pay all land tax, tithe, quit rent, sewers rates, and all other taxes, rates and assessments whatsoever, parliamentary, parochial, extraordinary or otherwise, for the time being charged, assessed or imposed on the demised premises, or any part thereof, or on the reserved rents, or any of them."

Amongst the covenants by the lessee there was one that the lessee should, during the term, use all diligence to collect and get in all duties and sums payable to him under and by virtue of the "Derbyshire Mining Customs and Mineral Courts Act, 1852," and under and by virtue of this lease. And another that he should keep books of account in which should be entered all such sums as should be received by him in respect of the demised premises and all sums paid by him in respect thereof, which he might be entitled to deduct from the reserved rent as provided by the said clause 1 of the fourth schedule, and should at all times when required produce such books for the inspection of any person who should be authorised to inspect the same by Her Majesty or by the Chancellor of the Duchy.

Herschell (McLeod with him), for the appellant.—The Duchy of Lancaster is the owner of the mines in the hundred of High Peak, Derbyshire, amongst which is the mine in question, and the working of these mines is regulated by 14 & 15 Vict. c. 94, from which statute it appears that there is a custom from time immemorial in the High Peak hundred for all the subjects of the realm to have a right to search for and dig mines or veins of lead ore there, upon paying certain duties (2). The appellant is a lessee of this mine under a lease from the Crown in right of the duchy, and by that he has it is true a right to receive all the mineral duties payable in respect of the mine, but it is only as a collector or receiver for the duchy, for he is by the lease to hand over to the duchy all he so

(2) See the recital to the Act and the 16th section.

Arkwright v. Evans, C.P.

receives in respect of the demised premises, and in addition thereto, to pay the annual rent of five shillings. He therefore has no pecuniary interest whatever in the working of the mine. How, then, does he come within section 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 67) (3), as being either "the owner of the mine or other person interested in the minerals of the mine?"

The term "owner" is defined by section 41 to mean "any person or body corporate who is the immediate proprietor, or lessee, or occupier of any mine or of any part thereof, and does not include a person or body corporate who merely receives a royalty rent or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant or license for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine."

[LORD COLERIDGE, C.J.—Is not the appellant owner?]

No, and moreover to be within section 13 it is necessary, whether owner or not, that he should be interested in the minerals.

In *Evans v. Mostyn* (4) the owners had power to detain the minerals gotten until the royalty was paid, and were therefore interested in the minerals within the meaning of this 13th section. Here there is no evidence that there are any minerals in the mine, and even if there be, section 41 excludes the appellant from coming within its definition of owner.

Dugdale, for the respondent.—The appellant is both owner and a person interested in the minerals of the mine. The appellant clearly is lessee of the mine,

(3) Section 13 of 35 & 36 Vict. c. 77 enacts that, "Where any mine to which this Act applies is abandoned, or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced for the prevention of accidents."

(4) 47 Law J. Rep. M.C. 25.

and therefore, according to section 41 of the statute, fulfils the definition of the term "owner," and so is brought within section 13. It is immaterial what was the consideration for the lease, and whether it gives the appellant a pecuniary interest or not in the minerals. The lease is a distinct demise, which vests the mine and duties in the appellant, so that no one can work the mine and take out the lead without paying duties to the appellant. The Legislature, in requiring the shaft of an abandoned mine to be fenced, could not have contemplated that the owner of the mine, or person interested in its mineral, had any pecuniary interest therein, and it cannot be necessary that he should have such an interest in order to make him liable to do what the Act requires for the protection of the public. There was no evidence before the justices that there were no minerals in the mine, and the appellant being lessee of the mine, must be interested in whatever minerals there are in the mine.

[LINDLEY, J.—Is it clear that the Metalliferous Mines Regulation Act, 1872, applies at all to Royal mines?]

If neither the Crown nor the appellant be bound to fence, then no one is bound.

Herschell replied.

LORD COLERIDGE, C.J.—I am of opinion that our judgment should be for the appellant, and that the true construction of this Act of Parliament does not include a person in the position of the appellant. Looking at the words and provisions of the Act, I think that the peculiar custom of the High Peak was not contemplated when the Act was passed, and certainly the 14 & 15 Vict. c. 94 is carefully left out of the Act, and is nowhere alluded to in it. We have, therefore, to apply the words of an Act of Parliament to a subject matter which the Act did not contemplate.

I pass over the question whether the Metalliferous Mines Regulation Act, 1872, does or not apply to mines the ownership of which is in the Crown in right of the duchy, and I will assume that it does, but I do not find in it words which will include a person in the posi-

Arkwright v. Evans, C.P.

tion of the appellant. In one sense the appellant is lessee of these mines, but only in a technical and unusual sense. It is true that there are in the lease words of demise, yet, when the whole of it is looked at, the appellant is much more like a receiver than a lessee. The Crown demises the mines to him, and also all the dues and royalties, and everything that comes from the mines, but what he has to pay for this demise is all that he receives. He is to pay all the rents and royalties which he receives subject to certain deductions, which are those which, if the Crown had not demised, the Crown would have had to pay; so that the lessee stands in the place of the Crown, and the whole of the rent is paid to the Crown. Does that bring the appellant within the meaning of the 41st section? Does it make him an "owner" or a "person" interested in the minerals of the mine? The more unfavourable mode for the appellant is to try whether he can be made out to be "owner" within the meaning of the Act rather than whether he can be regarded as interested in the mine; and I think that that is the proper mode of looking at the question, for the Act says, "the owner and any other person interested in the minerals of the mine." It does not, as it appears to me, distinguish the one from the other, and treat "owner" as one class and "person interested" as another class, but it treats both as interested in the minerals. Therefore, the question is whether the appellant can be said to come within the words "owner interested in the minerals of the mine." Now the 41st section enacts that the term "owner," when used in relation to any mine, means any person or body corporate who is the "immediate proprietor" (the appellant is clearly not the immediate proprietor of this mine) "or lessee" (in one sense he is the lessee, because he has a lease of the mine) "or occupier." He is not the occupier, though probably he is the lessee. But it is not enough that he fulfil that part of the interpretation clause; he must fulfil the whole of its conditions to be affected by it; and the clause goes on to say that the word owner "does not include a person or

body corporate who merely receives a royalty, rent or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant or license for the working thereof, or is merely the owner of the soil, and not interested in the minerals of the mine." Now a person or body corporate in this second part of the section must be taken as equally extensive with "person or body corporate" in the first part of the section, and if "a person or body corporate" in the first part includes a lessee, so a person or body corporate may be a lessee in the second part; but then, if he is a person who, being a lessee, "merely receives a royalty, rent or fine from a mine," he is not an owner within the meaning of the first part of the section by the express words of the section itself. It appears to me that that is exactly the appellant's position. He is a lessee of the mine, but a lessee who merely receives a royalty, rent or fine from the mine, and that does not make him owner in the sense in which it is sought to make him. Moreover, it seems to me that the appellant is placed by the duchy exactly in the position of the duchy, and the duchy are the owners of the soil, and if the lease parts with everything that the duchy has to part with for twenty-one years, then he is also merely owner of the soil, and that will not bring him within the first part of the 41st section if he has no other interest in the mine. It is said that he has the right of working it, but he has that right only in common with all other subjects of the realm; and the 14 & 15 Vict. c. 94 shews that, and that it is a right not by statute, but by immemorial custom. Therefore, the appellant, if he did dig for lead, would not do so under his lease, for he would have no better right as lessee to do so than any one in this Court who might choose to go and dig in this mine in accordance with the custom. I think, therefore, that he is not the owner in any sense which would bring him within the words of this Act. It seems to me, as I have already said, that the more unfavourable mode to the appellant was to try whether he was owner within the meaning of the Act, but it has been said that, if not owner,

Arkwright v. Evans, C.P.

he is interested in the minerals of the mine. Now I incline to think that we must assume that there are some minerals in the mine if it were worked (though this is not affirmatively proved); but the mine is not worked, and is an abandoned mine. However, if, instead of being abandoned, the mine were being worked and were full of lead, I fail to see that the appellant would be interested in the minerals in the sense intended by the Act; for as regards the right of digging and searching for lead, he would have no better right than any other subject of the Queen, and he would be interested only, if at all, in the dues; but though in form the lease is a demise of the dues, in substance it makes him only a receiver of them, for he has to hand over all the dues to the duchy when he receives them. I think, therefore, that neither upon the ground of being owner nor upon the ground of being interested in the minerals is the appellant within the terms of the Act. Probably the peculiar relation of the duchy and of the subjects of the realm, and such lessees as the appellant in the present case, were not in the contemplation of the Legislature when the Metalliferous Mines Regulation Act, 1872, was passed; at all events, the position of such a person as the appellant, as a middle man between the duchy and those who have the right of digging for minerals, namely, all the subjects of the realm, has not been defined by this Act. Therefore I am of opinion that the appellant is not brought within the words of the Act, and that the decision of the magistrates must be reversed.

LINDLEY, J.—I am of the same opinion. The appellant was summoned for not causing the top of the shaft of an abandoned mine to be securely fenced. The appellant is only a lessee of mines of lead. The case does not say that the mine in question is an old lead mine, or that there is or is not lead in it, and it may, for aught that appears to the contrary, be any other mine, when the appellant would have nothing to do with it. I will assume, however, that it is a mine of which the appellant would be lessee

under his lease. Then let us first understand the effect of this lease, which is a peculiar one. The lease is a demise from the Crown to the appellant of all the mines within the wapentake of Wirksworth, subject to the right of working the same; and the peculiarity of this lease is that the lessee, the appellant, has to hand over to the Crown all that he gets under it, and he has no pecuniary benefit from it whatever. Supposing, for instance, the 14 & 15 Vict. c. 94 were repealed, he would still be the lessee of these mines, and for that he pays a rent of 5s. a year. Technically he is lessee, and has, I presume, the legal estate, but instead of being lessee in the ordinary sense, he is really only a receiver and agent for the Crown. If he were a mere agent he would of course be liable to be dismissed, but by reason of the lease he has an interest in the mines, and for that he pays a rent of 5s. a year, and so cannot be dismissed as a common agent or receiver, and that, for aught I know, may be the explanation of reserving such rent of 5s. a year.

Now let us consider whether, that being his position under the lease, he is an owner or a person interested in the minerals within the meaning of the Metalliferous Mines Regulation Act, 1872. He has, so far as I can see, no interest whatever in the minerals except so far as he is lessee. Then the question is whether he is "owner" within the meaning of section 41. I assume that the mine is a lead mine, though that is not so found in the case. Then, being in some sense a lessee thereof, he would come within the first part of that section, but being a lessee in the sense only which I have before mentioned, he comes within the negative part of that section, which says that "the term owner does not include a person or body corporate who merely receives a royalty, rent or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant or license for the working thereof, or is merely the owner of the soil, and not interested in the minerals of the mine." It appears to me that he is in the position of a mere owner of the soil, and that he has no interest in the minerals except that he

Arkwright v. Evans, C.P.

has technically an interest in the dues and royalties, all of which, however, he has to hand over to the Crown after he has received them. I therefore do not think that the appellant is "owner" or "person interested" within the meaning of the Act, and that on these grounds the decision of the magistrates ought to be reversed.

Decision reversed.

Solicitors—F. J. & G. J. Braikenridge, agents for Richardson & Small, Burton-on-Trent, for appellant; F. T. Dubois, agent for Leech & Co., Derby, for respondent.

[CROWN CASE RESERVED.]

1880. }
May 1. } THE QUEEN v. ROADLEY.*

Assault—Consent—Child of Tender Years.

The prisoner was indicted at Quarter Sessions for an indecent assault on a girl seven years of age. The chairman refused to allow the prisoner's counsel to address the jury on the question of the girl's consent to the prisoner's act, ruling that a child of seven years old might submit, but was incapable of giving consent in such a case:—

Held, that such ruling was wrong.

The Queen v. Read (2 Car. & K. 957; 3 Cox C. C. 266) followed.

CASE reserved by the deputy chairman of the Leicester Quarter Sessions.

The prisoner was indicted for indecently assaulting Sarah Burton, a child of seven years old. According to the evidence given at the trial, the mother of the child, noticing that she had a discharge from her private parts, took her to a surgeon for advice, who treated the case as one of gonorrhœa. In consequence of this, inquiries were made, and the child stated at the trial that she and another child of a like age had been accustomed to ride with the prisoner in his milk cart, and that on one occasion she and the prisoner

got out of the cart and went into a yard; that there the prisoner undid his trousers and lifted up her clothes, putting his private parts against her own. The prisoner, on being examined by a surgeon, was found to be diseased, and in such a state that contact with his person might have infected the child in the manner described by the surgeon. There was no sign of penetration or of violence.

The prisoner was defended by counsel, who proposed to address the jury on the question of the child's consent to the prisoner's act. The chairman, however, refused to allow the question of consent to be put to the jury, ruling that a child of seven years old might submit, but is incapable of giving consent in such a case.

The prisoner was convicted.

The question reserved for the Court was the correctness or otherwise of the chairman's ruling in the case.

Hensman appeared for the prisoner.

Prosser (D. Kingsford with him), for the prosecution.

[DENMAN, J.—Is not this case concluded by the decision of this Court in *The Queen v. Read* (1) ?]

Prosser admitted that he was unable to distinguish the cases.

LUSH, J.—The ruling of the chairman cannot be supported.

THE COURT held that the conviction could not be sustained.

Conviction quashed.

Solicitors—Austen, De Gex & Candler, agents for W. N. Reeve, Leicester, for prosecution.

* *Coram* Kelly, C.B.; Lush, J.; Denman, J.; Lopes, J.; and Bowen, J.

(1) 2 Car. & K. 957; 3 Cox, C. C. 266.

[IN THE COURT OF APPEAL]

(Appeal from the Queen's Bench Division.)

1880. } MELLOR (appellant) v. DENHAM
March 18. } (respondent).*

Practice—Appeal—“Criminal Cause or Matter”—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47—Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 74 and 92—School Board—Offence against By-laws.

Section 74 of the Elementary Education Act, 1870, enables a school board to make by-laws for certain purposes, and, amongst them, for the purpose of imposing penalties, recoverable in a summary manner, for breach of any by-law.

Section 92 provides that any penalty recoverable summarily under the Act may be recovered before justices in manner directed by the 11 & 12 Vict. c. 43 (*Jervis' Act*), and the Acts amending the same.

Upon an information against the respondent to recover a penalty for breach of one of the by-laws of a school board, justices stated a case for the opinion of the Queen's Bench Division, who gave judgment for the respondent:—

Held, on appeal, that this judgment was in a “criminal cause or matter” within section 47 of the Judicature Act, 1873, and therefore that the appeal would not lie.

Appeal from a judgment of the Queen's Bench Division on a case stated by justices under 20 & 21 Vict. c. 43.

The appellant who was clerk to the Oldham School Board preferred an information against the respondent for neglecting to cause his child to attend school during the whole of the ordinary school hours as required by the by-laws of the board.

Upon the hearing, justices at petty sessions holden at Oldham dismissed the information, but stated a case for the opinion of the Queen's Bench Division, raising the question whether or not the respondent was bound to send his child, who was attending an efficient elementary school under the Factory Acts, to the board school under the by-laws.

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

The Queen's Bench Division gave judgment for the respondent—reported 48 Law J. Rep. M.C. 113.

A. L. Smith and Dicey for the appellant.—An objection will be taken to the jurisdiction of the Court to hear this appeal on the ground that the judgment of the Queen's Bench Division was given in a criminal cause or matter within section 47 of the Judicature Act, 1873. It is submitted that this objection must fail. By the Elementary Education Act, 1870 (1), the neglecting to send a child to school is not made a “criminal matter.”

The mere fact that a penalty is imposed cannot make the offence a criminal matter, and the mode in which the sum

(1) Section 74 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75) provides that “every school board may from time to time, with the approval of the Education Department, make by-laws for the purposes (*inter alia*) of requiring the parents of children between the ages of five and thirteen to attend school; determining the time during which such children are to attend school; and imposing penalties for the breach of any by-law.” The section further provides that “any proceeding to enforce any by-law may be taken, and any penalty for the breach of any by-law may be recovered, in a summary manner,” but no penalty for the breach of a by-law shall exceed such amount as with the costs will amount to 5s. for each offence.

By section 92: “Any penalty and any money which under this Act is recoverable summarily, and all proceedings under this Act which may be taken in a summary manner, may be recovered and taken before two justices in manner directed by the 11 & 12 Vict. c. 43 (*Jervis' Act*) and the Acts amending the same.”

The Oldham School Board duly made by-laws under the above provisions of the Elementary Education Act, 1870.

By those by-laws parents of children within the ages specified in the Act were required to cause them to attend the board school, and a penalty of 5s. for neglecting to do so was imposed.

Malton Local Board v. Malton Farmers' Manure Co., Excs.

respondents, being the occupiers of a certain manufactory, building or place for boiling, burning and crushing bones, or used for a certain trade, business, process or manufacture causing effluvia, unlawfully carried on their business so as to be a nuisance, or so as to cause an effluvia which was a nuisance or injurious to the health of the inhabitants of the district.

2. It was proved by the appellants that the respondents were the occupiers of certain buildings in which the manufacture of artificial manures (including bone manure and the dissolving bones and coprolites with sulphuric acid, but not the boiling or burning of bones) was extensively carried on, and that during the process of manufacture, or whilst the hot product was being moved after manufacture, or from the storage of material, effluvia were thrown off in large quantities, a considerable portion of which escaped from the buildings, and had been from time to time, but not continuously, blown or carried into parts of the appellants' district, and that numerous complaints had been made of a nuisance arising therefrom to the inhabitants. And the appellants' medical officer had certified to the appellants, under the said 114th section, that the building or place occupied by the respondents was a nuisance and injurious to the health of the inhabitants of the district.

3. The evidence for the appellants went to shew that the effluvia was offensive, and had on the occasions in question materially interfered with the comfort and enjoyment of the inhabitants, and that such effluvia had penetrated into some

of the houses within the district, causing the inhabitants to close their windows; and in one or two instances nausea and vomiting were attributed to it, but the appellants' principal medical witness did not think there was anything in the vapours to make the persons who attributed vomiting to them sick. The medical officer, however, adhered to the statement in his certificate that the works caused a nuisance and an effluvia which was injurious to health; whereas the other medical witnesses for the appellants, whilst of opinion that the effluvia might make sick people worse and cause nausea, yet did not think any permanent injury to health would arise therefrom.

4. At the close of the appellants' case it was contended for the respondents that, as the medical evidence had failed to prove injuriousness to health, the justices had no power to convict the respondents, and *The Great Western Railway Company v. Bishop* (2) was cited in support of that contention.

5. For the appellants it was contended that it was not necessary to prove a nuisance injurious to health, and that the case cited, which was decided under the Nuisances Removal Act, 1855, was distinguishable.

6. The justices considered that the nuisance must be proved to be injurious to health, and that on that point the appellants' case was not made out, it being shewn that sick persons might feel it, and to a certain extent suffer from it, but not permanently. The justices accordingly dismissed the complaint.

7. The questions for the opinion of the Court were: First, was it necessary for the appellants to prove not only that a nuisance was caused by the effluvia, but also that it was injurious to the health of the inhabitants of the district? Secondly, if the Court should so decide, then did the appellants sufficiently prove the effluvia to be "injurious to health" within the meaning of the statute by evidence that some nausea which was felt was probably caused by it, and that it would make sick persons within its influence

... is carried on to appear before a Court of Summary Jurisdiction.

"The Court shall enquire into the complaint, and if it appears to the Court that the business carried on ... is a nuisance, or causes any effluvia which is a nuisance or injurious to the health of any of the inhabitants of the district, and unless it be shewn that such person has used the best practicable means for abating such nuisance, or preventing or counteracting such effluvia, the person so offending ... shall be liable to a penalty. ..."

(2) 41 Law J. Rep. M.C. 120; Law Rep. 7 Q.B. 560.

Malton Local Board v. Malton Farmers' Manure Co., Excs.

worse, though in the opinion of the principal medical witness it was not actually injurious to health?

Herschell (A. L. Smith with him), for the appellants.—First, a nuisance complained of under section 114 of the Public Health Act, 1875 (1), need not be injurious to health. This case differs from *The Great Western Railway Company v. Bishop* (2), where it was held that in section 8 of the Nuisances Removal Act, 1855 (which corresponds with part of section 91 of the Public Health Act, 1875), the words “a nuisance or injurious to health” did not include any other nuisances than such as were injurious to health. The difficulty there felt of giving a reasonable meaning to the word “nuisance,” unless restricted to a nuisance injurious to health, does not arise here, inasmuch as section 114 of the Public Health Act, 1875, is one of a group of sections dealing with offensive trades; and the word nuisance, if it needs to be limited, is, therefore, naturally to be limited to nuisances apt to be caused by offensive trades. The provision that for the purpose of founding proceedings any ten inhabitants of the urban sanitary district may certify the nuisance is a strange one, if nuisances to health are alone intended. Secondly, there was evidence of injuriousness to health. Permanent injury to health is not necessary, and injuriousness to the health of persons already ill is enough.

Cave, for the respondents.—The words in section 114, “a nuisance or injurious to health,” mean a nuisance to health or injurious to health. The Legislature must be taken to have had the decision in *The Great Western Railway Company v. Bishop* (2) present to its mind when it used the words upon which a construction had been put in that case. Section 112, which deals with a trade established after the passing of the Act, extends to “any noxious or offensive trade,” but section 113, which deals with trades established either before or after the passing of the Act, is confined to “noxious or injurious effects.” And section 114, dealing as it does, like section 113, with trades established either before or after the passing of the Act, is to be read as

confined, like section 113, to such trades as are not merely offensive, but noxious or injurious. The fact of sick persons being made worse is not enough to constitute injuriousness to health within the meaning of the statute.

Herschell was not heard in reply.

Kelly, C.B.—The case turns upon the construction of section 114 of the Public Health Act, 1875, which, together with sections 112 and 113, deals with offensive trades. The section enacts that upon complaint made, as there mentioned, of any place used for any trade or manufacture which causes effluvia, the justices are to enquire into the complaint, “and if it appears to” them “that the business carried on . . . is a nuisance, or causes any effluvia which is a nuisance, or injurious to the health of any of the inhabitants of the district,” then (subject to matter to which I need not refer) the person offending is to be liable to a penalty. Now, upon the point whether the nuisance was injurious to health, the facts are thus stated in the concluding words of paragraph 6 of the case. Paragraph 6 states that upon that point the appellants’ case appeared not to have been made out, “it being shewn that sick persons might feel it, and to a certain extent suffer from it, but not permanently.” And the words of the second question are, “Did the appellants sufficiently prove the effluvia to be injurious to health within the meaning of the statute by evidence that some nausea which was felt was probably caused by it, and that it would make sick persons within its influence worse, though in the opinion of the principal medical witness it was not actually injurious to health?” My clear opinion, having regard to the words of the statute, “any of the inhabitants of the district,” is that causing effluvia which have the effect of making sick persons within the district worse is injury to health within the meaning of the statute. I am of opinion, therefore, that the appeal must be allowed.

Stephen, J.—Two questions are submitted to us. To the first question I answer, No; it was not necessary for the appellants to prove that the nuisance

Malton Local Board v. Malton Farmers' Manure Co., Exch.

caused by the effluvia was injurious to health. Sections 112 to 115 of the Act deal with offensive trades. The first question arising is, whether in the words of section 114, "a nuisance or injurious to the health of any of the inhabitants of the district," the word "or" is disjunctive, or whether, on the contrary, the word "nuisance" is to be read in connection with the words, "to the health of any of the inhabitants of the district." The respondents seek to make out that the word "nuisance" means a nuisance to health, by reference to the case of *The Great Western Railway Company v. Bishop* (2), decided upon 18 & 19 Vict. c. 121. s. 8, where the Court asked how a reasonable interpretation was to be given to the word "nuisance" save by restricting it to a nuisance to health. But there is no difficulty in restricting the meaning of the word "nuisance" in section 114 of the Public Health Act, 1875, without confining it to a nuisance to health, for it may easily be restricted to a nuisance such as offensive trades are apt to cause. I think, therefore, that whether the nuisance was or was not injurious to health, the appeal must be allowed.

As to the second of the two questions submitted to us, which I understand to be whether the suffering of sick people in health, but not permanently, was an injury to health within the meaning of the statute, I will only add to what my Lord has said, that an offensive smell which makes sick people worse must more or less interfere with the health of robust people. Both the questions submitted to us ought, I think, to be answered in favour of the appellants.

Case remitted with the opinion of the Court.

Solicitors—Williamson, Hill & Co., agents for H. W. Pearson, Malton, for appellants; Emmett & Son, agents for A. H. Jackson, Malton, for respondents.

INDEX

TO THE REPORTS OF CASES

CONNECTED WITH

THE DUTIES AND OFFICE OF MAGISTRATES.

MICHAELMAS 1879 to MICHAELMAS 1880.

ABORTION—*attempt to procure: noxious thing*—

A "noxious thing" within the 24 & 25 Vict. c. 100. ss. 58, 59, means anything which is harmful as administered, although not necessarily harmful *per se*. The prisoner, with intent to procure miscarriage, gave V. an ounce bottle of oil of juniper, telling her to take it in two doses of half an ounce each. She took one such dose, which caused violent sickness. There was evidence that the bottle given by the prisoner contained 500 to 600 drops of oil of juniper; that oil of juniper in small quantities of from five to twenty drops is commonly used without any bad effect as a diuretic, but that taken in a dose of half an ounce it acts as a powerful stimulant and irritant, and produces violent purging and vomiting, which would have a tendency to produce miscarriage by reason of the shock to the system and the straining of the parts consequent upon the purging or vomiting; and that a dose of half an ounce of oil of juniper would be a very dangerous dose to administer to a pregnant woman, and that such danger would consist in the high probability of its causing miscarriage:—*Held*, that there was evidence that the half ounce of oil of juniper was a "noxious thing" within the meaning of the section. *Reg. v. Cramp*, 44

ADULTERATION. See Sale of Food and Drugs Act.

AFFILIATION. See Bastardy Amendment Act.

APPEAL. See Lunatic. Practice.

ARREST. See Warrant of Commitment.

ASSAULT—*consent: child of tender years*—The prisoner was indicted at Quarter Sessions for an indecent assault on a girl seven years of age. The chairman refused to allow the prisoner's counsel to address the jury on the question of the girl's consent to the prisoner's act, ruling that a child of seven years old might submit,

but was incapable of giving consent in such a case:—*Held*, that such ruling was wrong. *Reg. v. Read* (2 Car. & K. 957; 8 Cox C.C. 256) followed. *Reg. v. Roadley*, 88

BASTARDY—*appeal: absence of appellant: order quashed not upon merits: second order: jurisdiction of justices*—Upon an appeal coming on for hearing to the sessions against an order adjudicating the appellant to be the putative father of a bastard child, it appeared that the respondent, the mother of the child, and the witnesses on her behalf, were not in attendance, owing to some mistake. The Court refused to adjourn the appeal, and quashed the order:—*Held*, that as the order had been quashed in the absence of all evidence, there had been no decision by the sessions on the merits so as to be final, and that a fresh order could be applied for to the justices at petty sessions by the respondent against the appellant. *The Queen v. Glynne* (41 Law J. Rep. M.C. 58) distinguished. *Reg. v. The Justices of Essex*, 67

BASTARDY AMENDMENT ACT—*order of affiliation: mistake in drawing up order: omission of words "maintenance and education": amendment*—By the Bastardy Amendment Act, 1873, s. 4, the justices who adjudge a man to be the father of a bastard child may make an order upon him for the payment to the mother of a sum of money weekly for the "maintenance and education" of the child:—*Held*, that an order purporting to be under section 4 for the payment of a weekly sum to the mother absolutely, and which contained no direction for the application of any part thereof for the "maintenance and education" of the child, was bad, and could not be amended by the Court under 12 & 13 Vict. c. 45. s. 7. *Reg. v. Padbury*, 66

BICYCLE. See Turnpike Toll.

BY-LAWS. See Common.

CHILD. See Assault.

CIVIL ENGINEERS. See Poor Rate.

COAL MINES REGULATION ACT—*insufficient ventilation in mine: expenses of alteration: information: liability of manager*—By the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, it is provided that, in the event of any contravention of the general rules set out in that section, the owner, agent, and manager shall be each guilty of an offence, unless he proves that he has taken all reasonable means to prevent such contravention. The first of all such general rules provide that an adequate amount of ventilation shall be constantly produced in every mine to render harmless noxious gases, so that the working places of the shaft of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein. The respondent, who was a certified manager of a colliery mine, at a salary of 1*l.* per week, was charged with an offence under section 51, rule 1. It was proved that the mine was improperly ventilated, and that the respondent might have improved the ventilation with the resources at his disposal, but that the requisite provision for the proper ventilation of the mine would have involved an outlay of 200*l.*—*Held*, that the finding of the justices, that the respondent had omitted to employ the resources at his disposal for the improvement of the ventilation of the mine, disclosed an offence under section 51, for which he was liable to be convicted. *Hall v. Hopwood*, 17

COMMON—*metropolitan commons supplemental act, 1877: validity of by-laws: right of public meeting: common dedicated to use and recreation of public*—A common was by Act of Parliament dedicated to the use and recreation of the public, and directed to be regulated and managed by the Metropolitan Board of Works, who were empowered to frame by-laws and regulations for, among other things, the preservation of order on the common. A by-law made under this power prohibited the delivery of any public speech, lecture, sermon or address of any kind, except with the written permission of the Board first obtained, and upon such portions of the common and at such times as might by such written permission be directed and sanctioned by the board:—*Held*, that the by-law was valid, not being *ultra vires* as repugnant to the laws of England or the intention of the particular Act, and that it was a reasonable mode of regulating the user of the common to require previous information of the object and character of any meeting proposed to be held thereon. *De Morgan v. The Metropolitan Board of Works*, 51

COMPLAINANT, DEATH OF. See Lapse of Proceedings.

CONDEMNATION EX PARTE. See Public Health Act.

CONSENT. See Assault.

CONSTABLE. See Warrant of Commitment.

COUNTY OF A TOWN. See Poor.

CRIMINAL MATTER. See Practice.

CROSS-EXAMINATION. See Libel.

DEBTORS ACT—*adjudication of bankruptcy: infant: trade debts: infants relief act*—The prisoner was convicted under section 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for that he, within four months before the presentation of a bankruptcy petition against him, upon which he was adjudged bankrupt, quitted England, taking with him property to the amount of 20*l.* which ought by law to have been divided amongst his creditors. The prisoner, who traded in Hull, left England with a sum of money exceeding 20*l.*, and was during his absence adjudged bankrupt. At the time he was so adjudged, he was, as also at the present time, a minor. The debts proved against his estate in the bankruptcy were trade debts, and it did not appear that any debts for necessities supplied to him existed:—*Held*, that the conviction could not be upheld, because the prisoner had no creditors amongst whom the said sum of money ought by law to have been divided, the trade contracts being, by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62. s. 1), void. *Reg. v. Wilson*, 13

DISTRESS WARRANT. See Summary Jurisdiction.

EVIDENCE. See Libel.

FORGERY—*fictitious christian name*—The prisoner in payment for a pony and cart purchased by him from the prosecutor, drew a cheque, in the presence of the prosecutor, upon a bank in which he, the prisoner, had no account, in the name of William Martin, his real name being Robert Martin, and gave it to the prosecutor as his, the prisoner's, own cheque drawn in his own name. The prosecutor received it in the belief that it was drawn in the prisoner's own name:—*Held*, that as the prisoner gave the cheque entirely as his own, his subscribing it by a fictitious name did not make it a forgery, the credit having been wholly given to himself, without any regard to the name, or any relation to a third person. *Dunn's Case* (1 L. C. C. 59) followed. *Reg. v. Martin*, 11

GUARDIANS. See Poor.

HIGHWAY—*name of owner of cart, when to be painted on it: highway act: "cart": customs and inland revenue duties act, 1869*—A light spring cart used by the maker of agricultural implements for conveying them to market as well as for driving himself and family from place to place, and on which he paid a tax under 32 & 33 Vict. c. 14. s. 18, is not a "cart" within the meaning of section 76 of the General Highway Act, 1835 (5 & 6 Will. 4. c. 50), so as to make it necessary for the owner's name to be painted thereon. *Danby v. Hunter*, 15

— See Public Health.

INFANT. See Debtors Act.

INSTITUTION. See Poor-rate.

JURISDICTION. See Libel.

—, **OUTRAGE OF—JUSTICES: summary jurisdiction: mens rea: assault and battery: 24 & 25 Vict. c. 100. ss. 42 and 46—The question as to property which will oust the jurisdiction of justices to determine a charge of assault under 24 & 25 Vict. c. 100. s. 42, must be a question as to real property. Where two persons who were gamekeepers in the employ of a landlord of a farm to whom the right to game and rabbits was reserved, were charged before the justices by the tenant of such farm, under 24 & 25 Vict. c. 100. s. 42, with assaulting and beating him, and the acts complained of were done in a scuffle to take from the tenant whilst on his farm his bag, in which were rabbits claimed as the landlord's property:—*Held*, that the fact that the justices were of opinion that the gamekeepers acted under a *bona fide* belief that they had a right to do the acts complained of did not oust the jurisdiction of the justices, no question having arisen as to title to any interest in land within the meaning of section 46 of 24 & 25 Vict. c. 100. *White v. Fox*, 60**

JUSTICES. See Libel. Poor.

LAPSE OF PROCEEDINGS—obscene books: order for destruction: death of complainant before order—In an appeal to sessions against an order made by a magistrate under Lord Campbell's Act (20 & 21 Vict. c. 83), for the destruction of certain books found on the appellant's premises, it was proved that the complainant had died after the summons was issued, but before the order appealed against was made. Thereupon it was contended by the appellant that the proceedings lapsed, as there was then no person in the position of a prosecutor:—*Held*, that inasmuch as the proceedings were *quasi* criminal in their nature, the death of the com-

plainant created no lapse, and that it was the duty of the magistrate, having once issued his summons on the information, to proceed. *Reg. v. Truelove*, 57

LIBEL—defamatory: jurisdiction of magistrate on criminal charge of libel: evidence of truth of libel, when admissible: Lord Campbell's Act—On the hearing before a magistrate of an information under section 5 of Lord Campbell's Act (6 & 7 Vict. c. 96) for maliciously publishing a defamatory libel, the magistrate has no jurisdiction to receive evidence, whether on cross-examination of the plaintiff's witnesses or on the direct testimony of witnesses called by the accused, to prove the truth of the libellous matter charged, on the ground that the truth is not in issue before him, and cannot at that stage constitute any defence. *Reg. v. Carden*, 1

LUNATIC—pauper in workhouse: where resident: order for removal to asylum made by officiating clergyman: practice: appeal from order of sessions: appeal from divisional court without leave: judicature act—It is provided by 16 & 17 Vict. c. 97. s. 67, that in certain cases a pauper deemed to be a lunatic may be examined by the officiating clergyman of the parish in which he is resident, and that an order may be made by that clergyman and another person, directing him to be received into an asylum. It is enacted by 7 & 8 Vict. c. 101. s. 56, that for the purpose of relief, settlement and removal of poor persons, the workhouse of a union shall be considered as situated in the parish to which such poor person is chargeable:—*Held* (affirming the decision of the Queen's Bench Division), that an order for the removal of a pauper lunatic under 16 & 17 Vict. c. 97, is not an order within section 56 of 7 & 8 Vict. c. 101, and that such an order made by the officiating clergyman of C., for the removal of a pauper then in the workhouse of C. was duly made, although the pauper did not, before entering the workhouse, reside in the parish of C. *Reg. v. Pemberton. Reg. v. Smith* (App.), 29

An appeal from an order of the Queen's Bench Division, discharging a rule for a *certiorari* to bring up an order of justices in petty sessions, is not an appeal from an inferior Court within section 45 of the Judicature Act, 1873, and no leave to appeal is required. *Ibid.*

— *reception of lunatics in an unlicensed house: honest belief*—8 & 9 Vict. c. 100. s. 44, makes it an offence for any person to receive two or more lunatics into any house, unless such house shall be an asylum or hospital registered under the Act, or a house duly licensed under the Act:—*Held*, that to constitute such an offence, knowledge or absence of knowledge of the person receiving lunatics as to their lunacy is immaterial. The defendant was convicted under such Act, but it was specially

found by the jury that though the persons so received were lunatic, the defendant honestly, and on reasonable grounds, believed that they were not lunatic. *Held*, that such belief was immaterial, and that the conviction was right. *Reg. v. Bishop*, 45

— See POOR LAW.

MENS REA. See Jurisdiction, Ouster of.

METROPOLIS MANAGEMENT—rate: inequality of benefit: exemption of, or levy of rate at a lower scale on, part of a parish: description of such parts in precept—By the Metropolitan Management Act, 1855, s. 158, district boards may require the overseers of parishes within their district to levy the sums which such boards may require for the execution of the Act. By section 159, district boards can exempt or rate on a lower scale parts of parishes not benefited or benefited to a less degree than other parts by such expenditure. The overseers of L. were required, by a precept of the district board, to levy a sum for the expenditure incurred in the execution of the above Act. The precept directed that, as regards such parts of "the parish as consist of lands used as arable, meadow or pasture lands only, or as woodland, orchard, market, hop, herb, flowers, fruit or nursery market garden," the rate should be levied on a lower scale. There was a considerable quantity of such land in the parish, the whole of which was assessed at the lower scale, though it did not lie altogether, but was scattered about:—*Held* (affirming the decision of the Queen's Bench Division), that the rate was good, and that the precept sufficiently described the nature of the property to be rated at the lower rate. *Reg. v. The London, Brighton and South Coast Rail. Co. (App.)*, 32

METROPOLITAN COMMONS. See Common.

MINES—metalliferous mines regulation: fencing shaft of abandoned mine: owner: person interested in minerals—The appellant was lessee of a lead mine and of all the duties arising therefrom, under a lease from the Duchy of Lancaster, by which he had to pay to the duchy, by way of rent, all he might annually receive in respect of the mine, with an additional yearly rent of five shillings. The mine was demised to him subject to a custom by which all the subjects of the realm have a right to search there for veins of lead ore, upon paying certain duties, and the appellant had no pecuniary interest in the mine or in the minerals thereof. Section 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), requires the owner of an abandoned mine to which the Act applies and every other person interested in the minerals of the mine, to cause the

top of the shaft to be fenced, and section 41 states that the term "owner" means any person "who is the immediate proprietor, or lessee, or occupier of a mine," and "does not include a person who merely receives a royalty rent or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine":—*Held*, that the appellant was neither owner of the mine nor a person interested in its minerals within the meaning of section 13, and, therefore, upon the mine being abandoned he was not liable to cause the top of its shaft to be fenced as required by that section. *Arkwright v. Evans*, 82

Quere, whether the statute applies to a mine which belongs to the Duchy of Lancaster. *Ibid*.

MISDEMEANOUR. See Debtors Act.

NUISANCE. See Public Health Act.

OBSCENE BOOKS. See Lapse of Proceedings.

POOR—guardians ex officio: county justices: county of a town—By 4 & 5 Will. 4. c. 76. s. 38, every justice of the peace residing in any parish and acting for the county, riding or division in which a union is situated, is made an *ex officio* guardian, and is entitled to act as such:—*Held*, that the term "county" in the above section included the county of a town. *Reg. v. Pearce*, 81

POOR LAW—settlement of pauper lunatic: husband and wife: desertion by husband: order of removal: wife's settlement—By 24 & 25 Vict. c. 55. s. 3, a married woman who has been deserted by her husband, and who, after such desertion, has resided for three years (altered by 29 & 30 Vict. c. 11. s. 1, to one year) in such a manner as would, if she were a widow, render her exempt from removal, shall not be liable to be removed from the parish wherein she shall be resident unless her husband returns to cohabit with her. A pauper lunatic was married to G. B. in 1840, and resided with her husband for some ten years afterwards. She committed adultery, and was eventually told by her husband to leave his house on that account. She left accordingly, and never returned to cohabit with him. From 1865 up to the time of her removal to the lunatic asylum in 1877 she resided at Chat-ham, and such residence was in such manner and under such circumstances as would have rendered her irremovable had she been a single woman. The husband's settlement was in the M. Union:—*Held*, that there had been a "desertion" of the pauper by her husband within the meaning of 24 & 25 Vict. c. 55. s. 3, and that consequently the pauper did not follow

his settlement, but was irremovable from Chatham. Whether the pauper acquired a settlement by residence at Chatham under the Divided Parishes, &c., Act (39 & 40 Vict. c. 61), s. 34, *quære*. *Reg. v. The Guardians of the Maidstone Union*, 36

POOR RATE—*occupier going out before the rate discharged: unoccupied premises*—The 16th section of 32 & 33 Vict. c. 41 relieving the occupier who was in occupation at the time of making the rate, but who has gone out before it was wholly paid, from the rate except in proportion to the time he has occupied, applies only to the case where there is an incoming occupier, and not where the premises are left unoccupied. *The Overseers of St. Werburgh, Derby, v. Hutchinson*, 28

— *exemption from: civil engineers: institution: primary object of society: purposes of sciences, literature and fine arts*—A society known as "the Institution of Civil Engineers," was formed for the purpose of promoting the general advancement of mechanical science, and more particularly the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states both for external and internal trade, as applied in the construction of roads, bridges, &c., and in the art of navigation by artificial power for the purpose of commerce, and in the construction and adaptation of machinery, and in the drainage of cities and towns. The by-laws and regulations of the society stated, under the head of "Objects," that the institution was established for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer. The institution consisted of three classes, namely, members, associates, and honorary members, with a class of students attached, and papers were read at the institution on various subjects:—*Held*, that the primary purpose of the institution was the edification and instruction of its members and students in sundry arts, with the view of enabling them the better to practise a particular profession, and consequently that such institution was not entitled to be exempted from rates under 6 & 7 Vict. c. 36, as a society established exclusively for the purposes of science, literature or the fine arts. *Reg. v. The Institution of Civil Engineers*, 34

— *liability to be rated: market: occupier of stall*—The appellant rented two stalls in Bodmin market year by year at a rent payable weekly. The stalls in question had been put up to auction and were bought by the appellant and used by him on market-days. The stalls thus rented were capable of being re-

moved, and there was no agreement that they should always stand on the same identical spot, though the appellant had a right to retain the same relative position in the row:—*Held*, that there was no such occupation of the stall as rendered the appellant liable to be rated under 43 Eliz. c. 2, he having acquired only the right to a given stall in a given row, and not the right to place one on any definite portion of ground. *Spear v. The Guardians of the Bodmin Union*, 69

— See Summary Jurisdiction.

PRACTICE—*appeal: "criminal cause or matter" judicature act: elementary education act: school board: offence against by-laws*—Section 74 of the Elementary Education Act, 1870, enables a school board to make by-laws for certain purposes, and, amongst them for the purpose of imposing penalties, recoverable in a summary manner, for breach of any by-law. Section 92 provides that any penalty recoverable summarily under the Act may be recovered before justices in manner directed by the 11 & 12 Vict. c. 43 (Jervis' Act), and the Acts amending the same. Upon an information against the respondent to recover a penalty for breach of one of the by-laws of a school board justices stated a case for the opinion of the Queen's Bench Division, who gave judgment for the respondent:—*Held*, on appeal, that this judgment was in a "criminal cause or matter" within section 47 of the Judicature Act, 1873, and therefore that the appeal would not lie. *Mellor v. Denham* (App.), 89

— See Lunatic.

PUBLIC HEALTH—*sale of meat unfit for human food: seizure by inspector: condemnation by justice: right of owner to be heard*—By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116, an inspector of nuisances may, at all reasonable times, inspect any meat exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man (the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged), and if it appears to the inspector that the meat is unfit for the food of man, he may seize and carry the same before a justice. By section 117, if it appears to the justice that the meat seized is unfit for human food, he shall condemn the same and order it to be destroyed or disposed of; and the person on whose premises the same was found is made liable to a penalty on conviction, either by the justice who condemned the meat, or by any other justice having jurisdiction. The appellant was convicted before two justices of having deposited meat for the purpose of sale or for

the purpose of preparation for sale, found by an inspector of nuisances to be unfit for the food of man. The meat in question had been seized and carried away by an inspector, and had been ordered to be destroyed by a justice *ex parte* without any formal notice being given to the appellant. It was objected by the appellant that the meat could not be condemned and ordered to be destroyed by a justice *ex parte* and without notice to him to attend and shew cause against the same. It was also objected that the conviction was bad for duplicity:—*Held*, that the condemnation of the meat and an order for destruction was an *ex parte* proceeding altogether apart from the punishment of the offender. *Held* also, that the purpose for which the meat was deposited was properly charged in the alternative, and that consequently there was no duplicity. *Reg. v. White*, 19

— *paving private street: highway repairable by the inhabitants at large: decision of justices as to character of street conclusive: res judicata: public health act: dismissal of complaint, evidence of*—A decision of justices, unappealed against, on a summons under the Public Health Act against an owner of premises abutting on a street, for payment of the expenses incurred by the board in paving, &c., such street is final and conclusive as to the street being or not being a highway repairable by the inhabitants at large. Where such a summons had been dismissed by justices in 1874, and no certificate of dismissal had been required or given under section 14 of 11 & 12 Vict. c. 43,—*Held*, that upon a fresh summons in 1879, the former adjudication was sufficiently proved by the entry in the justices' notebook, and when so proved was binding and conclusive. *Reg. v. Hutchins*, 64

— *highway: construction of local act: projection "over or upon" pavement: oriel window not interfering with traffic*—An Act "for the protection of the health of the inhabitants of Liverpool, and the better regulation of buildings in the borough," enacted (among other provisions dealing entirely with footways) that "no projection of any kind should be made in front of any building over or upon the pavement," with certain exceptions in favour of shop fronts and doorways:—*Held*, that an oriel window, which projected over the pavement of a street, but did not interfere with the use of the footpath, but only with the access of light and air to the street, was not within the above provisions. *Goldstraw v. Duckworth*, 78

— *offensive trade: "a nuisance or injurious to health": injury to health of sick persons: nuisance not to health*—Under the Public Health Act, 1875, s. 114, relating to complaints by an urban sanitary authority of trades causing effluvia which are "a nuisance or injurious to the health

of any of the inhabitants of the district" of such authority, complaint was made of a trade causing effluvia which were shewn to be a nuisance, but were not proved to affect health, except the health of persons already ill:—*Held*, that injury to the health of persons already ill was injury to health within the enactment; and by STEPHEN, J., that any nuisance by effluvia from an offensive trade, although not a nuisance to health, was a nuisance within the enactment. *The Malton Local Board of Health v. The Malton Farmers' Manure and Trading Co. (Lim.)*, 90

RATE. See Metropolis Management.

RATING—*sporting rights: severed from the occupation of the land*—Where the owner of land occupies it himself and demises the right of sporting to another, the right of sporting is severed from the occupation of the land within the meaning of 37 & 38 Vict. c. 54. s. 6. sub-s. 2, so as to make the lessee of the right of sporting rateable. *The Queen v. Battle, Sussex* (36 Law J. Rep. M.C. 1; Law Rep. 2 Q.B. 8) distinguished. *Kenrick v. The Churchwardens and Overseers of the Parish of Guilfield*, 27

RES JUDICATA. See Public Health.

REVENUE. See Highway.

SALE OF FOOD AND DRUGS ACT—*adulterated article: purchaser: inspector acting by deputy: information*—The respondent was summoned upon an information laid by the appellant, the inspector appointed under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), for having sold to the prejudice of one Toy certain coffee which was not of the nature and quality of the article demanded by such purchaser, contrary to the provisions of section 6. It appeared that Toy went as the appellant's assistant, and asked for some best coffee, for which he paid. On being analysed, the coffee purchased was found to contain a large proportion of chicory. The justices dismissed the information on the ground, amongst others, that the proceeding having been instituted by the appellant in his official capacity, he and not Toy should have personally purchased the article and dealt with the same:—*Held*, upon the above facts, that Toy might be treated as an ordinary purchaser, and that the justices had acted wrongly in entertaining the objection. *Horder v. Scott*, 78

SESSIONS. See Lunatic.

SETTLEMENT. See Poor Law.

SPORTING RIGHTS. See Rating.

SUMMARY JURISDICTION—*court of summary jurisdiction: proceedings for the recovery of poor-rates: distress warrant*—A justice of the peace sitting to issue a warrant of distress for the recovery of poor-rates is not a Court of summary jurisdiction within the meaning of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and the provisions contained in that statute in no way affect or apply to proceedings for the recovery of poor-rates. *Reg. v. Price*, 49

TAXES. See Highways.

TURNPIKE TOLL—*carriage drawn by steam or other power: bicycle*—A private Act (3 Will. 4. c. 1v.) imposed a toll of 6s. on every carriage of whatever description, drawn, impelled or set in motion by steam or by any other power or agency than being drawn by horses or beasts of draught:—*Held*, that a bicycle was not a "carriage" within the meaning of the Act, which was clearly intended to apply only to carriages impelled by mechanical power. *Taylor v. Goodwin* (48 Law J. Rep. M.(l. 104) distinguished. *Williams v. Ellis*, 47

VOLUNTEER ACT—*administrative battalion: dismissal of member: commanding officer: regulations*—By the Volunteer Act, 1863, s. 21, sub-s. 1, the commanding officer of a Volunteer corps may discharge from the corps any volunteer for breach of discipline. By sub-section 2, a volunteer belonging to a corps or administrative regiment who is guilty of misconduct while under arms or on march or duty is liable to arrest at the order of the officer then in command of the corps or regiment. The appellant was a member of the W. Corps, which consisted of two companies, of which the defendant was captain, commandant and commanding officer. Whilst the two companies were assembled in camp, they formed, together with certain other companies, an administrative battalion, the whole of the companies in camp being under

the command of M., the commanding officer of the first administrative battalion. On parade of the appellant's corps, forming part of the administrative battalion in camp, the appellant was dismissed from the corps for breach of discipline by the respondent, who was present superintending the company drill of the corps:—*Held*, that the respondent was the commanding officer on the occasion when he dismissed the appellant within the meaning of section 21 of the Volunteer Act, 1863, and that the power of the commanding officer of the administrative regiment was limited to arrest for the period during which the regiment was collectively under his control. *Tombs v. Magrath*, 76

WARRANT OF COMMITMENT—*backing of warrant: arrest by constable*—C. was convicted of an assault on two police constables in the execution of their duty. The constables were members of the county police force of Worcestershire, and were apprehending C. in the city of Worcester under a warrant issued by two justices of the county of Worcestershire, for his commitment to prison for default in payment of a fine. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force. The warrant was not backed by any justice of the city of Worcester, and C. was not pursued from the county, but found in the city:—*Held*, that the conviction was wrong, because the constables were not acting in the execution of their duty in so executing such warrant. *Reg. v. Camp-ton*, 41

WORDS—"Cart," 15

— "Noxious thing," 44

— "Over or upon," 73

— "Owner," 82

TABLE OF CASES.

Arkwright *v.* Evans, 82

Bishop; Regina, *v.* (C.C.R.), 45
Bodmin Union; Spear, *v.*, 69

Carden; Regina, *v.*, 1
Civil Engineers' Institution; Regina, *v.*, 34
Cramp; Regina, *v.* (C.C.R.), 44
Cumpton; Regina, *v.* (C.C.R.), 41

Danby *v.* Hunter, 15
De Morgan *v.* Metropolitan Board of Works, 51
Denham; Mellor, *v.* (App.), 89
Duckworth; Goldstraw, *v.*, 73

Ellis; Williams, *v.*, 47
Essex Justices; Regina, *v.*, 67
Evans; Arkwright, *v.*, 82

Fox; White, *v.*, 60

Goldstraw *v.* Duckworth, 73
Guilsfield, Overseers of; Kenrick, *v.*, 27

Hall *v.* Hopwood, 17
Hopwood; Hall, *v.*, 17
Horder *v.* Scott, 78
Hunter; Danby, *v.*, 15
Hutchins; Regina, *v.*, 64
Hutchinson; St. Werburgh, Derby, *v.*, 23

Kenrick *v.* Guilsfield, Overseers of, 27

London, Brighton and South Coast Rail. Co.;
Regina, *v.* (App.), 32

Magrath; Tombs, *v.*, 75
Maidstone Union; Regina, *v.*, 25
Malton Farmers' Manure and Trading Co. (Lim.);
Malton Local Board of Health, *v.*, 90
—— Local Board of Health *v.* Malton Farmers'
Manure and Trading Co. (Lim.), 90

Martin; Regina, *v.* (C.C.R.), 11
Mellor *v.* Denham (App.), 89
Metropolitan Board of Works; De Morgan, *v.*, 51

Padbury; Regina, *v.*, 55
Pearce; Regina, *v.*, 81
Pemberton; Regina, *v.* (App.), 29
Price; Regina, *v.*, 49

Regina *v.* Bishop (C.O.R.), 45
—— *v.* Carden, 1
—— *v.* Civil Engineers' Institution, 34
—— *v.* Cramp (C.C.R.), 44
—— *v.* Cumption (C.C.R.), 41
—— *v.* Essex Justices, 67
—— *v.* Hutchins, 64
—— *v.* London, Brighton and South Coast Rail.
Co. (App.), 32
—— *v.* Maidstone Union, 25
—— *v.* Martin (C.C.R.), 11
—— *v.* Padbury, 55
—— *v.* Pearce, 81
—— *v.* Pemberton (App.), 29
—— *v.* Price, 49
—— *v.* Roadley (C.C.R.), 88
—— *v.* Smith (App.), 29
—— *v.* Truelove, 57
—— *v.* White, 19
—— *v.* Wilson (C.C.R.), 13
Roadley; Regina, *v.* (C.C.R.), 88

St. Werburgh, Derby, *v.* Hutchinson, 23
Scott; Horder, *v.*, 78
Smith; Regina, *v.* (App.), 29
Spear *v.* Bodmin Union, 69

Tombs *v.* Magrath, 75
Truelove; Regina, *v.*, 57

White *v.* Fox, 60
——; Regina, *v.*, 19
Williams *v.* Ellis, 47
Wilson; Regina, *v.* (C.C.R.), 13

INDEX
TO THE SUBJECTS OF THE CASES
IN THE
Queen's Bench, Common Pleas, & Exchequer Divisions
IN
Other Divisional Courts,
AND ON APPEAL FROM THOSE COURTS,
IN THE
COURT OF APPEAL, AND HOUSE OF LORDS.
LAW JOURNAL REPORTS, VOL. XLIX.

[In the following Index (M. C.) denotes that the case is reported in the Magistrates Cases Volume.]

ACCOMMODATION WORKS. See Railways.

ACCOUNT, MATTERS OF. See Practice.

ADMINISTRATION — judgment creditor: priority: judicature act]—The rule by which a judgment creditor of a testator is entitled to priority over simple contract creditors in the administration of the assets of the testator under an administration decree is not affected by section 10 of the Judicature Act, 1875, which provides that in such administration of assets the same rules shall prevail as to the respective rights of secured and unsecured creditors as may be in force under the law of bankruptcy with respect to bankrupts' estates. *Smith v. Morgan*, 410

AFFIDAVIT. See Bill of Sale. Practice.

AGENCY. See Husband and Wife.

ANCIENT MARKET—cattle: tolls: lairs for reception of cattle: right to collect tolls within limits of market: metropolitan market act: opening of "new market": disturbance: right of prescription]—The plaintiffs were, down to 1855, seised in fee of an ancient market for the sale of cattle, known as Smithfield Market, and were entitled to certain tolls in respect of cattle exposed for sale in the market. In 1855 the Smithfield Market was, under the authority of an Act of Parliament, removed to Islington; but all privileges were expressly preserved to the plaintiffs, and it was enacted that no new market for the sale of cattle should be opened within a distance of seven miles from St.

Paul's Cathedral, in the City of London. One of the defendants became in 1854 lessee of certain premises about six hundred yards distant from the Islington Market, and within the distance of seven miles from St. Paul's Cathedral, and converted them into lairs and receptacles for cattle, containing accommodation for about four hundred head. Some of the cattle were from time to time sold by the defendants upon the premises between the market days, which were held on Mondays and Thursdays. Beyond a uniform charge for lirage, there was nothing in the nature of a toll upon sales effected by other persons than the defendants; but where the defendants themselves acted as salesmen, they charged the same commission as if the cattle had been sold in the plaintiffs' market. The cattle thus sold in the interval between the two markets would, if there had been no opportunity for sale between the two markets, have found their way to and have been sold in the market of the plaintiffs:—*Held*, on the above facts, that an action was maintainable against the defendants for a disturbance of the plaintiffs' market. *The Mayor, &c., of London v. Low*, 144

APPEAL AS TO COSTS—An order for a new trial obtained by the defendants was, by the Court of Appeal, confirmed conditionally on the defendants paying the costs of the first trial:—*Held*, that an appeal by the defendants against the confirming order was not within the rule which prohibits appeals as to costs only. *The Managers of the Metropolitan Asylums District v. Hill* (H.L.), 745

— See Practice.

VOL. 49.—Q.B., C.P. & EXCH., INDEX.

APPORTIONMENT. See Public Health.

ARBITRATION—*validity and effect of agreement to refer: pure question of law: application for leave to revoke submission*—A contract entered into between the plaintiffs and defendants for the purchase of some wheat contained the following clause: "Should any dispute arise, the same to be submitted for settlement to the arbitration of two London cornfactors respectively chosen, whose decision shall be final and binding":—*Held*, that the clause in question formed part of the consideration for the contract, and was intended to include questions of law as well as of fact which might arise upon the construction of the contract. *Forwood & Co. v. Watney*, 447

— See Public Health Act.

ASSIGNMENT. See Contract.

AUTHORITY. See Company.

BAILEMENT. See Railway Company.

BALLOT ACT. See Municipal Elections.

BANKRUPTCY—*disclaimer by trustee of leasehold interest: leave of court: evidence: notice sent by registered letter*—By section 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), the trustee is empowered by writing under his hand to disclaim any onerous property of the bankrupt, and section 24 limits the time for disclaimer by the trustee to twenty-eight days after "application in writing made to him by any person interested in such property requiring him to decide whether he will disclaim or not." Rule 28 of the General Rules of 1871 says that, "where any property of a bankrupt acquired by a trustee under the Act shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose":—*Held*, that the rule merely regulated the procedure of the Court, and that a disclaimer duly made in time was effectual, though no leave had been asked for or obtained. *Reed v. Harvey*, 295

Where a registered letter containing a notice, requiring the trustee to disclaim, had been posted, but the trustee denied having ever received it,—*Held*, that some evidence of the delivery of the letter to the trustee or at his office must be given to affect the trustee with notice, under section 24 of the Bankruptcy Act, 1869. *Ibid*.

— *bankruptcy act: execution creditor: title of trustee: notice of act of bankruptcy*—Notice that a petition in bankruptcy has been filed

is notice of an act of bankruptcy, since such petition must be founded on an act of bankruptcy. On the 7th of May, 1879, after seizure under an execution by a judgment creditor, but before sale, such creditor received a letter from the solicitor for the execution debtor, giving him notice that a petition in bankruptcy had on the 1st of May in the same year been filed in a certain County Court by A. B. against the execution debtor. The debtor having been afterwards adjudged bankrupt on such petition:—*Held*, that this letter was sufficient notice of an act of bankruptcy committed by the bankrupt within the meaning of section 95 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), to deprive the execution creditor of the protection of that section. *Lucas v. Dicker*, 415

— *disclaimer: use and occupation: trespass: personal liability of trustee: bankruptcy act*—A trustee in bankruptcy used and occupied leasehold premises of the bankrupts, and paid the next quarter's rent to the landlord. Thenceforth the trustee ceased to use the premises, but for a time retained the key of them, and ultimately disclaimed the lease, and handed over the key to the landlord:—*Held*, that the trustee was not personally liable, either upon an implied contract of tenancy or as a trespasser, to pay the landlord in respect of the possession of the premises between the time when the trustee's actual occupation ceased and the date of the disclaimer. *Lowrey v. Barker & Sons* (App.), 433

Sed quære, per COCKBURN, C.J., and THESIGER, L.J., whether a trustee in bankruptcy, although he has disclaimed, would not be personally liable to the lessor in respect of any actual use and occupation of the premises. *Ibid*.

— *disclaimer: liability of trustee: vesting of leaseholds: "writing under his hand": bankruptcy act*—The leaseholds of a debtor liquidating under the Bankruptcy Act, 1869, are vested absolutely in the trustees on their appointment, subject to the right to disclaim, and the trustees are personally liable on the covenants unless they have made a valid disclaimer. A letter signed by the solicitor of the trustees in his own name is not a "writing under their hand" sufficient for the purposes of disclaimer within section 23 of the Bankruptcy Act, 1869. *Wilson v. Wallani*, 437

— See Principal and Surety.

BASE FEE. See Revenue.

BASTARDY—Appeal: absence of appellant: order quashed not upon merits: second order: jurisdiction of justices. *Reg. v. The Justices of Esser* (M.C. 67), 770

BASTARDY AMENDMENT ACT—Order of affiliation : mistake in drawing up order : omission of words " maintenance and education " : amendment. *Reg. v. Padbury* (M.C. 55), 511

BILL OF EXCHANGE—*blank acceptance : drawing and indorsement by apparent drawer forged*]—The defendant accepted a bill of exchange in blank. Drawing and drawer's indorsement were afterwards forged by the person to whom the defendant gave the bill. The plaintiffs took the bill for value without notice:—*Held*, that the forgery of the drawing and indorsement did not prevent the defendant from being liable to the plaintiffs. *London and South Western Bank (Lim.) v. Wentworth*, 557

— See Partnership.

BILL OF LADING. See Shipping.

BILL OF SALE—*registration : sale of goods by sheriff under execution : receipt and inventory given by sheriff's officer : bills of sale act*]—A sheriff's officer seized goods of the judgment debtor at his house under a *fi. fa.*, and sold them to the debtor's father-in-law, to whom he gave a receipt for the purchase-money, with an inventory of the goods written under it. On the same day the purchaser let the goods to the debtor, who kept possession of them until they were again seized in execution:—*Held* (affirming the judgment of a Divisional Court—Cockburn, C.J., and Pollock, B.), that the receipt did not require registration as a bill of sale within ss. 1 and 7 of the Bills of Sale Act, 1854, because the sale by the sheriff's officer was a transaction complete and effectual in itself, and the receipt was not the medium of transfer of the goods. *Woodgate v. Godfrey* (App.), 1

— *affidavit : description of occupation of grantor*]—In the affidavit filed with a bill of sale, pursuant to 17 & 18 Vict. c. 36, s. 1, the occupation of the grantor was described thus : " was until lately a commercial town traveller or agent " :—*Held*, an insufficient description. *Castle v. Downton ; Bradley (claimant)*, 6

— *non-attestation of : effect of, as between grantor and grantee : bills of sale act*]—The non-attestation of a bill of sale to which the Bills of Sale Act, 1878, applies, does not make it void as between the grantor and grantee thereof. So *Held* by the Court of Appeal, reversing the judgment of the Common Pleas Division, reported *ante*, p. 101. *Davis v. Goodman* (App.), 344

— *prior unregistered bill of sale : assignment by cestui que trust : inventory and receipt : bills of sale act : county court appeal*]—The goods of the defendant had been seized in

execution and sold by the sheriff to one Oliver, to whom the sheriff gave an inventory and receipt attached; this document, which was given subsequent to the passing of the Bills of Sale Act, 1878, was not registered; possession of the goods was never taken by Oliver, and they remained in the possession of the defendant. Four days after, Oliver conveyed the goods by deed in trust for the defendant's wife, with a power to the trustee to sell upon her direction; this document was not registered. The defendant's wife subsequently sold the goods to the claimant Watson, and an inventory and receipt signed by her and the defendant were given to him; this document was duly registered, but the trustee was not a party to it. Watson allowed the goods to remain in the possession of the defendant:—*Held*, that the assignment to Watson was invalid and void as against an execution creditor of the defendant, because not a proper compliance with the Bills of Sale Act and also contrary to the direction of the settlement. *Per GROVES, J. (LORRES, J., dissentiente)*, that the assignment to Oliver being invalid, because not registered under the Bills of Sale Act, 1878, he could confer no better title than he himself possessed, and that the subsequent assignments were therefore void as against the execution creditor. *Chapman v. Knight ; Watson (claimant)*, 425

The Court will uphold the decision of the County Court Judge, where it can be supported on points other than those on which he decided, though such other points were not taken in the Court below. *Ibid.*

— *statement of consideration : bills of sale act*]

—A bill of sale recited that the grantor, having two executions on his premises, and being unable to carry on his business by reason thereof, had applied to the grantee to lend him 182*l.* 3*s.* to enable him to pay out such executions, and that the grantee had agreed to this; and it then stated that in pursuance of the said agreement, and in consideration of the said sum of 182*l.* 3*s.* then paid, the grantor assigned the goods therein mentioned to the grantee. The evidence was that the 182*l.* 3*s.* was in fact paid by the grantee, but that part of it only was given to pay off an execution, that part was given to an execution creditor, part to the grantor's solicitor for costs and money lent, and the residue to the grantor himself; but that all these were so paid with the knowledge and sanction of the grantor:—*Held*, that the bill of sale truly set forth the consideration for which it was given so as to satisfy the requirements of section 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). *Hamlyn v. Betteley*, 465

— *implied licence to grantor to carry on business : bona fide purchase of goods comprised in bill of sale : growing crops*]—In an action by the grantees of a bill of sale to recover certain goods comprised therein, the defendants pleaded that

the goods in question were *bona fide* sold to them by the grantor in the ordinary course of his business, and without any notice that they did not belong to the grantor:—*Held*, on demurrer, that the defence was good, inasmuch as there was an implied licence given to the grantor of the bill of sale to carry on his trade, and consequently a *bona fide* purchaser was protected by a sale made in the ordinary course of business. *The National Mercantile Bank v. Hampson*, 480

BILL OF SALE (continued)—mortgage of land: consolidation of mortgages—The rule that the mortgagee of two estates belonging to the same mortgagor may consolidate them, so that one cannot be redeemed without the other, will not be extended so as to enable the grantee of a bill of sale who has realised his security to appropriate any remaining surplus of the goods assigned, and so defeat the right of an execution creditor thereto, on the ground that the grantee is also mortgagee of land of the grantor, and has a right to consolidate the two securities. *Chesworth v. Hunt. Harrison (claimant)*, 507

—**grantor carrying on business and selling goods: covenant not to remove: bona fide purchase of goods comprised in bill of sale**—The grantor of a bill of sale, described in the instrument as an innkeeper and horse dealer, in consideration of a loan of 100*l.*, assigned to the plaintiff by the said bill all his personal property, including "an entire horse called Fireaway, a cob called Charley, a pony called Nelly." The bill of sale contained a covenant that so long as the money should remain owing the grantor would not remove any of the said premises from the said messuage without the consent of the plaintiff, and provided that until default in payment the grantor should hold, make use of and possess the premises thereby assigned. Subsequently, and without the consent of the plaintiff, the grantor sold the three horses, Fireaway, Charley and Nelly, at a public auction, where one of them, the cob, was purchased by the defendant. In an action of detinue brought by the plaintiff to recover the cob or its value from the defendant, it was,—*Held*, that the object of the bill of sale being to enable the grantor to carry on his business, the sale of the horses, which must be taken to have been sold in the ordinary course of his business, was not a breach of the covenant, and that the action was, therefore, not maintainable. *The National Mercantile Bank v. Hampson* (ante, 480), followed. *Walker v. Clay*, 560

—**stock-in-trade: implied licence to grantor to sell in course of trade: title of purchaser**—Where by a bill of sale a trader assigns his stock-in-trade as security for the money borrowed, and by its terms the grantor is to hold and use the goods without hindrance by the

grantee until he makes default in repayment of the money, there is an implied licence given to the grantor until default to sell the goods which form such stock-in-trade, but he must do so in the ordinary course of his trade; and where, therefore, he sells fraudulently, and not in the ordinary course of his trade, the purchaser acquires no title to them as against the grantee of the bill of sale, though he purchases *bona fide* and without notice of the fraud. *Taylor v. McKeand*, 563

—**default in payment: giving time**—By a bill of sale, dated the 9th of July, 1878, the plaintiff assigned to the defendant certain furniture and goods in his house, subject to the proviso that if the plaintiff should pay to the defendant a sum of 42*l.* by twenty-five consecutive weekly payments on every Monday before noon the assignment should be void. It was also agreed that the plaintiff might at any time after the execution of the bill of sale take possession of the property therein comprised, and retain possession thereof until all the moneys payable should be fully paid; and further that if default should be made by the plaintiff in payment of any of the instalments on the days on which such should become due, the whole amount which at the time of such default should be unpaid, should at once become due, and the defendant was empowered thereon to sell the property and to receive the moneys arising from such sale. The previous instalments having been paid by the plaintiff, he failed to pay the fourteenth instalment, due on the 14th of October; he saw the defendant on the 16th of October, and asked for time. The defendant replied that he "would not look to a week"; on the plaintiff's returning home on the 17th of October he found that the goods had been seized and sold. In an action for conversion and for an improper sale, the jury found for the plaintiff on the ground that the defendant had induced him to believe that he would not seize the goods:—*Held* (by the Court of Appeal affirming the judgment of the Queen's Bench Division), that there must be a new trial, for that the defendant was entitled by the provisions of the bill of sale to seize on default, that there had been a default, and that he had not in any way induced the plaintiff to alter his position. *Albert v. The Grosvenor Investment Co.* (37 Law J. Rep. Q.B. 24) questioned. *Williams v. Stern* (App.), 663

—**registration: affidavit sworn before solicitor to parties: bills of sale act**—An affidavit filed with a bill of sale is good, though sworn before a solicitor acting for grantor and grantee of the bill. Judgment of LORD COLERIDGE, C.J., reversed. *Vernon v. Cooke* (App.), 767

—**assignment of future acquired property: stock-in-trade**—A bill of sale purported to assign all the stock-in-trade in certain specified pro-

misses, and also "the stock-in-trade which should at any time during the continuance of the security be brought into the premises or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade now being therein":—*Held*, a valid assignment of stock-in-trade which had been subsequently brought into the premises in addition to, or in substitution for the stock-in-trade originally therein. *Lazarus v. Andrade*, 847

— See Practice.

BOND—conditions: repayment by instalments: proviso for immediate payment on single default: penalty—Plaintiffs having advanced 50*l.* to A. took the joint and several bond of A. and the defendant as security for the loan. The bond was conditioned for the repayment of the loan in five years by quarterly instalments of 3*l.* 10*s.*, if A. should live so long. The instalments were calculated so as to cover principal, interest, expenses and premium for the insurance of A.'s life. In case of default in payment of any instalment the whole of the instalments up to the end of the five years were to become immediately due and payable. Default was made and plaintiffs sued for the whole:—*Held*, by Bowen, J., on further consideration (distinguishing *Thompson v. Hudson*, 38 Law J. Rep. Chanc. 431), that the provision, being one which did not revive an old right, but which created a new one, was to be regarded as a penalty; and that equity would not allow the plaintiffs, by reason of the default in payment of an instalment, to claim and receive not merely their money back with interest and expenses, but also the unpaid premiums on a life insurance, which would no longer be kept up, and interest on a loan which would have ceased to be outstanding; and that the plaintiffs were therefore only entitled to the one instalment and interest. *The Protector Endowment Society v. Grice*, 247

— **conditions: payment of debt by instalments: proviso for immediate payment on single default: penalty**—Plaintiffs having advanced 50*l.* to A., took from A. and the defendant their joint and several bond conditioned for the payment for five years of quarterly instalments of 3*l.* 10*s.*, with a stipulation that if default should be made in payment of any instalment the whole amount of the unpaid instalments should be paid immediately. Default having been made, the plaintiffs sued for the whole amount:—*Held* (reversing the judgment of Bowen, J.), that the stipulation was not by way of penalty, and therefore that the plaintiffs were entitled to recover. *The Protector Endowment Society v. Grice* (App.), 812

BRIGHTON PAVILION. See Limitations, Statute of.

BROKER. See Principal and Agent.

BUILDING SOCIETY. See Principal and Agent.

BURGESS ROLL. See Municipal Elections.

BY-LAW. See Railway Company.

CANAL—overflow of: extraordinary rain: vis major: damage to individual arising from act for averting general catastrophe: injuria absque damno—The plaintiffs, owners of collieries, sued the defendants, proprietors of a canal constructed under an Act of Parliament, for damages caused to their mines by water which overflowed from the canal into a brook, and thence into the mines. They also in the alternative claimed to be entitled to a *mandamus* for the summoning of a jury to assess compensation for the same injury, as being one caused by the works which the canal company were authorised to construct and maintain. It was found in the Special Case stated by an official referee that on the occasion of an extraordinary rainfall the defendants opened a sluice and discharged from the canal into a brook more water than the latter was able to carry off; the consequence being that the brook overflowed into the plaintiffs' mines. It was found further that if the sluice had not been so opened the canal bank would shortly have burst; that the adjacent country and the plaintiffs' mines would have been inundated; that the course which the defendants adopted to avert such a catastrophe was a prudent one, and the only effectual one which could have been adopted in the emergency; that so far as the plaintiffs' mines were concerned the opening of the sluice caused them to be flooded some hours sooner than they would otherwise have been, but that no additional damage was caused thereby to the plaintiffs, the inundation being inevitable by reason of the excessive rainfall and consequent accumulation of water:—*Held*, upon these findings, that even assuming the defendants' act to have been a wrongful one, it was *injuria absque damno*, and therefore not a ground of action. *Held*, secondly, that the compensation clauses of the Acts of Parliament did not apply to such a case. *Thomas v. The Birmingham Canal Co.*, 851

CARRIAGE. See Railway Company.

CERTIORARI—discretion: lands clauses consolidation act, 1845 (6 Vict. c. 18): time within which certiorari to quash inquisition should be applied for—A railway company, having power to take lands compulsorily, gave notice to treat, under the Lands Clauses Consolidation Act, 1845, for a portion of some leasehold land belonging to the claimant. Upon an inquisition to assess compensation before the under-sheriff and a jury, compensation was claimed for (amongst other things) loss to the claimant by reason of the portion of his land not taken by the railway company having been rendered, through

the proximity of the railway, unfit for the carrying on of the claimant's business upon it. No objection to this claim, or the evidence in support of it, was raised by the company, and it was left by the under-sheriff to be considered by the jury. The inquisition and finding were signed on the 19th of February, and the claimant taxed his costs, and was paid them on the 19th of April, without any objection. Abstract of title was furnished and requisitions thereon answered, and the draft assignment prepared. The railway company having failed to pay the compensation assessed, the claimant issued his writ in an action for the amount, and on the 21st of July the company obtained a rule for a *certiorari* to bring up and quash the inquisition, on the ground that there had been an excess of jurisdiction in considering the damage caused to the claimant in respect of his use of land not taken by the company. The Queen's Bench Division discharged the rule, on the ground that the application for a *certiorari* was too late, the Court stating that, as a rule, a *certiorari* to bring up, for the purpose of quashing it, an inquisition taken under the Lands Clauses Consolidation Act, 1845, should not be granted after the expiration of the time allowed for setting aside an award made under the same Act. Reported *ante*, p. 329:—*Held*, that the rule stated by the Queen's Bench Division was a good one, and that their discretion had been rightly exercised. *Reg. v. Sheward* (App.), 716

CHARTER-PARTY—*cargo "to be discharged with all despatch, according to the custom of the port": demurrage*—In an action for demurrage upon a charter-party, which contained the following clause: "The cargo is to be discharged with all despatch, according to the custom of the port,"—*Held*, that the charterers were not liable for delays caused by the insufficiency of the appliances for unloading provided at the port of discharge, and the rules regulating their user. *Postlethwaite v. Freeland*, H.L., 630

— See Shipping.

CHEQUE—*stolen cheque with forged indorsement: negligence: conversion*—To a statement of claim alleging that a cheque payable to the order of the plaintiffs was stolen from them, and the indorsement of their name forged upon it, and that it subsequently came into the possession of the defendant, who converted it to his own use, the defendant pleaded that the plaintiffs knowingly employed as clerk a man who had been convicted of embezzlement, and was a notorious thief; that the clerk was allowed access to the rooms where the plaintiffs' letters and cheques were kept, and was empowered and permitted to receive and open the said letters and cheques, and to witness the mode in which the plaintiffs indorsed their cheques; that the clerk was frequently paid his wages by the duly indorsed cheques of

the plaintiffs, and sometimes employed by the plaintiffs to indorse cheques payable to their order; that the cheque in question was taken or stolen by the clerk, who thereupon forged the indorsement, and then procured one E., who had no notice of the forgery and theft, to cash the cheque; that the defendant received the same, with other cheques from E., without notice of the forgery and theft, and in the ordinary course of business gave full value therefor; that, by their carelessness and wilful neglect in dealing with their letters and cheques, the plaintiffs did not discover the forgery and theft for a considerable time; and after such discovery did not take any steps to prevent the negotiation of the cheque, and by such carelessness and neglect caused the defendant to become a *bona fide* holder for value of the cheque without notice of the forgery and theft:—*Held*, on demurrer, that the plea was bad. Judgment of GROVE, J., reversed. *The Patent Safety Gun Cotton Co. v. Wilson* (App.), 713

CHOSE IN ACTION. See Landlord and Tenant.

CHURCH—*private chapel annexed to church: acts of ownership: right to light: prescription act*—The parish church of St. Nicolas, Arundel, regarded as one building is a cruciform church with a central tower; the portion east of this tower is called the Fitzalan Chapel, and occupies the place commonly filled by the chancel. The plaintiff claimed this portion of the building as his private property, and built a wall across the west end of it so as to separate it structurally from the rest of the church. The defendant pulled down part of this wall, alleging that the chapel known as the Fitzalan Chapel was the chancel of the parish church, and even if it were not, still that the parishioners were entitled either by prescription at common law, or by virtue of a lost grant or under the Prescription Act (2 & 3 Will. 4. c. 71), to light from this chapel. Evidence was given of numerous acts of exclusive ownership by the plaintiff and his ancestors for more than 300 years; documentary evidence of title to the same effect was produced, and at the trial before Lord Coleridge, C.J., without a jury, judgment was given for the plaintiff:—*Held*, by the Court of Appeal, that the evidence shewed that the disputed building was not the chancel of the parish church, but had always been the property of the plaintiff and his predecessors in title, and that the claim to light could not be maintained on any of the grounds set up by the defendant. *The Duke of Norfolk v. Arbuthnot* (App.), 782

— and clergy: *presentation to endowed chapel: rights of vicar of parish: quare impedit*—The vicar of a parish has not, as vicar, the right of presentation to any consecrated public chapel in his parish, unless such chapel is a chapel of ease; but he has the right to

forbid any person to officiate therein, unless deprived of such right by some statute or some arrangement assented to and binding on the bishop of his diocese, the patron of the mother church and the incumbent thereof. The plaintiff, as vicar, claimed the right of presentation to an endowed chapel erected in the parish and consecrated for the administration of sacraments and all other divine offices. The defendants also claimed the right of presentation, alleging that the chapel had been erected by the freeholders and endowed by the defendants, and conveyed to the Ecclesiastical Commissioners to make declaration of the right of nomination, pursuant to 14 & 15 Vict. c. 97; that before making any declaration, application had been made by the freeholders to the Commissioners, containing such information as is required by the said statute, and notice of the same had been sent to the plaintiff, both as patron and incumbent, as required by the said statute; that the plaintiff was not in fact patron, but that after notice he had allowed the defendants to endow the chapel and procure it to be consecrated in the belief that he was, and was therefore estopped from denying he was patron; and that three months after such notice the right to nominate was duly declared to be for ever in the defendants:—*Held*, that the plaintiff had not shewn any title to the right of presentation; but that if he had, the facts alleged by way of estoppel would not have been an answer to his claim, as a vicar's rights are not mere private rights which may be waived or renounced at his own will or pleasure. *M'Allister v. The Bishop of Rochester*, 114

CHURCH DISCIPLINE ACT—meaning of words "it shall be lawful": complaint against clerk for ecclesiastical offences: discretion of bishop as to allowing proceedings: *mandamus*].—By 3 & 4 Vict. c. 86. s. 3, it is provided that "in every case of any clerk in holy orders who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report, as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission for the purpose of making enquiry as to the grounds of such charge or report." By section 13 it is provided that "it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment, then for the bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit either in the first instance or after the commissioners shall have reported . . . to send the case by letters of request to the Court of Appeal of the province . . .":—*Held*, that these sections do not prescribe two alternative courses, one of which must be taken, but that the bishop has a discre-

tion, so that he can refuse to allow any proceedings to be instituted against a clerk accused of ecclesiastical offences. *Julius v. The Bishop of Oxford*, H.L., 577

The words "it shall be lawful," when used in a statute, are in themselves always permissive, not compulsory. Where it has been held that there is an obligation to exercise an authority conferred by such words, the obligation must be found in the context of the statute, or in the nature of the act authorised. *Ibid*.

COAL MINES REGULATION ACT—Insufficient ventilation in mine: expense of alteration: information: liability of manager. *Hall v. Hopwood* (M.C. 17), 272

COMMISSION. See Company. Evidence.

COMMITTAL. See Justice of the Peace.

COMMON—Metropolitan Commons Supplemental Act, 1877: validity of by-laws: right of public meeting: common dedicated to use and recreation of public. *De Morgan v. The Metropolitan Board of Works* (M.C. 51), 454

COMPANY—promoter: agreement for sale: principal and agent: profit by promoter: undivided contract: commission].—The defendant purchased certain calico printing works and premises for 15,000*l*. These were afterwards conveyed to the plaintiff company by the defendant and S. for 20,000*l*., the defendant having previously purported to sell the premises to S. for that sum by a sham contract intended to be used for the purpose of the negotiations with the company. The defendant made an agreement with S., which existed at the date of the incorporation of the company, by which S. was to have 3,000*l*. out of the purchase-money paid by the plaintiff company. The defendant and S. were at the time of the sale promoters of the company, and the directors, who were in fact nominees of the defendant and S., knew that the defendant had previously purchased the property for 15,000*l*.:—*Held*, by BOWEN, J., on further consideration, that the plaintiff company was entitled to enforce against the defendant the secret agreement to pay over 3,000*l*. to Smith so far as it remained still unexecuted, upon the ground that the contract with S. must under the circumstances be treated as a contract made for the profit of the plaintiff company. *The Whaley Bridge Calico Printing Co. (Lim.) v. Green*, 326

—transfer of stock: registration: stock certificate: estoppel].—On a transfer of stock in a company, incorporated under the Companies Act, 1862, the issue of the company's stock certificate to the transferee is not a representation that the immediate transfer to him is valid, so

as to give him any right of action against the company if it proves invalid. A buyer, on the Stock Exchange, of stock in a company incorporated under the Companies Act, 1862, received and lodged with the company for registration, an instrument which purported to be a transfer of the stock from the registered holder to himself. After making enquiries, the company registered the transfer, and the buyer having transferred the stock to a bank in order to secure advances, the company registered that transfer also, and issued their stock certificate to the bank as the registered holders. The original transfer to the buyer was discovered to be a forgery, and he thereupon paid off his debt to the bank, and brought an action, in which he and the bank were plaintiffs, to recover the value of the stock from the company:—*Held*, that the buyer had no right by estoppel against the company in respect of the stock; that the company, by issuing their stock certificate to the bank, as the buyer's transferees, had made no representation to the buyer that the original transfer to him was valid; and, therefore, that the action was not maintainable. *Simm v. The Anglo-American Telegraph Co. The Anglo-American Telegraph Co. v. Spurling* (App.), 392

COMPANY (continued)—*directors of: personal liability: assignment of property of the company by directors without authority: representation of authority: measure of damages*—By an agreement, headed as between a limited company of the one part and the plaintiff of the other, in consideration of the advance by the latter of 500*l.* to the company, the undersigned three directors of the company agreed to repay the loan in six months, and they thereby assigned as security for the advance the machines and tools as invoiced to him, to be removed by him only in case default should be made in repayment of the 500*l.* The agreement was not sealed with the company's seal nor countersigned by the secretary, nor was there any statement by the directors that they signed on behalf of the company. Default having been made, the plaintiff took possession, but was restrained from dealing with the machines by a perpetual injunction obtained by the company, on the ground that the directors had no power to make the assignment. On action brought subsequently by the plaintiff against the three directors personally, to recover the advance with interest, and also his costs of defending his possession of the machines against the company:—*Held*, by LUSH, J. (on further consideration), that the agreement was to be read as a guarantee given by the defendants personally for repayment of the advance, and that the heading expressing it to be made on the part of the company must be rejected, as inconsistent with the form of signature; but there being no representation that the directors had special authority from the company to assign the machines, and it being incumbent on all persons dealing with directors to know how far under

the articles of association their general powers extend, the plaintiff was not entitled to recover the costs of resisting the injunction. *M'Collis v. Gilpin*, 558

—*prospectus: promoter: concealment of contracts: companies act*—All contracts which might reasonably affect the mind of a person in determining him to take or not to take shares in a company, are contracts which ought to be specified in the prospectus of the company, within the meaning of section 38 of the Companies Act, 1867. A statement of claim alleged that the plaintiff was a shareholder in a company, formed for the purpose (amongst others) of buying the patent rights in a certain manufacture; that he was induced to take his shares on the faith of a prospectus issued on the formation of the company by the defendants, who were promoters; that the prospectus was fraudulent as against the plaintiff within the meaning of section 38 of the Companies Act, 1867, by reason of the defendants having knowingly omitted to specify certain contracts entered into by the promoters before the formation of the company, by which contracts a small part only of the purchase-money of the patent rights was to be paid to the vendor, and the remainder was to be divided among the promoters; and the plaintiff claimed the amount paid for his shares. On demurrer, it was,—*Held* (by BAGGALLAY, L.J., and THESIGER, L.J., BRAMWELL, L.J., dissenting), that the contracts were such as ought to have been disclosed in the prospectus, within section 38, and therefore that the statement of claim was good. *Per* BRAMWELL, L.J.—Section 38 requires such contracts only to be disclosed in the prospectus as bind or, if adopted, may bind, the company when formed. *Sullivan v. Micalfe* (App.), 815

COMPENSATION. See Certiorari.

COMPOSITION—*bankruptcy: statement of affairs: name of creditor inserted, but not for debt in question: waiver by attendance at meeting: bankruptcy act*—The plaintiff entered into a composition with his creditors, under section 126 of the Bankruptcy Act, 1869. In his statement of affairs presented at the meeting of creditors, he set down the defendants as his creditors for a certain amount, but set down a second debt really due to them as due to some one else. The defendants attended the meeting, tendered proof of the second debt, which was admitted, took part in the discussion, opposed the resolution for a composition, and when it was carried, declined to accept the amount of the composition:—*Held*, that the defendants were not bound by the resolution for composition as to this debt, because the plaintiff had not complied with the requirements of section 126 of the Bankruptcy Act, that there had been no waiver by the defendants, and that the case was governed by *Ex parte Lang* (5 Law Rep. Ch. D. 971). *Oppenheim v. Jackson* (App.), 216

CONSIDERATION. See Bill of Sale.

CONSOLIDATION. See Bill of Sale.

CONSTRUCTIVE TOTAL LOSS. See Marine Insurance.
Ship and Shipping.

CONTAGIOUS DISEASES (ANIMALS) ACT—*slaughter of foreign animals before landing: claim for compensation from local authority*—By the Contagious Diseases (Animals) Act, 1869, ss. 68, 69, compensation is payable by a local authority for animals slaughtered in pursuance of the Act:—*Held*, that no compensation was payable under these sections in respect of foreign animals stopped while afloat in an English port, and slaughtered before being landed, inasmuch as a local authority had no authority to order the slaughtering of such animals. *Nissler v. The Corporation of Hull*, 501

CONTRACT—*withdrawal of offer: contract when complete: letters sent by the post: breach of contract: waiver: continued breach*—Though an offer of sale may be withdrawn before it has been accepted, the withdrawal must be communicated to the party to whom the offer has been made before such acceptance. *Byrne & Co. v. Leon van Tienhoven & Co.*, 316

Where an offer of sale is made and accepted by letters sent through the post, the withdrawal takes effect only when the letter containing it has been received, and not from the moment it is posted, unless the party to whom the offer is made has given the other authority to notify his withdrawal by letter so posted. *Ibid.*

If there is a continued refusal by a party to perform his contract, the neglect of the other party to treat the first refusal as a breach will not prevent his suing for a breach. *Ibid.*

—*assignment of: liquidation of company: power of liquidator: nature of contract: judicature act*—The defendants entered into an agreement with the P. Company for the hire of certain railway waggons for a term of seven years. The agreement contained a clause by which the P. Company bound themselves during the term to keep the waggons in good and substantial repair and working order. Some eighteen months afterwards the P. Company went into liquidation, and the contract between them and the defendants was assigned to the plaintiffs, who took over from the P. Company the repairing stations previously used for the repair of the waggons let to the defendants and also the staff of workmen employed in executing such repairs. In an action brought by the plaintiffs to recover from the defendants rent due for the hire of the waggons, the defendants disputed their liability on the grounds, first, that the P. Company had, by going into liquidation, incapacitated themselves from performing the contract; and secondly, that there

was no privity of contract between them and the plaintiffs whose services, in substitution for those to be performed by the P. Company under the contract, they, the defendants, were not bound to accept:—*Held*, that, whatever might be the position of the parties on the dissolution of the company, the liquidator, pending the winding-up, had power to continue the performance of the contract. *Held* also (distinguishing *Robson v. Drummond*, 2 B. & Ald. 303), that, as personal performance was not of the essence of the contract, the repair of the waggons undertaken and done by the plaintiffs under their contract with the P. Company was a sufficient performance by the latter of their engagement to repair under their contract with the defendants. *The British Waggon Co. (Lim.) v. Lee & Co.*, 321

—*promise to leave realty by will: statute of frauds*—In an action for the title-deeds of a farm, the jury found that the defendant was induced to serve the plaintiffs' predecessor in title for many years as his housekeeper without wages, and to give up other prospects by the promise made by him to her to make a will leaving her a life estate in the farm:—*Held*, that the facts found amounted to a contract to leave the farm by will to the defendant, and that the defendant having served as stipulated was entitled to judgment, although the contract was not in writing. *Alderson v. Maddison*, 801

CONVERSION — *pledge: re-delivery obtained by fraud: right of pledgee against innocent transferee for value*—D. & Sons pledged, in return for advances, certain goods to the plaintiffs. The plaintiffs agreed to deliver the goods to them or their order as sold on condition of D. & Sons paying over to the plaintiffs the proceeds of any sale of those goods. D. & Sons afterwards obtained advances on a pledge of the same goods from the defendants, who were unaware of the dealings between D. & Sons and the plaintiffs. D. & Sons then told the plaintiffs that they had obtained a purchaser, and would hand over the price received, and thus induced the plaintiffs to transfer the goods to them. The advances made by the defendants not having been repaid they sold the goods. In an action by the plaintiffs against the defendants for conversion,—*Held* (affirming the judgment of the Queen's Bench Division), that the plaintiffs could not recover, that they had parted with the property in the goods, and could not maintain an action against the *bona fide* transferees for value. *Babcock v. Lawson* (App.), 408

— See Shipping.

CONVEYANCE. See Husband and Wife.

CONVICTION, PROOF OF. See Evidence.

B

CORPORATION. See Interrogatories. Pharmacy Act.

CORRUPT PRACTICES. See Election Petition. Elementary Education.

COSTS in House of Lords. See Railway.

— See Appeal as to Costs. Practice.

COUNTER-CLAIM, Costs of. See Practice.

— See Marine Insurance.

COUNTY COURT—power of judge to restrain an action in the high Court: county courts act: judicature act—The County Courts Act, 1865 (28 & 29 Vict. c. 99), s. 2, confers upon the Judge of a County Court all the powers and authorities, for the purposes of that Act, possessed by a Judge of the Court of Chancery, which at that time included the power of restraining by injunction an action in a superior Court of Common Law. Such a power has been taken away from the Court of Chancery by sec. 24, sub-sec. 5 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and is therefore impliedly taken away also from a County Court Judge, who has moreover expressly conferred upon him by the same Act (s. 89) the same powers as are possessed by the High Court of Justice. *Cobbold v. Pryke; Baxter (claimant)*, 8

— *objection to trial in county court where claim exceeds 20l.: county court rules: "return day": new trial*—The provisions in 19 & 20 Vict. c. 108. s. 39, and Order IX. rule 5, County Court Rules, 1875, enabling a defendant in the County Court to a claim exceeding 20l. in contract or 5l. in tort, to object to the trial taking place in the County Court, on giving notice five clear days before the "return day," do not apply to the case of a second trial. Where, therefore, a new trial of an action had been, on the application of a defendant, granted by the County Court Judge,—*Held*, that the defendant could not, under the above statute, take objection to the new trial being had in the County Court. *Campbell v. Fairlie*, 445

— *interpleader: powers to stay action: county court act*—The County Court Act, 1867, provides that where a claim is made by any person to or in respect of any goods taken in execution under process of a County Court, or in respect of the proceeds or value thereof, the high bailiff may interplead by issuing a summons to bring before the Court the party issuing the process and the party making the claim; and the Court shall adjudicate between such parties and the high bailiff, and any action which shall have been

brought in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed:—*Held* (affirming the judgment of the Exchequer Division), that an action brought by a plaintiff, whose goods had been taken in execution, against the high bailiff and against the purchasers of the goods, could be stayed against the former; but that there was no power under the above section to stay it against the purchasers. *Hills v. Renny* (App.), 710

— Appeal. See Practice.

COVENANT. See Landlord and Tenant.

CRIMINAL LAW—practice: joinder of several misdemeanours in one indictment: perjury: power to award successive sentences for several misdemeanours, exceeding in the aggregate the maximum punishment fixed for the offence charged—The first count of an indictment charged C. with committing perjury in an action of ejectment in the Court of Common Pleas; the second count charged him with committing perjury in a suit brought in the Court of Chancery, in order to obtain an injunction to prevent the defendants to the action of ejectment from setting up certain defences. Upon conviction on both counts, C. was sentenced on each count to the maximum term of penal servitude fixed by statute for perjury, the second term being directed to commence at the expiration of the first. A writ of error having been issued,—*Held*, by the Court of Appeal, that the charges contained in the two counts were charges of two distinct offences; that upon conviction on both charges the maximum sentence allowed by law for the offence charged could be awarded for each of the two offences, and that the commencement of the second term could be postponed until the expiration of the first term of punishment. *Held* also, that 2 Geo. 2. c. 25. s. 2, and 20 & 21 Vict. c. 3. s. 2, which enact "that besides the punishment already to be inflicted for" perjury, "it shall and may be lawful" for the Court to send to penal servitude, for "a time not exceeding seven years," persons convicted of perjury; and "thereupon judgment shall be given that the person convicted" shall be sent to penal servitude "accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being," do not require that any other sentence should be prefixed to that of penal servitude. *Reg. v. Castro* (App.) 747

CUSTOM. See Mines and Minerals.

DAMAGES—personal injuries: railway company: breach of contract of carriage: measure of damages: direction to jury—The right direc-

tion to a jury, who have to assess damages in an action for personal injuries sustained in a railway accident by a professional man making a large income, is that, in respect to the plaintiff's money loss, they should not attempt to arrive at an absolute or mathematically accurate compensation, but should give a fair and reasonable compensation, taking into consideration the amount of his income when the injuries were sustained, the length of time he has been deprived of that income, the probability of his having continued to earn it if he had not been injured, the prospect of his being able to earn anything in the future, and all the other circumstances of the case. The distinction between such a case and the case of *Hadley v. Baxendale* (9 Exch. Rep. 341; 23 Law J. Rep. Exch. 179) pointed out. *Phillips v. The London and South Western Railway Company* (App.), 233

— by Water. See Landlord and Tenant.

— See Company.

DEMURRAGE. See Charter-party.

DEVIATION. See Shipping.

DIRECTORS. See Company.

DISCHARGE. See Liquidation by Arrangement.

DISCLAIMER. See Bankruptcy.

DISCOVERY—*letters written by master in answer to enquiries as to servant's character: libel: privileged communication: production*—A master kept copies of the letters written by him in answer to enquiries respecting the character of a servant late in his employ. The servant commenced an action for damages against his master, alleging that the letters were libellous, and took out a summons for liberty to inspect and take copies of the copy letters:—*Held*, that the copy letters were not privileged from production. *Quare*, whether, if the defendant had deposed on oath that the production of the letters would incriminate him, they would have been privileged from production. *Webb v. East* (App.), 250

— See Practice.

DISQUALIFICATION. See Public Health.

DURHAM, BISHOPRIC OF. See Mines and Minerals.

ECCLESIASTICAL COURT—*power to append a monition to a definitive sentence: mode of enforcing: suspension ab officio et beneficio for contumacy in disobeying such monition: prohibition*—A

beneficed clerk, having been convicted in a criminal suit in the Court of Arches of offences against the laws ecclesiastical, was suspended *ab officio* for a certain time, and admonished not to repeat the offence. He disobeyed this monition, and on this being proved the Court again admonished him. This second monition having been also disobeyed, application was made to the Court by motion on affidavits to enforce the monition. The clerk did not appear, and the Court sentenced him to be suspended *ab officio et beneficio* for three years. A writ of prohibition directed to the Judge of the Court of Arches to prohibit him from enforcing this sentence was applied for in the Queen's Bench Division, and granted by COCKBURN, C.J., and MELLOR, J. (*dissentiente LUSH, J.*):—*Held*, in the Court of Appeal, by COLERIDGE, C.J., JAMES, L.J., and THESIGER, L.J. (*dissentientibus BRETT, L.J., and COTTON, L.J.*), reversing the decision of the Queen's Bench Division, that the writ of prohibition ought not to issue; for that such a monition could be so appended to a definitive sentence in a penal suit in an Ecclesiastical Court; that disobedience to such a monition could be punished as contumacy; that such contumacy could be punished, on summary process, by suspension *ab officio et beneficio*; and that the motion to enforce the monition was not a fresh proceeding instituted within the meaning of section 23 of the Church Discipline Act (3 & 4 Vict. c. 36). *Martin v. Mackonochie* (App.), 9

ELECTION PETITION—*municipal: conditions precedent: notice of presentation: corrupt practices (municipal elections) act*—By section 13 of the Corrupt Practices (Municipal Elections) Act, 1872, the following provisions shall have effect with reference to the presentation of a petition: First, a petition may be presented by four or more voters, &c. Second, a petition shall be presented within twenty-one days after the day on which the election was held, &c. Third, at the time of presenting a petition, or within three days afterwards, the petitioner shall give security, &c. Fourth, within five days after the presentation of a petition the petitioner shall serve on the respondent a notice of the presentation and of the nature of the proposed security, and a copy of the petition:—*Held*, that these provisions were conditions precedent to the right to try a petition. *Williams v. The Mayor, &c., of Tenby*, 325

ELEMENTARY EDUCATION—*expenses of school board: power of board to borrow for temporary purposes*—The power of school boards to borrow is defined and limited by the express enactments of the Acts under which they are constituted, so that a school board has no power to borrow money to defray current expenses when the school fund is not sufficient, and interest on such a temporary loan ought not to be allowed in the accounts of a school board. *So held* by

the Court of Appeal, reversing the decision of the Queen's Bench Division. *The Queen v. Reed* (App.), 600

ELEMENTARY EDUCATION (continued)—*school board election: mode of questioning election: corrupt practices (municipal elections) act*—The Corrupt Practices Municipal Act, 1872 (35 & 36 Vict. c. 60), does not apply to a school board election, and therefore such election cannot be questioned by petition under that Act. *In re The West Bromwich School Board*, 641

EQUITABLE ESTATE. See Parliament.

ESTOPPEL. See Company.

EVIDENCE—*admissibility of: evidence taken upon commission: secondary evidence received upon commission abroad: time to object*—Where in an action a commission had issued to take evidence abroad, and both parties being represented, secondary evidence had been received of the contents of a written document without objection,—*Held*, that it was not competent to one of the parties afterwards, upon the hearing of the reference of the cause before an arbitrator, to dispute the admissibility of the evidence so taken and returned by the commissioners in the depositions. *Robinson & Co. v. Davies & Co.*, 218

— *witness: proof of previous conviction admissible, though immaterial to issue*—A party to a cause who gives evidence in support of his case may be cross-examined as to whether he has been ever convicted of a felony or misdemeanour, and if he denies or refuses to answer it, the opposite party may prove such conviction under section 25 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), although the fact of such conviction be altogether irrelevant to the matter in issue in the cause. *Ward v. Sinsfeld*, 696

— See Marine Insurance.

EXECUTOR. See Wasta.

FISHERY—*non-tidal river: gradual change of river course: encroachment: following fishery*—Plaintiff, lord of the manor, claimed the exclusive right to fish in part of a river which was formerly locally situate within the manor, but which by gradual alteration of its course now flowed over land of the defendant. The manor had been granted by the Crown to the predecessors in title of the plaintiff with the right of fishery in all its waters; afterwards certain lands of the manor were enfranchised and now became vested in the defendant. At the time of the enfranchisement the river flowed wholly

within the manor, but since then its course had gradually changed, approaching nearer and nearer to the defendant's land until some portion of that land became part of the river bed. This part could be identified. The changing of the river course and consequent shifting of the bed was so gradual as not to be perceptible from day to day, but only by comparing its position of recent years with its position many years before:—*Held*, that the plaintiff had an exclusive right of fishery which extended over that part of the river flowing over the defendant's land. *Foster v. Wright*, 97

— *trespass: several oyster fishery: navigable river: claim to take without stint: free inhabitants of ancient tenements*—The plaintiffs, an incorporated body, claimed to be possessed of a several fishery in a tidal navigable river, and in support of their title produced charters of confirmation and grant, and proved acts of immemorial user, from which the Court, drawing inferences of fact, held a *prima facie* title to the soil and several fishery to be established, raising the presumption of a legal origin, i.e. a grant before Magna Charta. The defendants claimed, as free inhabitants of ancient tenements in the borough of Saltash, to have from time immemorial, without interruption, and as of right, the privilege of dredging for oysters in the *locus in quo*, from the 2nd day of February to Easter Eve in each year, and carrying away the same without stint, for sale and otherwise. They also claimed to have exercised the above privilege as free inhabitants of the borough, and as subjects of the realm; and they also claimed a general right to dredge for oysters as subjects of the realm:—*Held*, that no right in the defendants, as subjects of the realm, could be established, as it would be inconsistent with a several fishery in the plaintiffs, who would take nothing by their grant, and would be destructive of the fishery. *Held*, further, that the other claims of the defendants founded on immemorial user could not be established, for that they were made in respect of a fluctuating body, and would have to be supported by the presumption of a lost royal grant, which alone would have the effect of incorporating such body, and that such a presumption could not be made when antagonistic to the existing rights of the plaintiffs. *Lord Rivers v. Adams* (48 Law J. Rep. Exch. 47; Law Rep. 3 Ex. D. 361) followed. *The Mayor and Free Burgesses of the Borough of Saltash v. Goodman*, 565

FIXTURES. See Landlord and Tenant.

FOREIGN CORPORATION. See Income Tax.

— Ship. See Marine Insurance.

FORGERY. See Cheque. Bill of Exchange.

FRAUDS, STATUTE OF. See Contract.

FREEHOLD. See Parliament.

FREIGHT. See Ship and Shipping.

GARNISHEE ORDER. See Lien of Solicitor.

GENERAL AVERAGE. See Marine Insurance. Ship and Shipping.

GRANT, LOST ROYAL. See Fishery.

GUARANTEE. See Principal and Surety.

HIGHWAY—*action to recover land: presumption of ownership by adjoining owner of soil of intended highway: dispossession of and discontinuance of possession of land by owner: statute of limitations*—The plaintiff granted to the defendant two pieces of land separated by, and each described as abutting on, a strip of land called a street, which the plaintiff intended to dedicate as a highway, but which was in fact never so dedicated. For more than twenty years before action the defendant used this piece of land for the purposes of his business in such a way as to make it impassable, save for foot passengers. Within twenty years both the plaintiff and the defendant had repaired some railings which separated this intended street from an adjoining highway; and within the same period the defendant had first enclosed a small portion of the street, and then fenced it in at each end, where it abutted on two highways. In an action to recover possession of the land,—*Held* (affirming the decision of the Exchequer Division), that the presumption that the soil to the middle of a highway belongs to the owner of the adjoining enclosed land, does not apply where such land abuts on an intended highway which has not at the time of the conveyance been dedicated to the public. *Held* also, that the plaintiff had not been dispossessed by the defendant nor had he discontinued possession within the meaning of section 3 of the Statute of Limitations. *Leigh v. Jack* (App.), 220

— *locomotives on roads: highways and locomotives amendment act: "excessive weight" and "extraordinary expenses," how ascertained*—Section 23 of the Highways and Locomotives Amendment Act, 1878, enacts that where by a certificate of their surveyor it appears to the authority which is liable to repair any highway that, "having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway, by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon," the authority may recover in a summary manner the amount of such expenses from

the person by whose order the weight or traffic has been conducted. The appellant used on a highway a locomotive engine and waggons in order to carry goods and materials for the ordinary purposes of his estate. The engine was constructed and used in accordance with the Locomotives Acts, 1861 and 1865, and the weight of the engine and the width of its wheels were in compliance with section 28 of the Highways and Locomotives Amendment Act, 1878. Justices having made an order for the payment by the appellant of a sum to cover extraordinary expenses incurred by the highway authority by reason of the damage caused to the road by the use of the engine and waggons, it was,—*Held*, on a case stated by the justices, that the question of what was "excessive weight" and "extraordinary traffic" within section 23, must be determined with reference to the ordinary traffic of the road, and its capacity for bearing weights, and not with reference to abnormal traffic merely, or to weight in excess of that authorised by statute, and therefore that the order of the justices was rightly made. *Lord Aveland v. Lucas* (App.), 643

— Name of owner of cart, when to be painted on it: highway act: "cart:" customs and inland revenue duties act. *Danby v. Hunter* (M.C. 15), 219

HUSBAND AND WIFE—*wife's authority to pledge husband's credit for necessities: secret revocation of authority: effect of: presumption of agency*—Where husband and wife live together, and the husband has privately forbidden her to buy goods on credit, he is not liable for the price of articles of dress, although suitable to her rank in life, supplied to her by a tradesman with whom she has not dealt before, but to whom the fact that she was so forbidden has not been communicated. *Jolly v. Rees* (15 Com. B. Rep. N.S. 628; 33 Law J. Rep. C.P. 177) followed. *Debenham v. Mellon* (App.), 497

— *conveyance by married woman*—The Court refused to make an order under 3 & 4 Will. 4. c. 74. s. 91, dispensing with the concurrence of the husband to the execution of a deed by his wife on an affidavit by the son that the husband and wife had for three years been living apart, in consequence of the intemperate and violent habits of the former, which rendered necessary his confinement in a lunatic asylum for some time, and that, although he had since been discharged, he was not in a fit mental condition to execute a deed, or understand its nature. The Court directed that application should be made to the husband to execute, and that the result should be stated to the Court, and that he should have notice of an application for the order, and further, that there should be an affidavit by a medical man of the husband's mental condition. *In re The Trusts of the Will of Clare*, 557

INCOME TAX—quarries: mines: profits how to be assessed—A property in which slate is gotten by levels driven underground into a hill, is a quarry and not a mine for the purposes of the rules for assessing income tax, and ought as such to be assessed on the profit of the preceding year, under rule 1 of Part III. of schedule A of 5 & 6 Vict. c. 35:—*So held by the Court of Appeal, affirming the judgment of the Exchequer Division. Jones v. The Cwmorthin Slate Co. (Lim.) (App.), 110*

— **profits: exhausted capital: brewers: premiums for leases of public-houses**—Brewers claimed that, in computing for income tax the balance of their profits, a deduction should be allowed for premiums paid by them in order to obtain leases of public-houses, which they sublet to tenants undertaking to buy beer of them alone:—*Held*, that such a deduction could not be allowed. *Watney & Co. v. Musgrave, 493*

— **profits of foreign corporation with English agency and English shareholders: dividends partly from foreign profits paid to English shareholders out of English profits: 16 & 17 Vict. c. 34. s. 10: "entrusted for payment"**—Dividends of a foreign corporation with an agency in England which were derived partly from foreign profits were paid to shareholders resident in England by the English agency out of money in hand from English profits. The Crown claimed from the English agency, in addition to income tax upon all the English profits of the corporation, income tax upon so much of the dividends paid to shareholders resident in England as was derived from foreign profits:—*Held*, by POLLOCK, B., and HUDDLESTON, B. (KELLY, C.B., dissenting), that the claim must be allowed, under 16 & 17 Vict. c. 34. s. 10, notwithstanding that no portion of the foreign profits was actually remitted to England. *Gilbertson v. Ferguson; in re The Imperial Ottoman Bank, 536*

INDORSEMENT ON WRIT. See Practice.

INFANT—promise to marry: infants relief act: evidence: fresh promise or ratification after age—When both the plaintiff and defendant were under age, the defendant made an express promise to marry the plaintiff, which she accepted, but no time for the marriage was then fixed. For some years afterwards, and after the defendant had come of age, the parties remained on the footing of engaged lovers, and at last (the defendant being then of age) the day of their marriage was fixed, the plaintiff naming the day at the request of the defendant to do so. Ultimately the defendant refused to marry. In an action for breach of promise of marriage,—*Held*, by DENMAN, J., and LINDLEY, J., that, assuming the case of *Coxhead v. Mullis*

(47 Law J. Rep. C.P. 761; Law Rep. 3 C.P. D. 439) to be rightly decided, and that a contract to marry is within the Infants Relief Act (37 & 38 Vict. c. 62), and therefore not capable of being ratified by an infant after he comes of age, there was here evidence from which a jury ought to find a fresh promise to marry made after the defendant had come of age, as distinguished from a mere ratification of the promise to marry which had been made during the defendant's infancy:—*Held*, by LORD COLERIDGE, C.J., that as a contract to marry is within the Infants Relief Act, what took place after the defendant came of age was only evidence of a ratification of the subsisting contract to marry, and was not evidence of a fresh contract. *Ditcham v. Worrall, 688*

INJUNCTION. See County Court. Practice.

INQUISITION. See Certiorari.

INTERPLEADER. See County Court. Practice.

INTERROGATORIES—corporation answering by their solicitor: privileges—Interrogatories were administered to the plaintiffs, a corporation, which they elected to answer through their town clerk. The town clerk claimed to be privileged from answering some of the interrogatories, on the ground that he was also solicitor to the plaintiffs in the action, and had received the information asked for in his capacity as solicitor for the purpose of the action:—*Held*, that the plaintiffs, having elected to put forward their solicitor to answer the interrogatories, could not avail themselves of the privilege which otherwise would have attached to communications made to him in such capacity. *The Mayor and Corporation of Swansea v. Quirk, 157*

— See Parliament.

JURISDICTION to refer. See Practice.

— See County Court.

JUSTICE OF THE PEACE—order for expenses of conveying prisoners to gaol: "period of committal": prison authority—The Prisons Act of 1877 (40 & 41 Vict. c. 21), has not transferred to the Secretary of State the liability for the expenses of conveying prisoners after summary conviction or committal for trial by a magistrate to the gaol named in the warrant. Such expenses still fall, as enacted in 27 Geo. 2. c. 3 and 11 & 12 Vict. c. 42, in Middlesex upon the overseers, and in other counties upon the treasurer of the county where the offence alleged against the prisoner was committed. *Mullins v. The Treasurer of the County of Surrey, 257*

— Summary jurisdiction: ouster of jurisdiction: *mens rea*: assault and battery. *White v. Fox* (M.C. 60), 563

KIDNAPPING ACT. See Pacific Islanders Protection.

LANDLORD AND TENANT—*assignment of chose in action: surrender after notice of assignment of future rent: judicature act*—The plaintiffs sublet a portion of premises, of which they had a lease, to the defendant. They afterwards assigned their interest in the premises to B., and agreed in writing with B., that notwithstanding this assignment they should receive the rent due from the defendant for the remainder of her lease, and notice of this agreement was given to the defendant. The defendant afterwards surrendered her lease to B. In an action for rent claimed as accruing after the surrender, —*Held*, that even if there was a valid assignment of a chose in action, still that the plaintiffs could not recover, for that the assignment was of rent to become due, whereas no rent had accrued due after the surrender, and the defendant could not be prevented by the agreement between the plaintiffs and B. from surrendering her lease to B. *Southwell v. Scotter* (App.), 356

— *implied covenant: sub-lease: fixtures*—A covenant in a lease by which the lessee agrees at the expiration of the lease to deliver up to the lessors "all landlord's fixtures," does not imply a representation and covenant on the part of the lessors that the lessee is to be at liberty without hindrance from anyone to remove during the term trade fixtures, and that the lessors have not entered into covenants inconsistent with such right. *Porter v. Drew*, 482

— *lease: covenant for quiet enjoyment: water supply: house let out in flats: damage by water*—The defendant demised the ground floor of his house to the plaintiff under a lease containing a covenant that the lessee might "peaceably hold and enjoy the said demised premises during the said term without any interruption by the lessor, or any person lawfully claiming through or in trust for him." The remainder of the house was let out in floors to different tenants. Before and during the demise to the plaintiff the water supply was effected by means of a main service pipe connected with a cistern placed at the top of the house, branch pipes being inserted into the main pipe for the supply of water to each floor. The tenants paid a proportion of the water rate for the supply to their respective premises. The branch pipe on the first floor suddenly burst, and the water therefrom poured down into the plaintiff's premises and injured his goods. In an action for damages the jury found that the branch pipe when fixed (which was before the demise) was a reasonably fit and proper one

for the purpose for which it was fixed and intended, and that there was no negligence or want of skill in the fixing and maintaining the pipe where and as it was:—*Held* (affirming the judgment of FIELD, J., reported *ante*, p. 456), that the plaintiff had no cause of action founded upon the covenant for quiet enjoyment, because the covenant was prospective, and there had been no act of omission or commission during the demise to the plaintiff, causing an interruption of his enjoyment. *Held* also, that the apparatus for the water supply, being for the common benefit of the plaintiff and the other tenants, the plaintiff had no cause of action founded upon the principle laid down in *Fletcher v. Rylands*, 34 Law J. Rep. Exch. 177; 3 Hurl. & C. 774; 35 Law J. Rep. Exch. 154; *Rylands v. Fletcher* (H.L.) 37 Law J. Rep. Exch. 161; in Ex. Ch. Law Rep. 1 Exch. 265; in H.L. Law Rep. 3 H.L. 330. *Anderson v. Oppenheimer* (App.), 708

— *lease of floors in a warehouse: fall of building through overloading: covenant by lessee to keep inside in repair: by lessor to keep outside in repair: suspension of rent*—The plaintiffs by lease demised to the defendant certain floors in a warehouse for seven years at a yearly rent, the defendant covenanting to repair, maintain and keep the inside of the demised premises in good and tenantable repair and condition, and to deliver them up at the end of the term, damage by fire, storm or tempest, or other inevitable accident and reasonable wear and tear, only excepted; and the plaintiffs covenanting to keep the walls, roof and main timbers of the premises in good and substantial repair and condition. The lease also contained a proviso for the suspension of the rent in the event of the premises being burnt down or damaged by fire, storm or tempest, and a clause against assigning or underletting without the written consent of the plaintiffs. The defendant sublet some of the floors without the written consent of the plaintiffs; the sub-lessee overloaded one of the upper storeys, in consequence of which the whole building fell. The plaintiffs rebuilt the warehouse, and claimed rent since the fall of the building, and damages occasioned by the fall:—*Held*, that the proviso for suspension of rent did not include the cause which led to the fall of the building, and that the defendant was consequently liable to pay rent as if it had never fallen; that the plaintiffs were not liable to damages by reason of any implied warranty or covenant by them that the building was fit for the purposes for which it was to be used, nor by reason of their express covenant to keep the walls, roof and main timbers of the building in repair, though they would be liable for any unreasonable delay in the rebuilding; that the defendant was not liable for the fall of the building, provided he could shew it was used in a reasonable manner, having regard to its character and the purposes for which it was intended to be used.—*Saner v. Billon* (47 Law J.

Rep. Chanc. 267; Law Rep. 7 Ch. D. 815) followed;—that the defendant was liable under his express covenant to make good the cost of putting the inside of the floors demised to him and the fixtures therein in good and tenantable repair. *The Manchester Bonding Warehouse Co. v. Carr*, 809

— See Lease.

LANDS CLAUSES CONSOLIDATION ACT—superfluous land : mines under superfluous land—Lands had been acquired by a railway company by agreement under their statutory powers. The time within which they might be sold if not required for railway purposes expired in 1863, at which time they had not been used for such purposes nor sold. The lands were in close proximity to W. station, and since the year 1868 additional sidings had been required at the station, for which the lands would be needed, but for want of funds such sidings had not been constructed. Meanwhile the lands were let, first to an agricultural tenant, and afterwards to a mining company, the lessors having the right to re-enter at any time at short notice. Upon an action brought in 1875 by adjoining landowners to recover the lands as superfluous within 8 & 9 Vict. c. 18, s. 127,—*Held*, that the lands were not superfluous, the fact that they were required for the railway in 1868 being strong presumptive evidence that they were so required in 1863, and the burden of proof, especially after so great a lapse of time, being upon the plaintiffs to shew that they were not. The lease to the mining company reserved to the lessors the right to regulate the manner of removing the minerals, so as to prevent injury to the surface:—*Held*, that the minerals were not superfluous. *Hooper v. Bourne* (H.L.), 370

Semble, that where land is bought by a railway company with the mines under it the mines cannot be claimed as superfluous land apart from the surface. *Ibid*.

— See Certiorari. Railway.

LEASEHOLDS. See Bankruptcy.

LEAVE TO DEFEND. See Practice.

LETTER. See Bankruptcy.

LETTERS BY POST. See Contract.

LEX FORI—statute of limitations: specialty debt contracted in India—Specialty debts have in India no higher value than simple contract debts, and the same period of limitation, namely, three years, applies. But the right to sue on a specialty debt in England cannot be barred by a

less period than twenty years, although the debt was contracted in India, and the right to recover was barred in India by the shorter period of limitation. *The Alliance Bank of Simla v. Carey*, 781

LIBEL—privilege: malice: fair report of proceedings in a court of justice: whether protected if sent with malice—The defendant, a solicitor, conducted a case in a County Court, and sent a report of the proceedings containing matter defamatory of the plaintiff to several newspapers for publication. In an action for libel the jury found that the report was a fair one, but sent with malice:—*Held* (affirming the judgment of Cockburn, C.J.), that no absolute privilege attached to the publication of a report, though a fair one, of proceedings in a Court of justice, and that the defendant, having been actuated by malice in sending the report, was liable in the action. *Stevens v. Sampson* (App.), 120

— **innuendo: evidence for the jury: privileged communication**—The defendants were brewers, and had been accustomed to receive, in payment for beer supplied to a number of their tenants in Sussex, cheques drawn upon different branches of the plaintiffs' bank. A dispute arose between the defendants and the manager of the plaintiffs' branch bank at Chichester, through the latter refusing to cash cheques for the defendants drawn upon any other of the branch banks, and the defendants thereupon sent round to the tenants a printed circular in the following terms: "Messrs. H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." In an action for libel the statement of claim set out the circular with the innuendo, "meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheques of their customers." At the trial evidence was given that the plaintiffs incurred a loss through the issue of the circular, and that the defendants, on being informed of it, took no steps to prevent the loss increasing. The case was left to the jury, who, being unable to agree, were discharged without a verdict:—*Held* (by the Common Pleas Division, on motion to enter judgment for the defendants), that the circular was capable of the defamatory meaning suggested by the innuendo; that there was evidence for the jury that it had that meaning; that, assuming the publication of it to be privileged, there was evidence for the jury of express malice on the part of the defendants, and therefore that the case was rightly left to the jury. *Held* (by the Court of Appeal—BRETT, L.J., and COLLINS L.J.; THESIGER, L.J., dissenting), that the circular, according to the ordinary or primary meaning of the language, could not reasonably be read as defamatory of the plaintiffs; that there was no evidence upon which the jury could

reasonably find that it had any secondary meaning defamatory of the plaintiffs; that the publication of it was privileged, and there was no evidence of express malice on the defendants' part to destroy the privilege; and therefore that the defendants were entitled to judgment. Judgment of the Common Pleas Division reversed. *The Capital and Counties Bank v. Henty* (App.), 830

— Defamatory: Jurisdiction of magistrate on criminal charge of libel: evidence of truth of libel, when admissible: Lord Campbell's Act. *Reg. v. Carden* (M.C. 1), 219

— See Discovery. Practice.

LIEN. See Ship and Shipping.

LIEN OF SOLICITOR—*garnishee order: priority: solicitors act*—The plaintiffs were the solicitors for W. in an action in which he recovered a sum of money. The defendant was a judgment creditor of W., and obtained *ex parte*, on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day the plaintiffs for the first time learned of the defendant's claim, and then gave notice, to the defendant in the action in which W. was plaintiff, of their claim of lien, and within five days applied for an order declaring that they were entitled to a charge on the money recovered by W.:—*Held*, affirming the decision of the Common Pleas Division, that the plaintiffs had a lien for their costs on the sum recovered by W.; that they were entitled to the order sought for; and that the garnishee order obtained by the defendant did not take priority over that lien. *Shippey v. Grey* (App.), 524

LIMITATION ACTION. See Practice.

LIMITATIONS, STATUTE OF—*renewable leaseholds: surrender by operation of law: estate in reversion: when time begins to run against reversioner*—Sections 3 and 5 of the Statute of Limitations, 3 & 4 Will. 4. c. 27, enact that the right to bring an action to recover any land shall be shewed to have first accrued with respect to estates or interests in reversion, "at the time when such estate or interest became an estate or interest in possession." During the continuance of a lease for years the reversioner in fee granted a new lease of the premises for years to his tenant:—*Held*, that, although the first lease became surrendered by operation of law on the granting of the second, the reversioner's estate did not thereby become an "estate in possession" within the meaning of sections 3 and 5, and therefore that time did not begin to run against him under the Act. *The President and Scholars of Corpus Christi College, Oxford, v. Rogers* (App.), 4

VOL. 49.—Q.B., C.P., & EXCH., Index.

— *writ specially indorsed: affidavit for leave to defend under order: affidavit in reply*—Upon an application by the plaintiff for leave to sign final judgment under Order XIV., the Court or Judge has a discretion to allow the plaintiff to file an affidavit in reply to the defendant's affidavit. *Rotherham v. Priest*, 104

— *licensee: effect of statutory prohibition against alienation*—Commissioners, under the authority of a local Act, erected a town-hall at B., and afterwards by a subsequent Act passed in 1850, they purchased an estate called the P. estate. By this Act of 1850 the said commissioners were empowered to sell and convey such estate, provided that no such sale should be without the consent of the inhabitants of the parish in vestry assembled. From the time of the erection of the town-hall until 1853, the guardians of the poor of B. had the use of portions of the town-hall for offices, and in 1853 they removed to a part of the P. estate, which by arrangement with the said commissioners they were to be permitted to have for their permanent use in lieu of their offices in the town-hall. The said guardians laid out money in rendering this part of the estate suitable for their offices, and they used the same as such from that time until November, 1879, without paying any rent or giving any acknowledgment in writing of the title of the commissioners or of the plaintiffs to whom the property of the said commissioners was transferred by statute in 1855. In March, 1863, the plaintiffs wrote to the said guardians for an acknowledgment in writing that they held the offices from the plaintiffs on sufferance, but the guardians refused to give such acknowledgment. In an action brought in November, 1879, by the plaintiffs against the guardians to recover possession of the said offices,—*Held*, that under the above circumstances the plaintiffs had been out of possession for more than twelve years, and were barred by the Statute of Limitations. *Held* also, that the statutory prohibition against alienation without the consent of the inhabitants in vestry did not prevent the plaintiffs from being so barred by the Statute of Limitations. *The Mayor, &c., of Brighton v. The Guardians of the Poor of Brighton*, 648

— *succession of ecclesiastical commissioners to estates of corporations sole*—By 3 & 4 Vict. c. 113. s. 57 the Ecclesiastical Commissioners are to have, for the purpose of obtaining possession of lands vested in them as successors to ecclesiastical corporations sole, all rights, powers and remedies at law and in equity, which belonged to those to whose estates they succeeded. In 1864 the Ecclesiastical Commissioners succeeded to the estates of the dean of A., and in 1877 they brought an action to recover part of those estates, which had been possessed adversely to them and their predecessors, the

C

deans, for more than twenty but less than sixty years:—*Held* (by LORD SELBORNE, L.C., and LORD WATSON, *dissentiente* LORD BLACKBURN), that the Ecclesiastical Commissioners had, for the purpose of obtaining possession of the lands transferred to them, the right to bring an action at any time within which an incumbent of the deanery might have brought it if no transfer had taken place. *Held* (by LORD BLACKBURN), that the words in 3 & 4 Vict. c. 113. s. 57, being merely general, and containing no reference to the Statute of Limitations, do not give the commissioners the right to the extended period for bringing an action allowed to corporations sole. *The Ecclesiastical Commissioners for England v. Rowe* (H.L.), 771

— See Highway. *Lex Fori*.

LIQUIDATION. See Contract.

LIQUIDATION BY ARRANGEMENT—*resolutions giving power to grant discharge: acceptance by dissenting creditor of benefits under liquidation scheme: effect of certificate of discharge: bankruptcy act*—A creditor who dissents from, but who accepts, the composition paid under resolutions adopted for the liquidation by arrangement of a debtor's affairs, cannot, the debtor having duly received his discharge and certificate, on default being afterwards made in the payment of a part of the composition, impugn the validity of the resolutions and sue on the original debt. *Lewis v. Leonard & Son* (App.), 308

The certificate of discharge given by the Registrar to a debtor whose affairs are liquidated by arrangement, is conclusive evidence of the validity of the liquidation proceedings. *Ibid*.

— *bankruptcy: fraudulent omission of name of creditor from statement of debts: bankruptcy act*—The certificate of discharge obtained by a debtor who has gone through liquidation by arrangement, under the Bankruptcy Act, 1869, s. 125, is a defence to an action for a debt provable in the liquidation proceedings, although the name of the creditor to whom the debt is due has been fraudulently omitted by the debtor from the list of creditors delivered to the Registrar. *Wadsworth v. Pickles*, 454

LOCAL AUTHORITY. See Nuisance. See Public Health.

LOCAL BOARD—*member acting after disqualification: action for penalty: plaintiff: consent of attorney-general, whether necessary; public health act*—Section 253 of the Public Health Act, 1875, enacts that "proceedings for the recovery of any penalty under the Act shall not, except as in this Act is expressly provided," be taken by

any person other than by a party aggrieved, or by the local authority of the district, without the consent in writing of the Attorney-General. By rule 70 of schedule II. (which by section 317 is to be read as part of the Act) any person who acts as a member of a local board, after disqualification, shall be liable to a penalty of 50*l.*, "which may be recovered by any person" by action of debt. In an action to recover a penalty under rule 70, it was,—*Held* (affirming the judgment of the Exchequer Division, *ante*, 697), that the exception in section 253 applied to "any person" suing for a penalty under rule 70, and therefore that the plaintiff could bring his action without the consent of the Attorney-General. *Fletcher v. Hudson* (App.), 793

LOCOMOTIVES ON ROADS—*Locomotive Act, 1865: nuisance: liability of owner for injuries caused by using locomotives on roads under statutory power*—A person who, without negligence and in accordance with the provisions of the Locomotive Act, 1865, uses a locomotive engine on roads, is liable for injuries caused to the property of others by such use. *Powell v. Fall* (App.), 428

— See Highway.

LUNATIC, Pauper, in Workhouse—Where resident: order for removal to asylum made by officiating clergyman: practice: appeal from order of sessions: appeal from divisional court without leave: Judicature Act. *Reg. v. Smith* (M.C. 29) (App.), 360

MANDAMUS. See Church Discipline Act. Vestry.

MANOR. See Fishery.

MARINE INSURANCE—*policy: partial loss: cost of repairs to ship: measure of damages: suing and labouring clause: salvage expenses: liability of underwriter*—The plaintiff effected a policy for 1,200*l.* with the defendants on his ship, valued at 2,600*l.*, against the usual sea risks on an out and home voyage. The policy contained the usual suing and labouring clause. The vessel suffered damage on the voyage, and was repaired. The cost of the repairs, after the usual deduction of one-third new for old, together with certain particular average charges, covered by the policy, amounted to the sum of 3,178*l.* 1*l.* 7*d.* The plaintiff paid in addition 61*l.* for salvage and general average expenses. The value of the ship, which was an old one, was much greater after the repairs than before the damage was suffered. In an action on the policy, the defendants contended that the loss was to be estimated by the depreciation of the ship as a saleable chattel, and not by the cost of the repairs; and also that in the case of a

partial loss the assurer could not be liable for more than total loss with benefit of salvage:

—*Held*, that the measure of damages, where the shipowner elected to repair, was to be ascertained by the cost of repairs less the proper deduction of one-third new for old, even though the result might be to make the underwriters liable for more than a total loss with benefit of salvage. *Held* also, that salvage and general average expenses could not be recovered under the suing and labouring clause. *Aitchison v. Lohre* (H.L.), 123

— *action by assignee of policy: defence: set-off: counter-claim*—In an action on a policy of insurance on a ship's cargo brought by the assignee of such policy in his own name, pursuant to the provisions of 31 & 32 Vict. c. 86, the defendant cannot set off any debt which he could not have set off prior to the passing of that Act. Nor does rule 3 of Order XIX. alter the law in this respect, for a counter-claim is not a defence within the meaning of section 1 of 31 & 32 Vict. c. 86.—*So held*, reversing the decision of the Common Pleas Division. *Pellas & Co. v. The Neptune Marine Insur. Co.* (App.), 153

— *total loss: salvage and costs: refitting: insurable interest.* *Dixon v. Whitworth. The Same v. The Sea Insurance Co.* (App.), 408

— *stranding*—Cargo was insured by a policy containing a warranty of freedom from average "unless the ship was stranded." The voyage was to a tidal harbour, where the ship must necessarily take the ground at every tide, and could only reach the quay at high spring tides. She grounded before reaching the quay on a small bank, and on the tide falling she settled down by the head into a hole, and the cargo was damaged. The bank and hole were caused by steamers going out at low tide, and their existence was previously unknown:—*Held* (affirming the judgment of FIELD, J.), that the ship, having grounded from an unusual cause, not necessarily incident to the navigation, had been stranded within the meaning of the policy, and that the underwriters were liable for an average loss. *Letchford v. Oldham* (App.), 458

— *ship and shipping: payment by cargo owner in respect of bottomry bond: English policy on foreign ship: loss by perils of the sea*—By a marine policy effected in England on goods in a French ship it was provided that general average was to be payable as per judicial foreign statement. On the voyage the master was obliged to take up a loan secured by bond on ship, freight and cargo, in order to effect repairs to the ship occasioned by a collision which did not damage the cargo. The ship and freight proving insufficient to satisfy the bond, the cargo was seized, and the owner obliged to pay the de-

ficiency to obtain his goods. On action by the owner of the cargo to recover the amount so paid from the underwriters,—*Held*, that the defendants were entitled to judgment, on the ground that according to English law there was no loss by perils of the sea, and as the policy stipulated for the application of foreign law only as regarded general average, the plaintiff was not at liberty to construe by French law any other portions of the policy so as to constitute the loss a loss by perils of the sea. *Greer v. Poole*, 463

— *charter-party: agency of master: liability of brokers "acting for owners" for tort of master*—The defendants offered the plaintiffs room for a cargo at a named rate in the ship D.; they then chartered that ship under a charter-party which provided *inter alia* that the ship should go to C., should receive on board such goods as might be required, that the whole ship should be at the disposal of the charterers, that the master and owners should be responsible as if the ship were loaded for the owners independently of the charter-party, that the master should sign bills of lading at any rate of freight the charterers might require, without prejudice to the charter-party, that the ship should be addressed to the charterers' nominee at the port of discharge, and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. Shortly after, the defendants "acting for the owners of" the D., agreed with the plaintiffs to receive on board a cargo at the rate previously mentioned by them to the plaintiffs, and further agreed that the barges as they came along should be immediately discharged, or they undertook to pay demurrage. The cargo was received on board, and the master signed bills of lading for the cargo to be delivered at C. to the plaintiffs' order or assigns. Half the freight, less discount, was, by agreement, paid to defendants before the ship sailed; the residue, being the sum mentioned in the bill of lading, was to be paid at C. The ship sailed, met with bad weather, put into an intermediate port, and was condemned; the cargo was discharged, and the master sold it without communicating with the plaintiffs. In an action for the value of the cargo the jury found that the sale was unjustifiable:—*Held*, that the defendants were not liable, that the contract between the plaintiffs and the defendants was at an end when the cargo was on board, and that the master was not the agent or servant of the defendants. *Wagataff, Brassey & Co. v. Anderson, Moss & Co.*, 485

— *general average contribution: port of refuge: expenses of warehousing and reshipping cargo: pilotage and port charges: practice of average adjusters inconsistent with law*—Where a ship is compelled to put into port to repair damage occasioned by a general average sacrifice, the expenses of warehousing and reshipping cargo,

necessarily unloaded in order to repair, and the port and pilotage charges and other expenses on leaving the port, are the subject of a general average contribution. Judgment of the Queen's Bench Division affirmed. *Attwood v. Sellar* (App.), 515

MARINE INSURANCE (continued)—insurance limited to actual damage: claim for constructive total loss: effect of by-law when indorsed on policy—A valued policy of insurance, made with a mutual marine insurance company, incorporated certain by-laws of the company, which were indorsed thereon. The policy declared that the acts of the assurer or assured, in recovering, saving or preserving the property insured, should not be considered a waiver or acceptance of abandonment. By one of the by-laws it was provided that, in the event of any ship being stranded or damaged, and not taken to a place of safety, the company might use all possible means to procure her safety; but that no acts of the company, in pursuance of such power, should be deemed to be an acceptance of any abandonment of which the assured might have given notice; and that the company, under any circumstances, should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured. In an action brought to recover for a constructive total loss,—*Held* (affirming the decision of LUSH, J., reported *ante*, 243), that the by-law did not exclude a constructive total loss, and that the plaintiff was entitled to recover. *Forwood v. The North Wales Mutual Marine Insur. Co.; The Same v. The Provincial A1 Mutual Marine Insur. Co. (Lim.)* (App.), 593

— **constructive total loss: sale of ship by master: urgent necessity: evidence: misdirection: new trial**—A vessel struck upon a rock outside a harbour, and it was necessary to lighten her in order to get her off at the next high tide, and for that purpose her master entered into a contract with one G., who was the only person at the place who had a sufficient number of men to render effectual assistance, to find the labour required for that purpose. G. supplied only a small number of men, who worked very languidly in discharging the cargo for two or three hours, and at the end of that time G. persuaded the master to cancel this contract and to call a survey of the vessel and sell her. G. and some men he brought accordingly made a survey, and by it found the mainmast raised one inch, the main combings parted, the deck plank opening and the vessel unseaworthy, and advised that the ship and cargo should be sold for the benefit of all concerned. The master then sold her to G. for a very small sum of money. When the vessel struck on the rock there was a strong breeze blowing, but it afterwards got calmer, and at the time of the sale the weather was good, and the vessel lying on her bilge with no more danger than she had

been in from the time she struck, but there was evidence that if the wind veered round to the south or west the sea would have heaved in and the vessel would have broken up in a short time. As a fact, directly after the sale G. brought a number of hands to discharge the cargo, and so got the vessel off and floated her at the next high tide, and he afterwards repaired and made her seaworthy at a trifling expense. In an action against the underwriter on a policy of insurance on the vessel for a constructive total loss, the Judge ruled, on the above facts appearing at the end of the plaintiff's case, that there was no evidence upon which the jury could reasonably find the urgent necessity for the sale of the vessel at the time she was sold, and he accordingly withdrew the case from the jury and directed the verdict to be entered for the defendant:—*Held*, by LORD COLERIDGE, C.J., that such ruling was right. *Held*, by GROVE, J., that it was wrong, and that the case should not have been withdrawn from the jury. *Hall v. Jupe*, 721

Quere, whether Order XXXIX. rule 3, directing that a new trial shall not be granted on the ground of misdirection, unless some substantial wrong has been thereby occasioned in the trial of the action, applies to such a case. *Ibid*.

— **war risks: valued policy: total loss: money received by one sovereign state under treaty with another for war losses of subjects**—A cargo belonging to the defendants which had been insured by the plaintiffs against war risk was captured and destroyed by the *Alabama* cruiser during the war between the United States and the Confederate States of America. Under an arbitration held pursuant to a treaty between Great Britain and the United States, a sum of money was awarded, which was afterwards paid by Great Britain to the United States in satisfaction of the claims made by the United States on Great Britain for losses arising in part from the acts of the *Alabama*. An Act of Congress of the United States was afterwards passed for the constitution of a Court to distribute money out of the sum so paid by Great Britain to the parties who might be adjudged entitled to compensation. The defendants (who were paid by the plaintiffs, as for a total loss, the whole of the sum insured, such sum being stated in the policy to be the value of the cargo) claimed in the Court so constituted under the Act of Congress a sum of money, which was the difference between the sum so received from the plaintiffs and the actual value of the cargo, which exceeded the sum insured. This claim was allowed, and its amount was paid to the defendants after certain deductions for the expense of obtaining it. This Act of Congress contained a clause which would have prevented the plaintiffs from obtaining such money from the said Court either by their applying for it in their own names or in those of the defendants:—*Held*, first, that the valuation of the cargo stated in the policy was conclusive as between

the parties; second, that the defendants were trustees for the plaintiffs in respect of the money so recovered from the United States Court; third, that the plaintiffs were entitled to recover it from the defendants in an English Court, although the American statute intended that they should not receive it. *Burmand v. Rodocanachi, Son and Co.*, 732

MARKET. See Negligence.

MARRIAGE, PROMISE OF. See Infant.

MARRIED WOMAN—separate estate: resettlement after action brought: form of judgment against married woman]—At the trial of an action, brought against husband and wife to recover the amount of a bill of exchange indorsed by the wife to the plaintiff, it appeared that the wife, when she indorsed the bill, was a married woman possessed of a life interest in certain property settled to her separate use without any restraint upon anticipation, and that after writ issued, but before trial; her life interest was, by deed, resettled upon her for her separate use without power of anticipation. Judgment having been entered for the plaintiff for the amount claimed, with a direction to the Master to enquire as to the wife's separate estate and report to the Court, and also with an injunction restraining the defendants from dealing with the separate estate until the debt was paid or the money paid into Court, it was,—*Held*, on appeal, that this judgment was wrong: that the proper order to make was one declaring the plaintiff entitled to be paid the amount of the debt out of the estate (if any) to which the wife might be entitled for her separate use without restraint on her power of dealing therewith; judgment to be entered for the husband; and (the plaintiff having failed to shew that the wife at the time of the trial was entitled to any separate estate with power of dealing therewith) no further order to be made, except that the judgment was to be without prejudice to such proceedings as the plaintiff might be advised to take in order to set aside the deed of resettlement. *Barber v. Gregson* (App.), 731

MASTER AND SERVANT. See Discovery.

METROPOLIS MANAGEMENT ACT—rate: inequality of benefit: exemption of, or levy of rate at a lower scale on, part of a parish: description of such part in precept. *Reg. v. The London, Brighton and South Coast Rail. Co.* (M.C. 32), (App.) 344

METROPOLITAN POOR ACT. See Nuisance.

MINES. See Income Tax. Lands Clauses Consolidation Act.

MINES AND MINERALS—rights of owner of minerals: compensation for disturbance of surface: bishopric of Durham: custom]—By an Inclosure Act the waste lands of a manor were divided among several allottees, who were to be bound to contribute *inter se* to compensate any of their number whose allotments might be injured by the lord working the minerals. The minerals were reserved to the lord; and it was enacted that he should at all times thereafter hold and enjoy all mines, &c., together with the liberty of searching for and working the said mines as fully and freely as he could have had or enjoyed the same if the Act had not been passed, and that without making any satisfaction for so doing:—*Held*, overruling *Blackett v. Bradley* (31 Law J. Rep. Q.B. 65), on demurrer to a statement of defence which, in answer to a claim by one of the allottees against the lord for working the mines without leaving a sufficient support for the surface, set up the statute, and alleged that the lord had been used as of right to search for minerals and disturb the surface without making any compensation, that the Act having expressly authorised the lord to disturb the surface without making any satisfaction for so doing, the defence was good; and that it was not competent to the plaintiff to enquire into the question whether before the Act the lord could, consistently with the principle laid down in *Hilton v. Lord Granville* (13 Law J. Rep. Q.B. 193), have had such a right as it was averred that he had exercised. *Gill v. Dickinson*, 262

— **Metalliferous Mines Regulation Act: fencing shaft of abandoned mine: owner: person interested in minerals.** *Arkwright v. Evans* (M.C. 82), 242

MONITION. See Ecclesiastical Court.

MORTGAGES. See Bill of Sale.

MOTION FOR JUDGMENT. See Practice.

MUNICIPAL ELECTIONS—qualification of candidate: burgess roll: municipal corporations act]—Up to the time of the passing of 38 & 39 Vict. c. 40, a candidate for the office of town councillor or alderman was qualified for election if entitled to be on the burgess list of the borough, even though his name, as a fact, was not on the list. *Middleton v. Simpson*, 312

By section 1 of that Act a candidate "shall be enrolled on the burgess roll of the borough":—*Held*, that section 1 merely added to the existing law a requirement that the name of the candidate must be on the burgess roll. Therefore, on the trial of a petition to enquire into the election of a town councillor, the burgess roll is not conclusive evidence of qualification. *Ibid.*

MUNICIPAL ELECTIONS (continued)—*form : nomination paper : number on burgess roll of subscribing burgess : ballot act*—In the nomination paper of a candidate for the office of town councillor of a borough under the Municipal Elections Act, 1875, the register number of the seconder was inserted as 695 instead of 704:—*Held*, an insufficient compliance with the note to schedule 1, form 2, by which "the number on the Burgess Roll of the burgess subscribing" is to be affixed, and that the nomination paper was therefore invalid. *Gothard v. Clarke*, 474

Section 13 of the Ballot Act, 1872, by which no election shall be declared invalid by reason of any mistake in the use of the forms, has no application to the decision of the returning officer on the validity of the nomination papers. *Ibid*.

— See Elementary Education.

NAVIGABLE RIVER. See Fishery.

NEGLECTANCE—*market : dangerous erection : duty of owner of market to the public*—The defendants, owners of a market for the sale of cattle, put up some railings round a statue in the market-place. One of the plaintiffs was in the habit of bringing his cattle to the market, and occupied, and paid toll to the defendants for, a site near the statue. A cow of the plaintiff's, in trying to jump the railings, was killed, and the plaintiffs sued the defendants to recover damages in respect of the loss. At the trial the jury found, in answer to the only question left to them, that the railings were kept negligently in not being of a sufficient height, and judgment was entered for the plaintiffs:—*Held*, that the judgment was rightly entered, because the defendants were *prima facie* bound to provide a reasonably safe place for the receipt and storage of cattle brought into the market at the defendants' invitation and for their profit, and no question had been raised at the trial whether the dangerous character of the railings was obvious to persons using the market. *Lax v. The Mayor, &c., Darlington* (App.), 105

— See Cheque. Railway Company.

NEW TRIAL. See County Court.

NOMINATION PAPER. See Municipal Elections.

NON-TIDAL RIVER. See Fishery.

NOTICE. See Bankruptcy.

NUISANCE—*statutory authority to establish asylums : power of statutory superior to sanction an act resulting in a nuisance : authority given by sta-*

tute, how to be pursued : liability for nuisance of local authority acting under direction of local government board : small-pox asylum and metropolitan poor act—A hospital for small pox was erected by the defendants, a body created under the Metropolitan Poor Act, 1867, and the plan pursued by them was sanctioned by the Local Government Board. In an action by neighbouring occupiers for damages for a nuisance, the jury found that the hospital was a nuisance, and that the defendants had not exercised all proper and reasonable care in carrying it on:—*Held*, that the defendants would not be protected by the sanction of the Local Government Board if what was sanctioned was not legal; and that the statute under which the defendants acted did not authorise the creation of a nuisance or interference with private rights. *Hill v. The Managers of the Metropolitan Asylums District* (App.), 228

— See Locomotives on Roads.

OBSCENE BOOKS—*order for destruction : death of complainant before order : lapse of proceedings.* *Reg. v. Truelove* (M.C. 57), 592

PACIFIC ISLANDERS PROTECTION—*kidnapping act : offence against the act : seizure of vessel : reasonable suspicion that offence is being committed*—By the Kidnapping Act, 1872, it is unlawful for a British vessel to carry native labourers, not part of the crew, without a licence, or to ship natives without their consent, and naval officers may seize "any British vessel which shall upon reasonable grounds be suspected of being employed in the commission of" the above offences. Plaintiff's vessel started on a trading expedition in 1871. Natives were shipped, with their consent, but under circumstances which the Court held not to constitute them part of the crew. During the voyage the Act was passed, and the captain did not hear of it until he was returning to land the natives. Defendant, a naval officer, finding the natives on board, seized the vessel. In an action for such seizure the jury, being asked whether the defendant had reasonable cause for thinking that the vessel was employed in breaking the Act, found a verdict for defendant:—*Held*, affirming the judgment of the Queen's Bench Division, that there was no misdirection, and defendant was not liable. *Held* also, that the carrying of the natives, having been commenced before the Act was passed, was not an offence against the Act. *Burns v. Nowell* (App.), 468

PARLIAMENT—*borough vote : notice of objection : parish of person objected to*—The statute 41 & 42 Vict. c. 26, gives in Schedule A. Form I. the forms of notices of objection in a parliamentary borough, No. 1 to the overseers, No. 2 to the person objected to. And then follows a note: "If there is more than one list of par-

liamentary voters, the notice of objection in each of the above cases Nos. 1 and 2, should specify the list to which the objection refers, and if the list referred to is made out in divisions, the notice of objection should specify the division to which the objection refers":—*Held*, that the list which the notice of objection should specify is the list of voters under each head of franchise, and that it is not necessary to specify the parish to which the objection refers. *Mortlock v. Farrer*. *Hall v. Cropper*, 160

— *registration: persons incapacitated by law or statute from voting: power to expunge*—Section 28 of the Parliamentary and Municipal Registration Act (41 & 42 Vict. c. 26), which declares the duties and powers of the Revising Barrister, by sub-section 7 enacts that he shall expunge from the list the name of every person "incapacitated by any law or statute from voting at an election":—*Held*, that the incapacity referred to was the general incapacity which would exist in the case of peers, women, aliens, &c., and not such transitory incapacity as would exist by reason of the receipt of parochial relief, insufficient occupation, &c. *Stowe v. Jolliffe* (43 Law J. Rep. C.P. 265) followed. *Hayward v. Scott*, 167

— *borough vote: residence*—A person on the list of voters for the city of Exeter had not in fact resided within seven miles of that city for six calendar months previous to the 16th of July, but during a small portion of that time he had been in London serving under articles of clerkship to a solicitor there. He had, however, a separate bedroom set apart for his exclusive use in his father's house, which was situate within seven miles of Exeter, where he had continuously resided previously to his going to London to serve under such articles, and where, subject to such articles, he always intended to reside, and where in fact on the expiration of such articles he did so reside:—*Held*, that such person whilst serving in London under such articles had not a sufficient constructive residence within seven miles of Exeter to satisfy the requirements of 2 & 3 Will. 4. c. 45. s. 31. *Ford v. Drew*, 172

— *borough vote: description of qualification: declaration by voter: houses in succession: power to amend*—The 41 & 42 Vict. c. 26, does not, any more than 6 & 7 Vict. c. 28, empower a Revising Barrister to substitute a different qualification for that appearing on the list. Therefore where the qualification of a person on the list of borough voters was described in the third column as "house" and in the fourth column as "8 Birley Place," and such person made a declaration according to section 24 of 41 & 42 Vict. c. 26, in which he declared that the correct particulars of his qualification ought to be stated in the third column "houses in suc-

cession," and in the fourth column "8 Birley Place and 9 Birley Place," it was held that the Revising Barrister had no power to amend the list in accordance with such declaration. *Porrett v. Lord*, 176

— *borough vote: amendment: lodger franchise: mistake in claim*—By section 28 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), the Revising Barrister shall, with respect to the lists of voters which he is appointed to revise, perform the duties and have the powers following:—(1) "He shall correct any mistake which is proved to him to have been made in any list"; (2) "He may correct any mistake which is proved to him to have been made in any claim or notice of objection." The appellant claimed for the first time to have his name inserted in the list of voters in respect of a lodger qualification. The claim, which was in the Form H, No. 2, of the Parliamentary and Municipal Registration Act, 1878, was insufficient, inasmuch as the appellant had omitted from the 4th and 5th columns respectively to state the amount of rent he paid and the address of his landlord. The Revising Barrister refused to amend:—*Held*, that these were mistakes in a "claim" within section 28, sub-section 2, and that the Barrister had therefore a discretionary power, and was not bound to amend. *Pickard v. Baylis*, 182

— *county vote: interest in land of uncertain duration: land devised in trust for sale: estate of cestui que trust pending sale*—A testator devised his copyhold lands to trustees upon trust to sell and invest the proceeds and pay the dividends to his wife for life, and after her decease to divide the proceeds among his children equally. The share of each son to become vested and payable at twenty-one; the share of each daughter to become vested at twenty-one or marriage, and the trustees to stand possessed of each daughter's share upon trust to pay the dividends to her during her life for her sole use independent of her husband (if any), and after her decease in trust for her children. The trustees duly proved the will, and were admitted to the copyholds according to the custom of the manor. The wife predeceased the testator, and at the time of his death there were three sons and one daughter; the daughter was married and had issue, who were infants. The sale of the copyhold lands was postponed, and in the meantime the children of the testator became of full age, and by verbal agreement among themselves, in which the husband of the daughter concurred, agreed to keep the copyhold lands unconverted. The rents, which were of sufficient annual value to confer the franchise on each of the testator's children, were received by the trustees and divided amongst the testator's children yearly. The appellant, one of the testator's sons, claimed to vote as a freeholder in respect

of his equitable interest in the copyholds:—*Held*, that the appellant had no such freehold estate as would entitle him to be registered as a voter for the county. *Spencer v. Harrison*, 188

entitled to vote for the borough of Horsham, but retained their right to vote for the borough of New Shoreham. *Foster v. Medwin*, 297

PARLIAMENT (continued)—borough vote: notice of objection: description of objector: parish: 41 & 42 Vict. c. 26, s. 4.—The Parliamentary Borough of Liskeard consists, first, of the municipal borough which is part of the parish of Liskeard; secondly, of so much of the parish of Liskeard as is not within the municipal borough; and thirdly, of the parish of St. Cleer. Each of these places has separate parochial officers and rates, and for the purpose of distinction the first is known as "the borough of Liskeard," and the second is known as "the parish of Liskeard." In a notice of objection to a person on the list of parliamentary voters for the borough, and given under 41 & 42 Vict. c. 26, the objector was described as being "on the list of parliamentary voters for the parish of the borough of Liskeard, Division 1":—*Held*, that such notice of objection was sufficient, as the borough of Liskeard was a parish as defined by section 4 of 41 & 42 Vict. c. 26, and the notice followed the words of the Form (I.) No. 2 in the schedule to such Act. *Sargent v. Rodd*, 195

—**borough vote: notice of objection: description of objector: parliamentary list: power to amend notice**—In a notice of objection to a person on the list of parliamentary voters for a borough, the objector, who was himself on such list, and as such entitled to object, described himself as "on the list of voters for the parish" of W., instead of "on the list of parliamentary voters for the parish" of W., in accordance with Form (I.) No. 2 in the schedule to the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26):—*Held*, that this was a mistake within the meaning of section 28, sub-section 2 of that Act, and that the Revising Barrister both could and ought to have corrected such mistake. *James v. Howarth*, 169

—**borough vote: divided parishes and poor law amendment act: alteration of parish boundary: parliamentary boundary of borough**—An alteration of parish boundaries under the Divided Parishes and Poor Law Amendment Act, 1876, does not affect the parliamentary divisions of counties and limits of boroughs for election purposes, so as to transfer the votes of voters from one division or borough to another. The parish of S. was within the parliamentary borough of New Shoreham, but an isolated portion of the parish of S., called Broadbridge Heath, was locally situated within the parish of Horsham, which parish is coterminous with the parliamentary borough of Horsham. The Local Government Board under the powers of the above Act amalgamated Broadbridge Heath with the parish of Horsham:—*Held*, that persons qualified to vote in respect of property situate within Broadbridge Heath were not

—**parliamentary elections act: election petition: interrogatories**—The Court has no power to order interrogatories to be delivered to a respondent to a Parliamentary election petition, under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), for though section 2 gives the Court the same powers, with reference to such petition, as it would have if such petition were an ordinary cause, yet this is "subject to the provisions of the Act," and section 26 enacts, that until rules have been made (and none have been made as to interrogatories), the "principles, practice and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions" are to be observed in the case of election petitions under the Act. *In re Wallingford (Borough) Election Petition. Wells v. Wren*, 681

—**election petition: change of place of trial**—The power to change the place of trial of an election petition under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 225), can be exercised only by the Court and not by an Election Judge. *In re Tenkesbury (Borough) Election Petition*, 685

Semble, the Court will not exercise such power unless there are special circumstances more than mere inconvenience why the trial should not be had in the borough or county (as the case may be) to the election for which the petition relates. *Ibid.*

—**parliamentary elections act: recognisance: security for costs: number of sureties**—Section 6, sub-section 5, of Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), states that the security for costs to the amount of 1,000*l.* which is to be given at the time of presenting an election petition under that Act, "shall be given either by recognisance to be entered into by any number of sureties not exceeding four, or by a deposit of money," &c. It is a sufficient compliance with this enactment that the recognisance be entered into by one surety only. *Hereford (City) Election Petition. Preece v. Pulley*, 686

PARTICULARS. See Practice.

PARTIES. See Practice.

PARTNERSHIP—*firm name the same as that of individual member: bill of exchange: liability of dormant partner on acceptance by individual member*—Action on two bills of exchange, one indorsed by the defendant W. B. the other addressed to him as "Mr. W. B., Chemical Works, R.," and accepted "W. B."—The defendant W. B. carried on a chemical business at R. In 1878 he and the defendant M. became part-

ners, and thenceforth carried on the same business at the same place, under the same name, "W. B." The account of the defendant W. B. at the bank became the firm account, and no alteration was made either in the name or the mode of keeping that account. It was agreed that the defendant M. should be a dormant partner, that the defendant W. B. should manage the business, and that neither partner should draw, indorse or accept bills without the written consent of the other. The bills sued on were made after the formation of the partnership, and were negotiated by the defendant W. B. without the knowledge or consent of the defendant M. in renewal of accommodation transactions entered into prior to the partnership. The proceeds of the two bills were paid into the account at the bank. W. B. drew on this account for goods supplied to the business, but also drew out for his private purposes sums exceeding in amount the proceeds of these bills, and he never treated these accommodation transactions as part of the chemical business, nor did he consider that he was binding the partnership by them. The plaintiffs, when they discounted the bills, did not know of the existence of M. or of the partnership. The jury found that the signature "W. B." on each of the bills was intended to denote the firm:—*Held* (affirming the decision of the Common Pleas Division), that the finding of the jury was against the weight of evidence; that there was nothing to prevent the defendant M. from denying his liability upon these bills to which he was no party, and from which he derived no benefit; that he was not liable on them, and that judgment ought to be entered for him. *Held* also (reversing the decision of the Common Pleas Division), that where a signature to a bill is common to an individual, and a firm of which the individual is a member, and when the individual carries on no business separate from the firm, there is a presumption that the bill is given for and is binding on the firm. *The Yorkshire Banking Co. v. Beatson and Mycock; The Leeds and County Bank v. The Same* (App.), 380

PASSENGER. See Railway.

PAVING STREETS. See Public Health.

PAWNBROKER—*pawnbrokers act, 1872* (35 & 36 Vict. c. 93): *rights of true owner of pledge*—The Pawnbrokers Act, 1872, which in section 25 provides that "the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn-ticket, and he is thereby indemnified for so doing," governs the rights between pawnbroker and customer only, and

the pawnbroker who delivers the pledge to the person producing the pawn-ticket is not indemnified against the true owner, without whose consent the pledge has been made, but the true owner, is entitled to enforce his rights at common law by action. *The Singer Manufacturing Co. v. Clark*, 224

PAYMENT into Court. See Practice.

— See Principal and Agent.

PENALTY. See Bond. Local Board.

PERJURY. See Criminal Law.

PHARMACY ACT—*chemist and druggist: corporation: "person"*—In sections 1, 15 of the Pharmacy Act, 1868, which prohibit under a penalty any person, not being a duly registered chemist, from selling or keeping open shop for the sale of poisons, or using the name of chemist or druggist, the word "person" does not include a corporation; and a corporation having a department for sale of drugs under the management of a duly registered chemist, are not liable to the penalty. *The Pharmaceutical Society of Great Britain v. The London and Provincial Supply Assoc. (Lim.)* (App.), 338 (H.L.), 736
Semble (per LORD BLACKBURN), a corporation employing an unqualified manager would be liable. *Ibid.*

PLEADING. See Practice.

PLEDGE. See Conversion.

POLICY. See Marine Insurance.

POOR—Statute: guardians *ex officio*: county justices: county of a town. *Reg. v. Pearce* (M.C. 81), 829

POOR LAW—Settlement of pauper lunatic: husband and wife: desertion by husband: order of removal: wife's settlement: statutes. *Reg. v. The Guardians of the Maidstone Union* (M.C. 25), 432

— See Parliament.

POOR RATE—Occupier going out before the rate discharged: unoccupied premises. *The Overseers of St. Werburgh, Derby, v. Hutchinson* (M.C. 23), 265

D

VOL. 49.—Q.B., C.P. & EXCH., *Index*.

POOR RATE (continued)—Liability to be rated: market: occupier of stall. *Spear v. The Guardians of the Bodmin Union* (M.C. 69), 656

— **Exemption from: civil engineers: institution: primary object of society: purposes of science, literature and fine arts.** *Reg. v. The Institution of Civil Engineers* (M.C. 34), 710

PRACTICE—**writ of summons: special indorsement: rules of court**—The plaintiff applied to sign judgment under Order XIV. rule 1, on the following special indorsement: "The plaintiff's claim is 49*l.* 5*s.* 8*d.* The following are the particulars: 1879. Feb. 14. To goods, 16*s.* 1*d.*" Several similar items followed, and the list ended with, "May 21. British Bank draft returned, 20*l.*" Credit was given for certain cash payments, and also for 20*l.*, "Credit by British Bank draft," and the amount claimed represented the balance on the whole account:—*Held* (affirming the judgment of the Common Pleas Division), that the indorsement was a sufficient special indorsement. *Smith v. Wilson* (App.), 96

— **order for particulars: particulars of credits given by plaintiff**—The rule which formerly existed not to compel a plaintiff to state the items of sums for which he has voluntarily given credit to the defendant in his particulars of demand, is, since the Judicature Act, no longer applicable, and the defendant can require the plaintiff to state such items, unless they are such as would be more within the knowledge of the defendant than of the plaintiff. Therefore where, in an action on a builder's contract, the plaintiff in his particulars, on a specially indorsed writ, gave credit to the defendant for a lump sum "for work not performed," and for another lump sum for "bricks, goods and works," the Court held, that the defendant was entitled to have an account, with dates and items, as to these two lump sums. *Godden v. Corsten*, 112

— **entering judgment on findings of jury: motion for new trial: divisional court: jurisdiction to enter final judgment**—Where a Judge entered judgment for the plaintiffs on special findings of a jury, and the defendants moved in a Divisional Court for a new trial on the ground that the findings were against the weight of evidence, —*Held*, that the Divisional Court had jurisdiction, under Order XL. rule 10, to enter final judgment for the defendants. *Hamilton and Co. v. Johnson and Co.* (App.), 155

— **trial by judge without a jury: finding of fact: appeal: motion for new trial**—In an action tried by a Judge without a jury, the Judge stated that he found certain facts, and then gave judgment for the defendants. The plaintiff moved *ex parte* in the Court of Appeal for a new trial

on the ground that the findings were against the weight of evidence:—*Held*, that the plaintiff ought to have appealed from the judgment, instead of moving for a new trial. *Krehl v. Burrell* (48 Law J. Rep. Chanc. 262; Law Rep. 10 Ch. D. 420) discussed and considered. *Potter v. Cotton* (App.), 158

— **appeal to divisional court not prosecuted: appeal to court of appeal**—An appellant to a Divisional Court who fails to prosecute his appeal there, and against whom judgment is there given, cannot afterwards appeal from that judgment to the Court of Appeal. *Walker v. Budden* (App.), 159

— **costs on the higher scale: rules of the supreme court (costs)**—Order VI., rule 2, Rules of the Supreme Court (Costs), provides that costs on the higher scale shall be allowed "in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained":—*Held*, that the rule applied to the particular class of cases specified in it, and to cases of trespass under an assertion of right, or where the damage is only incidental to the act complained of, or where the injury cannot be compensated for by damages, and did not include cases where the damage was of a temporary character. *Chapman v. The Midland Rail. Co.*, 245

— **appeal from county court: 38 & 39 Vict. c. 60. s. 6: time for moving: motion during vacation: jurisdiction of judge at chambers**—Where a motion for a new trial of an action in the County Court is made to a Judge at chambers in vacation, under section 6 of 38 & 39 Vict. c. 60, it must be heard and determined by him, and he has no power to adjourn it to the Divisional Court. *Button v. The Woolwich Building Society*, 249

— **costs: power of judge to deprive party of application at the trial: rules of court**—A plaintiff, after a trial with a jury, recovered 12*l.* in an action founded on tort. The Judge, counsel for the plaintiff and the defendant being present, said that he should consider whether he ought not to deprive the plaintiff of his costs. The counsel for the plaintiff argued against the making of such an order; the counsel for the defendant did not address the Judge. The order was made:—*Held*, affirming the decision of the Common Pleas Division, that the order depriving the plaintiff of his costs ought not to be rescinded, for that there had been a substantial compliance with the requirements of Order LV. rule 1. *Collins v. Welch* (App.), 260

— *costs: action tried with a jury: several issues: event where plaintiff succeeds on some issues and defendant on others: rules of the supreme court*]

—In an action brought to recover damages for, first, malicious proceedings in bankruptcy; second, libel and slander; third, trespass and conspiracy, and tried with a jury, the plaintiff obtained a verdict and judgment with a farthing damages upon the claim for libel, and the defendants obtained a verdict and judgment upon the other issues. Without any order having been made giving to the defendants any costs, a Master taxed in favour of the defendants the costs of the issues upon which they had succeeded:—*Held* (by the Exchequer Division and by the Court of Appeal, affirming the judgment of the Exchequer Division, upon motion to review the taxation), that the defendants were entitled to those costs, and that the taxation was right. *Myers v. Defries* (App.), 266

— *pleading in action for libel: denial and justification of libel and payment into court: embarrassing defence: rules of court*]

—In an action for libel the defendants pleaded denial and justification of the libel without the innuendo, and pleaded alternatively an apology and payment into Court of 40s. as amends:—*Held* (reversing the judgment of the Queen's Bench Division, reported *ante*, 207), that these defences could be pleaded together, and that they were not embarrassing so as to be liable to be struck out under Order XXVII. rule 1 of the Rules of Court. *Hawkeley v. Bradshaw* (App.), 333

— *test action: staying several actions on the application of the plaintiff until one has been tried*]

—Where several plaintiffs have brought separate actions against the same defendant raising a point in dispute common to all the actions, it is competent for a Court or Judge on the application of one of such plaintiffs to order a stay of proceedings in all such actions but one until such one has been tried, upon the plaintiffs in all the actions undertaking that the action so allowed to proceed shall be treated as a test action. The making of such order and the terms in which it is made are in the discretion of such Court or Judge. *Bennett v. Lord Bury*, 411

— *judgment by default in action on a replevin bond final, not interlocutory: rules of court*]

—In an action on a replevin bond, when judgment goes by default, such judgment is final and not interlocutory, and there is no necessity for a writ of enquiry. The old procedure is not altered by the Judicature Act. *Dix v. Groom*, 430

— *pleading: payment into court*]

—Where a plaintiff claims for distinct pieces of work and labour, alleged in separate paragraphs

of the statement of claim, a defendant, who has paid money into Court generally, need not specify in his statement of defence, how much is paid in respect of each head of claim. *Paraire v. Loibl* (App.), 481

— *third parties: party to the action: discovery by a third party*]

—Where a third party, upon whom notice has been served by a defendant to an action, enters an appearance in the action pursuant to Order XVI. rule 20, such third party is a party within the meaning of Order XXXI. rule 12, and liable to make discovery of documents according to the terms of that rule. *M'Allister v. The Bishop of Rochester*, 443

— *costs on higher scale: injunction: principal relief sought: additional rules of court (costs), order VI. rule 2*]

—To entitle a party in an action in which an injunction is claimed, in addition to other relief, to charge fees allowed in the "higher scale" of costs, the action must not only be one of the actions specified in rule 2 of Order VI. of the rules as to costs; but the injunction must also be the principal relief sought to be obtained:—*So held* by the Court of Appeal (affirming the decision of the Queen's Bench Division). The Master is to decide whether the "higher scale" is to be allowed under rule 2. *Chapman v. The Midland Rail. Co.* (App.), 449

— *writ specially indorsed: leave to defend: offer to bring the sum claimed into court: shewing cause*]

—Upon an application to sign final judgment under Order XIV., the Court has a discretion to refuse leave to defend the action, although the defendant offers to bring the sum claimed into Court under rule 3 of that Order. *Crumph v. Cavendish* (App.), 491

— *notice of trial: entry for trial: close of pleadings*]

—The defendants delivered a statement of defence and counter-claim; the plaintiffs replied, their reply not closing the pleadings, and at the same time gave notice of trial. Next day they entered the action for trial:—*Held*, that the action must be struck out of the cause list, on the ground (per KELLY, C.B.), that the entry for trial was irregular, and (per STEPHEN, J.), that the notice of trial and consequently the entry were irregular. *The Metropolitan Inner Circle Completion Rail. Co. v The Metropolitan Rail. Co.*, 505

— *appeal: case reserved by quarter sessions for the opinion of a superior court: leave to appeal: judicature act: public health act*]

—The Public Health Act, 1875, provides in certain cases for an appeal from petty sessions to quarter sessions, and provides that the quarter sessions may state the facts specially for the determination of a superior Court. In a case under this

Act an appeal was brought to quarter sessions, which quashed the order appealed from, subject to a case reserved. A *certiorari* issued, a rule calling on the prosecutor to shew cause was granted, was argued in, and discharged by the Queen's Bench Division. Leave to appeal was not given:—*Held*, that the case so reserved fell within the provisions of section 45 of the Judicature Act, 1873, and that no appeal could be brought from the decision of the Divisional Court upon it unless special leave to appeal were granted. *Reg. v. The Swindon New Town Local Board* (App.), 522

PRACTICE (continued)—costs: third parties—A Master has no jurisdiction when applied to for directions under Order XVI. rule 21, admitting a third party who has been served with notice to come in and defend, to order the costs to be in the discretion of the Judge at the trial. The only discretion as to costs given by the rule is as to imposing them or not upon the party so coming in, and there are no means for giving him his costs. *The Yorkshire Railway Waggon Co. v. The Newport and Abercarn Coal Co.*, 527

— **costs: judicature act: rules of court**—There is power to order a defendant to pay costs to a third party who appears in consequence of being served by the defendant with a notice under Order XVI. rule 18. *The Yorkshire Waggon Co. v. The Newport and Abercarn Coal Co.* (Law Rep. 5 Q.B. D. 268, ante, 527) explained. *Dawson v. Shepherd. Grier, Third Party* (App.), 529

— **appeal: prohibition to the county court: judicature act**—An appeal lies from the decision of the Divisional Court on an application for a prohibition to a County Court; for section 42 of 19 & 20 Vict. c. 108, relates to procedure only, and does not enact that the judgment of the Divisional Court shall be final. *Barton v. Titmarsh* (App.), 573

— **county court appeal: point not argued at trial: notes of county court judge: composition resolutions: validity of bill of sale given in pursuance of voidable resolutions**—An appeal lies by motion under 38 & 39 Vict. c. 50. s. 6, from the decision of a County Court Judge on a point of law, if it appears from the Judge's note that such point was necessarily decided by him in deciding the case, whether such point was taken in argument before him or not. It is not a condition precedent to the right of appeal that the Judge should have been requested at the trial to take a note. Decision of the Queen's Bench Division reversed. On the trial of an interpleader issue a County Court Judge held a bill of sale, given for valid consideration, to be void, because it was executed in pursuance of composition resolutions, and there had been fraud in procuring the resolutions; the resolutions had

not been set aside. On appeal by the claimants under the bill of sale.—*Held*, that the fraud in procuring the resolutions did not affect the validity of the bill of sale, and therefore the decision must be reversed. *Seymour v. Coulson* (App.), 604

— **time for appealing: final or interlocutory proceeding: rules of court**—A judgment on a question arising in an action, and stated in a special case for the opinion of the Court by the arbitrator to whom the action has been referred, is an interlocutory judgment, and must be appealed from within twenty-one days. *Collins v. The Vestry of Paddington* (App.), 264

— **appeal: extension of time for appealing: when granted: order LVIII. rule 15**—The plaintiff moved for an extension of time for appealing from an interlocutory order of the Queen's Bench Division, and relied on an affidavit stating that immediately after the order was made, which was on the 1st of April, 1879, the plaintiff's solicitor wrote to the defendants' solicitor, giving notice of the plaintiff's intention to appeal; that on the 8th of April the defendants' solicitor sent a copy of the order to the plaintiff's solicitor, who, though it was doubted whether the order was interlocutory or final, at once prepared to set down the appeal as from an interlocutory order, but believed that he had twenty-one days from the 8th of April, within which to set it down; that on the 18th of April the plaintiff's solicitor had an attack of illness which prevented him from attending to business until the 25th, when he saw his client, who instructed him to set down the appeal at once; that, finding it was too late to set down the appeal as from an interlocutory order, the plaintiff's solicitor, acting under counsel's advice, gave notice of appeal on the 12th of May, and set down the appeal as one from a final order. The Court of Appeal upon these facts refused to extend the time for appealing. *Collins v. The Vestry of Paddington* (App.), 612

Per BAGGALLAY, L.J., and THESIGER, L.J. (BRAMWELL, L.J., dissenting).—An extension of time for appealing is an indulgence which ought not to be granted, except upon strong special grounds, after an action has been tried and judgment given upon the merits. *Ibid.*

Per BRAMWELL, L.J.—An extension of time should be granted *ex debito justitiae* in all cases where the application is necessitated through some *bona fide* mistake, error or carelessness, and no damage has been done to the opposite party which cannot be repaired by payment of costs or otherwise. *Ibid.*

— **transfer of action: personal injury resulting from collision of ships: limitation action**—A collision having occurred between two ships, by which besides damage to cargo, personal injuries were occasioned to a fireman on board one ship,

an action in the Admiralty Division by the owners of that ship resulted in the other ship being adjudged solely to blame. The owners of the latter having thereupon instituted a limitation action also in the Admiralty Division, the fireman, the present plaintiff, issued a writ in the Queen's Bench Division, claiming 1,000*l.* damages for personal injuries from the owners of the delinquent ship. By the statement of claim in the limitation action, it was alleged that the fireman's was the only claim arising out of the collision in respect of personal injuries, and that it was for 500*l.* The defendants, of whom the fireman was nominally one, replied that his claim was for 1,000*l.* Judgment was given in the limitation action on this basis. Under these circumstances the fireman's action was transferred from the Queen's Bench Division to the Admiralty Division upon application made by the defendants under Order LL. rule 2. *Hawkins v. Morgan*, 618

— *discovery of documents: sufficiency of affidavit in answer: further affidavit in reply: rules of court, order XXXI. rule 12*—When an affidavit of documents has been made in answer to an order for discovery, no affidavit will be allowed in reply, unless it appear from the first mentioned affidavit itself, or from admissions on the pleadings of the party making it, or from documents mentioned therein, that it is not a sufficient compliance with the order. So held by the Court of Appeal, reversing the judgment of the Queen's Bench Division. *Jones v. The Monte Video Gas Co.* (App.), 627

— *costs on higher scale: injunction: principal relief sought: rules of the supreme court (costs), order VI. rules 2 and 3*—The plaintiff, the lessee and owner of a market, brought an action to recover damages for breaches of covenant against the tenants of certain houses within the market, and claimed an injunction to restrain the defendants from further breaches. The Judge before whom the action was tried, holding that the injunction was the principal relief sought, and that the action was brought to establish a right, made an order, allowing the plaintiff costs on the "higher scale." The Judge who tries the action has jurisdiction to make such an order under rule 3 of Order VI. of the rules as to costs, and should, in the exercise of his discretion, regard the intention of the Legislature, as expressed in rule 2 of the same Order. *Horner v. Oyler*, 655

— *appeal: compulsory order of reference: judicature act: jurisdiction to refer issues involving charges of fraud*—An appeal from a compulsory order of reference, made under section 57 of the Judicature Act, 1873, by a Judge, sitting at nisi prius or assizes, must be brought direct to the Court of Appeal. A Judge has jurisdiction, under section 57, to refer compulsory issues which involve questions of fraud, affecting

the character and reputation of the parties, though, as a general rule, such issues ought not to be referred. *Hoch v. Boor* (App.), 665

— *appeal: evidence: shorthand notes: time within which application for costs of shorthand notes used on appeal should be made*—Where shorthand notes of the evidence and proceedings in the Court below are used on appeal, an application to be allowed, on taxation, the costs of the notes as costs of the appeal, must be made before the judgment of the Court of Appeal is entered. Per BAGGALLAY, L.J., and BRETT, L.J. (*BRAMWELL, L.J., dubitante*)—The Court of Appeal has power to allow the costs of all shorthand notes properly used in the appeal, whether taken for the purposes of the appeal or not. *Hill's Executors v. The Managers of the Metropolitan District Asylum* (App.), 668

— *reference: matters of account: jurisdiction to refer issues compulsorily: judicature act*—Where there is a question of account which can be referred compulsorily under section 57 of the Judicature Act, 1873, the Court has power to order all the other issues in the action to be also referred. Rule 5 of Order XXXVI. does not apply to cases within section 57 of the Judicature Act, 1873; so that a summons to refer the issues in an action compulsorily under that section, need not be taken out within four days from service of notice of trial. In an action on a builder's bill consisting of many items, each of which, it appeared probable from the pleadings, would be separately disputed it was,—*Held* (reversing the decision of the Queen's Bench Division), that the matter was one "requiring a prolonged examination of accounts," within section 57 of the Judicature Act, 1873, and might, therefore, be compulsorily referred to an official referee. *Ward v. Pilley* (App.), 705

— *taxation of costs: set-off: same party successful defendant in action, and unsuccessful claimant in interpleader: rules of the supreme court (costs): special allowances*—In an action against two defendants, J. and H., H. obtained a judgment, but execution issued against J. The sheriff seized goods of J. which H. claimed, the sheriff interpleaded, and the claim of H. was barred with costs. On taxation of the costs of the action, the Master allowed the plaintiff to deduct from the costs due to the defendant H. the amount of costs due from him, as unsuccessful claimant in the interpleader, to the plaintiff as execution creditor.—*Held*, that he was wrong in so doing, as the action and the interpleader were wholly distinct proceedings. *Barker & Co. v. Hemming*, 730

— *Appeal: "criminal cause or matter": Judicature Act: Elementary Education Act: school board: offence against by-laws. Mellor v. Denham* (App.), 89

PRACTICE (continued)—time for moving for new trial: rules of court—According to the proper interpretation of Order XXXIX. rule 1 (a), as amended by the rules of March, 1879, a party applying for a new trial has the whole of four days within which to move; and if no Divisional Court sits upon the fourth day, his time is then extended to the next sitting of a Divisional Court. *Grant v. Holland*, 800

— **time for giving notice of trial: rules of court: orders**—By Order XXXVI. rule 3, a plaintiff is entitled as of right to give notice of trial with his reply, even though the reply may not formally close the proceedings. *Asquith v. Molineaux*, 800

— **costs: claim and counter-claim: reference to arbitration: "costs to abide the event:" amount recovered: county courts act: judicature act: rules of court**—Where a plaintiff establishes his claim in an action for a sum over 20*l.*, although the amount for which he obtains judgment may be reduced by a defendant's counter-claim to less than that amount, the plaintiff is entitled to his costs in the High Court, as section 67 of the Judicature Act, 1873, does not apply to such a case. Where a defendant establishes his counter-claim (which is either wholly or in part for unliquidated damages) for any sum, although it may be less than the claim the plaintiff has established, he is entitled to the costs of his counter-claim. The plaintiff claimed 10*l.* for rent, 100*l.* damages for breach of covenant, and 30*l.* damages for the conversion of goods by the defendant. By his counter-claim the defendant sought to recover 100*l.* for breach of covenant, and 5*l.* balance of rent due from the plaintiff to the defendant. At the trial the claim and counter-claim were referred to an arbitrator, "the costs of the action to abide the event of the award or certificate; the costs of the reference to be in the discretion of the arbitrator," to whom power was also given to give judgment. The arbitrator made his award in favour of the plaintiff for 15*l.*, and directed that the defendant should pay the plaintiff's costs of the reference and should bear the costs of the award; but he gave no certificate under section 5 of the County Courts Act, 1867, so as to entitle the plaintiff to the costs of the action. Upon an application to the Queen's Bench Division, the case was sent back to the arbitrator to find separately upon the claim and counter-claim. He thereupon found that the plaintiff was entitled to 35*l.* in respect of his claim, and that the defendant was entitled to 20*l.* upon his counter-claim, leaving a balance of 15*l.* due to the plaintiff, in respect of which he confirmed his award. The plaintiff obtained from a Judge at chambers an order allowing him the costs of the action. The defendant applied to set aside the order:—*Held*, that the order was good, as, according to the findings of the arbitrator, the

plaintiff had "recovered" 35*l.* in the action. *Held* also (FIELD, J., dissenting), that as the defendant had succeeded in establishing his counter-claim (which was not a mere set-off or claim for liquidated damages), he must be held to have recovered in his action, and therefore that he was entitled to have the costs of his counter-claim. *Staples v. Young* (Law Rep. 2 Ex. D. 324) dissented from. *Chatfield v. Sedgwick* (Law Rep. 4 C.P. D. 459) distinguished. *Stooke v. Taylor*, 857

— See Criminal Law.

PRESCRIPTION. See Ancient Market. Church.

PRINCIPAL AND AGENT—sale of goods: undisclosed principal: payment to broker when a discharge to the principal—Where a broker acting within the scope of his authority buys goods for his principal, and the vendor knows that the goods are bought for a principal, but does not know the name of the principal, the principal cannot discharge himself from liability to pay the vendor by settling with the broker, unless there has been conduct on the part of the vendor which justifies the buyer in concluding that the vendor looks to the agent and not to the principal for payment, and which estops the vendor from enforcing the debt against the principal. So held by the Court of Appeal (affirming the decision of BOWEN, J., reported *ante*, 239). *Irvine & Co. v. Watson and Sons* (App.), 531

— See Company.

PRINCIPAL AND SURETY—continuing guarantee: revocation of guarantee: death of guarantor, effect of: notice of withdrawal of guarantee, what is sufficient—A continuing guarantee is not *ipso facto* revoked by the death of the guarantor. But notice of the death of the guarantor and of the existence of a will, given to the holder of the guarantee, is constructive notice of the determination of the guarantee as to future advances. *Coulthart* (Public Officer of the Stalybridge, Hyde and Glossop Bank) v. *Clementson*, 204

— **collateral security: bankruptcy: policy of insurance: secured creditor: proof of debt without valuing the security: whether surety discharged**—The defendant became surety for the payment of a debt of 400*l.*, owing from P. to the plaintiff; and by agreement between the parties, P. handed over a policy of insurance on his life to the plaintiff as collateral security. P. afterwards became bankrupt, and at that time two of the premiums on the policy remained unpaid, and the policy had lapsed. The plaintiff proved in P.'s bankruptcy for the full amount of her debt, stating in her proof

that she held the policy as collateral security, but putting no value on it. The policy was afterwards given up to the trustee in bankruptcy for the benefit of the creditors, and the insurance company agreed to reinstate it. The plaintiff sued the defendant, as surety, for the amount of P.'s debt, and at the trial the plaintiff's counsel agreed to credit the defendant with 32*l.*, being the admitted value of the policy when reinstated:—*Held* (affirming the judgment of MANISTY, J., reported *ante*, 353), that the defendant's position as a surety was not altered so as to discharge him from liability, by reason of the course the plaintiff had pursued in the bankruptcy, as the policy was valueless when she sent in her proof. *Held* also, that, if the policy was of value when the plaintiff proved in the bankruptcy, and if she exercised her option, under the bankruptcy law, of handing over her security to the trustee, and proving for the whole amount of her debt, the defendant was not thereby wholly discharged from liability as a surety, but only to the extent of the value of the policy. *Rainbow v. Juggins* (App.), 718

— *unincorporated building society: loan: payment to treasurer: liability of society and directors: certified rules, contravention of*—By the certified rules of an unincorporated building society the directors were empowered to borrow money up to a prescribed limit. The course of business was for the treasurer of the society to receive the loan and give the lender a receipt, together with an undertaking on behalf of the directors to give a promissory note of the directors for the amount, and these notes were subsequently exchanged for the receipt and undertakings. The plaintiffs advanced 100*l.* to the society, paying the amount to the treasurer and receiving from him a receipt and undertaking. This sum was never paid over to the society, but was appropriated by the treasurer to his own use; and no promissory note for the amount was procured for the plaintiffs. At the time of this loan the society had borrowed in excess of the limit prescribed by the rules. The plaintiffs having sued the society and the directors to recover the amount,—*Held*, that the society and the directors might and did hold out the treasurer as having authority to act for them in the way he did, and that they were both liable, notwithstanding that the amount of the plaintiffs' loan was in excess of the limit prescribed by the rules of the society. *Chapleo v. The Brunswick Benefit Building Society*, 796

— *trustee and cestui que trust: bills of lading: rights of undisclosed principals: sub-agents*—The plaintiffs owned large estates in New Zealand, the produce of which was shipped to England for realisation, principally in the London market. They had offices at Glasgow, but no office or agency in London; and the

mode adopted by them for the realisation of their produce was to ship the wheat in New Zealand and take bills of lading, making it deliverable to them in London. These bills were from time to time indorsed to Messrs. M. & T. of Glasgow, with instructions to sell the goods in London. Messrs. M. & T., when sales were effected, delivered "account sales" in the usual form, debiting all expenses and *del credere* commission, and then paying the balance by cheque at the expiration of three months from the average date of the sales appearing upon the account. Messrs. M. & L. from time to time re-indorsed the bills of lading received by them from the plaintiffs specially to the defendants, who carried on business as corn factors and brokers in London, for the purpose of sale by them, the terms of the employment being altogether different from that upon which the plaintiffs employed Messrs. M. & T. The plaintiffs were aware that sales effected by Messrs. M. & T. for them in London were made by agents employed by them; but the plaintiffs were in no way parties to these sub-contracts, nor were their names disclosed in them. The indorsement by the plaintiffs to Messrs. M. & T., and by Messrs. M. & T. to the defendants, was for the purpose of sale only, and was not intended to pass any property in the cargoes. The defendants, in pursuance of their employment, effected sales of certain cargoes, and paid the proceeds into their own account with their bankers in the ordinary way, and from time to time made general remittances to Messrs. M. & T. on account of them. The proceeds thus got mixed up with all their receipts from other sources, but the proceeds of their sales could be traced and identified by reference to the defendants' books. In an action brought by the plaintiffs to recover from the defendants so much of the proceeds of certain cargoes as they had not remitted to Messrs. M. & T. the jury found, first, that the plaintiffs through their agents did not employ the defendants to sell and account for the proceeds to the plaintiffs; and, secondly, that the defendants knew that Messrs. M. & T. were acting as agents for another person. *Held* (by FIELD, J., upon further consideration), that the plaintiffs were entitled to sue the defendants for the balance in their hands, and that the latter were not entitled to set off any claim, arising at other times and upon other transactions, which they might have against Messrs. M. & T. *Held* also (upon the second finding of the jury), that the plaintiffs, as owners of the cargo, were entitled to follow the proceeds of the property in the hands of the defendants in their fiduciary character of agents and trustees. *The New Zealand and Australian Land Co. v. Ruston*, 842

PRISON ACT—*expenses incurred in maintenance of prisoners: reformatory schools: expense of clothing for boy sent to reformatory school: reformatory schools act*—The expense of providing a prisoner sentenced to be detained, after

a term of imprisonment, in a reformatory school, with clothing suitable for his admission to the school, is an expense incurred for the "maintenance of a prisoner" to be borne by the Prison Commissioners, under section 4 of the Prison Act, 1877. *The Prison Commissioners v. Corporation of Liverpool* (App.) 431

PRISONERS. See Justice of the Peace.

PROHIBITION. See Ecclesiastical Court. Railway Commissioners. Practice.

PROMOTER. See Company.

PUBLIC HEALTH—repair of road by frontagers: repair by local authority in case of default: apportionment by surveyor of expense: reference to arbitration in case of dispute: liability under award of non-disputing frontager not a party to reference]—The Public Health Act, 1875, provides by section 150 that in certain cases a local authority may by notice require owners of premises adjoining certain roads to pave such roads, and empowers the local authority, on default by the owners, to do it themselves, and to recover from the owners the expenses incurred, in such proportion as shall be settled by the surveyor, and in case of dispute by arbitration in the manner provided by the Act. Section 257 provides that the apportionment of the surveyor is to be binding and conclusive on the owner unless disputed within three months. Section 180 makes the award of the arbitrator final on all parties to the reference. The plaintiffs, a local authority, required the defendant and other owners of land adjoining a road within the above section to pave that road, and on their failing to do so, executed the work themselves, had the amount apportioned, and claimed and received from the defendant, who did not dispute the apportionment, his share of the expenses so incurred. Certain of the other owners disputed the apportionment, and an arbitration was held of which the defendant had no notice, and to which he was no party. The arbitrator re-apportioned the whole sum expended amongst all the owners, including the defendant, and fixed the amount to be paid by the defendant at a higher sum than had been fixed by the surveyor. In an action to recover the additional amount so charged to the defendant,—*Held*, that the plaintiffs could not recover the sum claimed on the footing of the assessment made by the arbitrator, and that the award was not binding on the defendant. *The Tunbridge Wells Local Board v. Akroyd* (App.), 403

— *election of members of local board: disqualification of member: lease of sewage farm by local board to member]*—A lessee of lands from a local board under a lease, by which he covenants to cultivate them as a sewage farm, and use upon them all the sewage to be supplied,

the board covenanting to deliver to him all the sewage of their district, is not disqualified from being elected or continuing a member of the board within the meaning of rule 64 of Schedule II. of the Public Health Act, 1875. *Reg. v. Gaskarth*, 509

— *apportionment of expenses incurred in paving street: deposit of plans]*—An apportionment of expenses duly incurred by a local board under section 150 of the Public Health Act, 1875, in the paving, &c., of streets was served on the owner of premises fronting the same. The apportionment mixed up the expenses of more than one street, but the owner not having objected within the three months provided by section 257, it was,—*Held*, that it was too late to raise an objection to the apportionment, which thenceforward became valid and binding. The deposit of plans and estimate of the works intended to be executed under section 150, and by that section directed to be made for the inspection of all persons interested, is not a condition precedent to the validity of all subsequent proceedings. *Cook v. The Ipswich Local Board* (40 Law J. Rep. M.C. 169; Law Rep. 6 Q.B. 451). *The Shanklin Local Board v. Miller*, 512

— Sale of meat unfit for human food: seizure by inspector: condemnation by justice: right of owner to be heard. *Reg. v. White* (M.C. 19), 232

— Paving private street: highway repairable by the inhabitants at large: decision of justices as to character of street conclusive: *res judicata*: dismissal of complaint, evidence of. *Reg. v. Hutchins* (M.C. 64), 563

— Highway: construction of local Act: projection "over or upon" pavement: oriel window not interfering with traffic. *Goldstraw v. Duckworth* (M.C. 73), 770

— Offensive trade: "a nuisance or injurious to health": injury to health of sick persons: nuisance not to health. *The Malton Local Board of Health v. The Malton Farmers' Manure and Trading Co. (Lim.)* (M.C. 90), 872

— See Local Board. Practice.

QUARRIES. See Income Tax.

QUARTER SESSIONS, Appeal from. See Practice.

QUIET ENJOYMENT. See Landlord and Tenant.

RAILWAY COMMISSIONERS—jurisdiction of: 36 & 37 Vict. c. 48: *order to execute structural works:* 17 & 18 Vict. c. 31: *prohibition*—The 2nd section of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), enacts that every railway company and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, &c.; and section 3 enacts, that it shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of that Act, to apply to the Court of Common Pleas to hear and determine the matter of such complaint, and for that purpose to prosecute any enquiry the Court may deem necessary by engineers, barristers or other persons, after which the Court may issue a writ of injunction. By section 6 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), the Railway Commissioners had transferred to them all the jurisdiction conferred by section 3 of 17 & 18 Vict. c. 31, on the several Courts and Judges empowered to hear and determine complaints under that Act, with power to make orders of a like nature with the writs and orders authorised to be issued and made by the said Courts and Judges. The Railway Commissioners, having been applied to by the Corporation of Hastings, who complained of the want of sufficient accommodation for passengers, goods and cattle at the Hastings Station of the South Eastern Railway Company, made an order upon the railway company requiring them to enlarge the platforms, to build new waiting rooms, to add a refreshment room, and a covered place under which carriages can set down; to make additional sidings for unloading goods, and to supply cattle pens:—*Held*, on demurrer to a declaration in prohibition, by COCKBURN, C.J., and MANISTY, J. (*dis-sentiente LUSH, J.*), that the Railway Commissioners have no jurisdiction to order structural works and additions to be executed by a railway company beyond those works contemplated when the capital of the company was fixed and sanctioned by Act of Parliament; and that a company cannot be forced, under the above-mentioned Acts, to find fresh capital for structural additions not within the scope of the original enterprise, simply because such constructions might be for the convenience of the public. *The South Eastern Rail. Co. v. The Railway Commissioners and the Mayor and Corporation of Hastings*, 278

RAILWAY COMPANY—toll "not exceeding per ton per mile" so much: right to charge for fractions of tons and miles: construction of acts imposing tolls on the public: practice of the House as to costs when there is an equality of votes—A railway company had power under their Act to impose tolls for the carriage of goods "not exceeding"

a certain amount "per ton per mile." Where the distance traversed was over four miles, they were authorised to charge for each quarter of a mile in excess of integer miles, and to treat as a quarter of a mile any fraction beyond an exact number of quarters of a mile. There was no provision as to fractions where the distance traversed was less than four miles. The company was also authorised to make "a reasonable charge for the expense of stopping" where the distance traversed was less than four miles:—*Held* (affirming the decision of the Court of Appeal), that the charge for stopping was not a toll within the meaning of the Railways Clauses Consolidation Act, 1845, ss. 93 and 96, requiring publication on a notice board. *Held*, by the Lord Chancellor (EARL CAIRNS) and LORD SELBOURN, in accordance with the decision of the Court of Appeal, that the company were entitled to charge rateably for fractions where the whole distance was less than four miles. Per the Lord Chancellor.—Where an Act grants a toll as payment for services rendered, it is not to be treated for purposes of construction as a taxing Act. *Held*, by LORD PENZANCE and LORD O'HAGAN, that the Act ought to be treated as a taxing Act, and that the rule applied that in case of doubt that construction should be adopted which was most beneficial to the public; that power to charge for fractions, not having been expressly given, was not to be supplied by implication. *Pryce v. The Monmouthshire Rail. and Canal Co. (H.L.)*, 130

In cases of appeal to the House of Lords there are always two motions before the House—one, that the judgment under appeal be reversed; the other, that the judgment under appeal be affirmed, and the appeal dismissed with costs. When the votes are equal upon the first motion, the motion is lost. The second motion is not put, as it is assumed that it would be lost also. The judgment appealed from is therefore affirmed, but no costs are given. *Ibid.*

— *passenger: contract to carry: ticket with conditions limiting liability: knowledge of passenger*—The plaintiff took a return ticket issued to him by the defendants (an English railway company), for the journey from London to Paris and back. The ticket was in the form of a small book with a paper cover, on the outside of which were the words, "Cheap return ticket. London to Paris and back. Second class. Available by night service only." Inside, sewn up with the cover, were the coupons for the different stages of the journey, and a page containing, amongst notices relating to luggage, a notice that this company "incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being booked to travel over the railways of other companies, such through booking being for the convenience of the passenger." The plaintiff sustained an injury whilst being carried in France under this ticket on the railway of a French company. In

an action against the defendants for such injury, the defendants relied on the said notice on the ticket relieving them from responsibility in the event which had occurred. The jury found that the plaintiff did not see or know of this notice, and further that the defendants had not done what was reasonably sufficient to bring it to the knowledge of the plaintiff:—*Held*, that notwithstanding such findings, the defendants were entitled to have judgment entered for them, as the whole of this ticket book and not merely what was on the outside formed the contract under which the defendants agreed to carry the plaintiff, and that, therefore, in the event which had occurred, the defendants were, according to the terms of the contract, relieved from responsibility. The case of *Henderson v. Stevenson* (Law Rep. 2 Sc. App. 470) distinguished. *Burke v. The South Eastern Rail. Co.*, 107

RAILWAY COMPANY (continued)—Lands clauses consolidation act, 1845 (8 & 9 Vict. c. 18), s. 127: superfluous lands: “required for the purposes of the undertaking”—Lands acquired by a company under the provisions of the Lands Clauses Consolidation Act, 1845, and not sold or used for the purposes of the undertaking within the period specified in section 127, are not “superfluous lands” within that section, if at the end of that period there is a purpose within the company's Act to answer which the land is retained in good faith by the company. *Betts v. The Great Eastern Rail. Co. (H.L.)*, 197

—**negligence: liability of company with running powers over another company's line: liability of carrying company apart from contract**—The South Western Railway Company have a station at Richmond; above the booking office are the words “S. W. and Metropolitan Booking Office and District Railway.” The defendants have a railway from Hammersmith to Shaftesbury Road, and running powers over the S. W. line from Shaftesbury Road to Richmond. The plaintiff took from a servant of the S. W. Railway Company at Richmond a return ticket to Hammersmith; the ticket was stamped “via Shaftesbury Road and District Railway”; on his return journey he travelled by a train belonging to and managed by the defendants. The defendants' carriages, although suited to their own stations, were unsuited to the platform of the S. W. station, and the plaintiff was hurt in alighting at Richmond. In an action for damages the jury found that the accident was caused by the negligence of the defendants:—*Held* (affirming the judgment of the Common Pleas Division), that whether there was a contract made by the plaintiff with the defendants or not, they were liable for the injuries received by him while travelling in their train. *Foulkes v. The Metropolitan District Rail. Co. (App.)*, 361

—**bailment: consignment of goods “to be left till called for”: destruction by fire before delivery: carriers or warehousemen**—Certain goods were consigned by the defendants' railway to W. addressed to the plaintiff, “to be left till called for.” On their arrival at W. they were placed in the station warehouse, to await their being called for. Two days afterwards, without default on the part of the defendants, the warehouse was burned down and the plaintiffs' goods were consumed by fire:—*Held*, that the goods were not, at the time when they were destroyed by fire, in the custody of the defendants as carriers but as warehousemen, and that, consequently, the defendants were not liable for a loss which had arisen through no default on their part. *Chapman v. The Great Western Rail. Co. The same v. The London and North Western Rail. Co.*, 420

—**accommodation works: remedy for insufficiency: railways clauses consolidation act**—An action was brought by owners of land adjoining a railway against the railway company for damage from alleged insufficiency of accommodation works made by the company. No proceedings had been taken by the landowners before justices of the peace under the Railways Clauses Consolidation Act, 1845, s. 69, in respect of the alleged insufficiency in the works, and the time limited by section 73 of that Act for compelling the company to make further accommodation works had expired:—*Held*, on demurrer, that the action was not maintainable. *Colley v. The London and North Western Rail. Co and others*, 575

—**by-law, validity of: refusal of passenger to shew ticket: variable penalty: railway clauses consolidation act**—The holder of a season ticket, entitling him to travel over parts of the lines of two railway companies, refused to shew his ticket to the collector of the first company, after having completed his journey on their line, and as he was leaving their station to go to the station of the second company. He had no fraudulent intention in so refusing. The first company summoned him under a by-law, which was in these terms: “Every passenger shall shew and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorised servant of the company when required to do so for any purpose. Any passenger travelling without a ticket or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey.” He was convicted in the amount of the fare from the place whence the train by which he had travelled had originally started. On appeal against this conviction,—*Held*, that the penal clause of the by-law was *ultra vires* and void on the ground that the penalty imposed by it was variable. *Held* further (by COCKBURN, C.J.) that section 108 of the Railway

Clauses Consolidation Act, 1845, did not empower the company to make regulations with respect to persons travelling by the company's own carriages, but that even if it did, the refusal to shew a ticket could not be constituted an offence unless accompanied by an intention to defraud, and such by-law must not be carried beyond the scope of section 103. Secondly, that the by-law, being made under the powers of the 109th section, was inapplicable to the present case, for the appellant was not when he refused to shew his ticket "travelling upon the railway." *Held* further (by LUSH, J.), that the by-law requiring a passenger to "deliver up his ticket," without any limitation as to time or purpose, was also unreasonable and void. *Saunders v. The South Eastern Rail. Co.*, 761

— See Damages.

RAILWAY PASSENGER DUTY—*extra charge to passengers to cover the duty: extra charge for sleeping accommodation*—Under 5 & 6 Vict. c. 79. s. 2, which imposes a duty of five per cent. upon all sums received or charged for the hire, fare or conveyance of passengers conveyed upon a railway, the Crown claimed from a railway company, empowered to demand maximum rates of charge for the conveyance of passengers, including every expense incidental to such conveyance except Government duty, duty upon a sum of five per cent. (which, to cover the Government duty, the company charged to their passengers in addition to the rate of fare, whether maximum or not:—*Held*, that the Crown was entitled to duty upon the five per cent. added to cover the duty. Per KELLY, C.B. —*Quære*, whether the charge made by the company was lawful; but if the charge was unlawful, the Crown was nevertheless entitled to the duty. Per HAWKINS, J.—It was unnecessary to decide whether, if the charge was shewn to be unlawful, the Crown would nevertheless be entitled to the duty; but, *semble*, that it would. The Crown claimed also duty under the same enactment upon a sum charged by the company, in addition to the ordinary first class fare, to passengers using sleeping carriages, who were provided with a couch, sheet, &c., a lavatory, &c., were left undisturbed upon arriving at their journey's end, and were waited upon in the morning by a servant to call them and bring them hot water:—*Held*, that the Crown was entitled to duty upon the sum charged for such extra accommodation. *The Attorney-General v. The London and North Western Rail. Co.*, 670

RATIFICATION. See Infant.

BATING—Sporting rights: severed from the occupation of the land. *Kenrick v. The Churchwardens and Overseers of the Parish of Guisfeld* (M.C. 27), 415

REASONABLE SUSPICION. See Pacific Islanders Protection.

RECEIPT AND INVENTORY. See Bill of Sale.

REFERENCE. See Practice.

REFORMATORY. See Prison Act.

REGISTRATION. See Bill of Sale.

RELEASE. See Liquidation by arrangement.

REMAINDERMAN. See Waste.

RENT. See Landlord and Tenant.

REPLEVIN BOND. See Practice.

REVENUE—*succession duty: mortgage of base fee: resettlement*—Conveyance to the use of the grantor for life, with remainder to his sons successively in tail male, remainder to his daughters in tail general. The grantor died, leaving two sons, Edward (a lunatic), and Reginald, and one daughter, Frances. Reginald conveyed, subject to Edward's estate, to the use of himself in fee, and then mortgaged the base fee so created to a bank for 124,000*l.*, being more than the fee-simple value of the property. Subsequently by arrangement between all interested, Reginald, Frances and the husband whom she had in the meantime married, with the consent of the Lord Chancellor as protector of the settlement, conveyed the property to trustees in fee, subject to Edward's estate tail, discharged of the mortgage and Reginald's equity of redemption, upon trust after the death of Edward to raise 37,000*l.* by sale, and after paying off the mortgage to convey to the use of other trustees, in trust for Frances for life, with remainder to her husband for life, with remainder to their sons in succession in tail male, with remainders over. Edward died without issue. Frances and her husband died, leaving the defendant, their eldest son:—*Held*, that the defendant derived his succession for the purposes of succession duty from his mother Frances, and not from his uncle Reginald. *The Attorney-General v. Dowling*, 621

REVOCATION. See Sale.

REVOCATION OF SUBMISSION. See Arbitration.

RIVER. See Fishery.

SALE—*conditional sale: sale of horse on trial: death of horse before trial*—The plaintiff sold a horse to the defendant upon a condition that

the horse should be tried by the defendant for eight days and returned by him at the end of that time if he did not think it suitable for his purposes. The horse died within such eight days without fault of either party:—*Held*, by DENMAN, J., that there was no absolute sale at the time of the horse's death, and, therefore, that the plaintiff could not recover the price. *Elphick v. Barnes*, 698

SALE (continued)—*revocation of offer: notice of revocation*—Negotiations having been going on for sale by the defendant to the plaintiffs of a quantity of iron, the defendant wrote saying that he "would sell now for 40s. net cash, open till Monday." On the Monday morning the plaintiffs telegraphed enquiring whether the defendant would accept 40s. for delivery over two months. The defendant did not reply, and about mid-day the plaintiffs succeeded in selling on the defendant's original terms, and telegraphed that they had done so. The defendant had himself in the course of the morning sold the iron to other persons, but his telegram announcing this reached the plaintiffs after the latter had dispatched their telegram to defendant. On action brought for non-delivery of the iron to the plaintiffs,—*Held*, by LUSH, J., on further consideration, that, the defendant's offer being a continuing one throughout Monday, the plaintiffs were authorised by it to sell at any time during the day until notice of its revocation reached them. The revocation having no effect until it was communicated, the plaintiffs were entitled to require delivery of the iron. *Cooke v. Osley* (3 Term Rep. 653) discussed. *Byrne & Co. v. Leon van Tienhoven & Co.* (49 Law J. Rep. C.P. 316) followed. *Stevenson, Jacques & Co. v. McLean*, 701

— of Food and Drugs Act: adulterated article: purchaser: inspector acting by deputy: information. *Horder v. Scott* (M.C. 78), 792

— of Goods. See Principal and Agent.

— of Horses. See Warranty.

SALVAGE. See Marine Insurance.

SCHOOL BOARD. See Elementary Education.

SECURITY FOR COSTS—*foreigner residing out of jurisdiction: breach of contract: counter-claim for damage on same cause of action*—The plaintiff brought an action against the defendant, a foreigner residing out of the jurisdiction, for breach of contract. The defendant, besides denying the breaches, brought a counter-claim against the plaintiff, alleging that the plaintiff broke the contract, and claiming damages less in amount than those claimed by the plaintiff:—*Held*, that the defendant ought not to be

called upon to give security for the costs occasioned by the counter-claim, inasmuch as the statement of claim and counter-claim respectively rested upon the same circumstances. *Winterfield v. Bradnum* (47 Law J. Rep. Q.B. 270) distinguished. *Mapleson v. Massini*, 423

SEPARATE ESTATE. See Married Woman.

SET-OFF. See Marine Insurance.

SHIP AND SHIPPING—*general average: exceptions in bill of lading: injury to goods by water employed to extinguish fire: liability of shipowner for not procuring adjustment of general average*—A bill of lading, by which the shipowner undertook to deliver the goods at a port to a railway company, to be by them carried inland and delivered to the consignees, contained an exception, "that the shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, or for any claim, notice of which is not given before the removal of the goods." On the voyage a fire broke out, and the cargo was damaged by the admission of water to extinguish the fire. The ship put back, and the shipowners delivered the cargo up, without taking security from any of the cargo owners, or taking any step for procuring an adjustment of general average:—*Held*, first, following *Schmidt v. The Royal Mail Steamship Company* (45 Law J. Rep. Q.B. 646), that the shipowners were not exempted from contribution to general average by the clauses in the bill of lading; and, second, that they were liable to an action by a shipper of goods for neglecting to take the necessary steps for procuring an adjustment of the general average, and securing its payment. *Crookes v. Allen and the Montreal Ocean Steamship Co.*, 201

— *charter-party: conversion of cargo: breach of contract in not signing bills of lading*—It was stipulated by a charter-party made between the plaintiffs and the defendants that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to do so, and sailed from the port of loading without having signed any bills of lading. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charter-party. In an action by the charterers against the shipowners for conversion and for penalties,—*Held*, that the plaintiffs could recover nominal damages for the breach of contract in not signing bills of lading as presented; but that there had been no conversion by the defendants of the cargo, as they had carried it for the plaintiffs, had intended to

deliver the whole of it to the consignees of the plaintiffs, and had been prevented by the acts of the plaintiffs from completing the delivery. *Jones v. Hough* (App.), 214

— *cargo on ship's account: nominal freight: vendor's lien: shipper's rights under contract with purchaser of cargo*—The plaintiff shipped goods in his own vessel to be carried on the ship's account, a nominal freight of one shilling per ton being payable under the bill of lading. He subsequently sold the goods whilst in transit, for 65s. per 500 lbs., "including freight and insurance, freight to be reckoned at 60s. per ton." After intermediate sales, the defendants bought the goods whilst still in transit upon the same terms as to freight. The ship arrived at the port of discharge, and the defendants, having notice of the terms of the plaintiff's contract, paid him a sum on account of freight at 60s. per ton, and thereupon obtained delivery of the goods. In an action by the plaintiff to recover the balance alleged to be due for freight,—*Held*, that the 60s. per ton agreed to be treated as freight in the plaintiff's contract for sale was unpaid purchase-money, in respect of which he had a lien on the goods before delivery; that the defendants' conduct under the circumstances amounted to an implied contract to discharge the lien, and therefore that the plaintiff was entitled to recover. *Swann v. Barber & Co.* (App.), 253

— *consignment of goods: pledge by consignee during voyage: sets of bill of lading: title of holder: innocent parties: warehouseman*—The plaintiffs advanced a sum of money to "C. & Co." upon the security of certain goods shipped for London, of which "C. & Co." were the consignees and owners. A bill of lading representing the goods was indorsed and delivered to the plaintiffs by "C. & Co." as collateral security for the goods. The bills, so indorsed and delivered, had been signed by the master of the ship in a set of three, each of which was marked "First," "Second," "Third," making the goods deliverable to "C. & Co., or their assigns." Freight was made payable in London, and the bills of lading contained the usual clause, "the one of which bills being accomplished, the rest to stand void." It was the "First" of the set which "was transferred to the plaintiffs by 'C. & Co.," and it was the only one which they ever indorsed. On the same day that the ship arrived in London, "C. & Co." made entry of the goods on board which were consigned to them, and these goods were landed and placed in the custody of the defendants in their warehouses. The following day the master lodged with the defendants a notice, directing them to detain the cargo until the freight should be paid. Two days later, "C. & Co." produced to the defendants the "Second" part of the set of three of the bills of lading of the goods in question, and the defendants then

entered "C. & Co." in their books as the proprietors of the goods. Subsequently the stop for freight was removed, and the defendants delivered the goods to third parties under delivery orders signed by "C. & Co." and lodged by them with the defendants. These orders and deliveries were made entirely without the knowledge of the plaintiffs. In an action by the plaintiffs against the defendants to recover the value of the goods represented by the bill of lading, of which the plaintiffs were the *bona fide* indorsees and holders for value,—*Held*, by FIELD, J. (on further consideration) that the plaintiffs were entitled to judgment on the ground that, whatever the rights and obligations of the master of the ship might have been, so long as the goods were still in her hold, the only authority conferred upon the defendants by the master was to detain until payment of freight, and then to deliver to the holder of the bill of lading, and that, accordingly, upon the release of freight, the defendants became either agents for the holder of the bill of lading (in which case they were only authorised to deliver to the plaintiffs) or warehousemen, who, as such, had been guilty of a conversion in delivering the goods upon the order of "C. & Co." to third parties, to sell or use for their own benefit. *Glynn, Mills, Currie & Co. v. The East and West India Dock Company*, 303

— *cargo of timber: charter-party: freight "on intake measure of quantity delivered": measurement of shipowner at port of loading: portion of cargo lost during voyage: measurement at port of discharge: mode of calculating freight*—The plaintiffs consigned to the defendants a cargo of deals and battens, with deal ends for broken stowage. Freight was, by the charter-party, to be paid on deals, battens, &c., at the rate of 3*l.* 5*s.* per St. Petersburg standard hundred of 1,980 super feet, and on deal ends at the rate of 2*l.* 1*s.* 8*d.* for the like hundred, eight feet and under. The charter-party contained the following provision as to freight: "Freight payable on deals and sawn lumber on the intake measure of quantity delivered." The bill of lading was signed for a specified number of pieces, deals, battens and scantlings, and a specified number of pieces, deal ends, and freight was made payable as per charter-party. The shipper adopted the usual course of business with respect to the measurement of timber, and made up his specification, shewing the number of pieces shipped of various dimensions. The dimensions were arrived at by measuring the length, breadth and depth of the various pieces of timber, on each of which, before shipment, were chalked the figures representing its dimensions. During the voyage, owing to the severe weather encountered by the vessel, a portion of the deals and deal ends was lost; there was evidence that the dimensions of such portion were average dimensions, compared with the rest of the cargo. The remainder of the timber was duly delivered, though on some

of the pieces so delivered the shipper's measurement had become obliterated:—*Held*, by BOWEN, J. (on further consideration) that the freight to be paid under the charter-party was on the measure put upon the timber when measured at the port of loading, and not on the quantity delivered measured according to the intake mode of measurement at the port of discharge; and that as the pieces thrown overboard or lost were of a fair average size, as compared with the rest of the cargo, the proportion which they bore to the rest of the cargo ought to be deducted from the specification total, and freight charged upon the residue. *Spaight v. Farnworth*, 346

SHIP AND SHIPPING (continued)—*charter-party: place of discharge: termination of voyage: "safe port, or so near thereto as ship can safely get."*—By a charter-party it was agreed that a ship should load a full cargo and proceed to a safe port within specified limits, or so near thereto as she could safely get; the port to be named on signing bills of lading. The cargo to be brought to and taken from alongside at merchant's expense. She was ordered to K., and the master signed bills of lading for delivery of the cargo at K. K. was situated thirty miles up a canal which was not deep enough to admit of the ship when laden passing up it. The shipowners having during the voyage in vain asked the charterers to give orders as to what was to be done when she should arrive at the mouth of the canal, and finding no one there to take delivery, lightered one-third of the cargo up to K., and took the rest up in the ship whose draught was thus sufficiently reduced to allow her to pass into the canal. On action brought to recover the expense of taking the cargo from the mouth of the canal to K.,—*Held*, that, under the circumstances, the master was justified in considering the voyage to be at an end at the mouth of the canal, and in treating it as the place of discharge, and that the plaintiffs were therefore entitled to recover. *Capper & Co. v. Wallace Brothers*, 350

— *deviation: perils of the seas: deviation to save life and property*—A deviation made by a vessel for the purpose of saving property is not justifiable, and the shipowner is liable to the charterer for loss or damage to cargo occasioned thereby. A deviation made solely for the purpose of saving life is justifiable. *Scaramanga v. Stamp* (App.), 674

— See Marine Insurance.

SHERIFF. See Bill of Sale.

SHORTHAND NOTES. See Practice.

SOLICITORS ACT. See Lien of Solicitor.

SPECIALTY DRET. See Lex Fori.

STATEMENT OF DEBTS. See Liquidation by Arrangement.

STAT OF ACTIONS. See Practice.

STRANDING. See Marine Insurance.

SUCCESSION DUTY—*appointees under a power: predecessor: succession duty act*—St. J., tenant for life in possession, and W., tenant in tail in remainder of certain estates, barred the entail and settled the estates to such uses as they should jointly appoint. On the following day they appointed the estates to such uses as they should jointly appoint, and in default of appointment to St. J., for life, remainder to W. for life, remainder to the first and other sons of W. in tail male, remainder to such uses as St. J. and T. should jointly appoint, and in default of appointment to T. for life, remainder to the first and other sons of T. in tail male, with remainders over. W. died in 1864, a bachelor, without having exercised his power of appointment. In 1866 St. J. and T. appointed the estates, subject to the life estate of St. J., in the events which happened, to the use that A., the widow of St. J., should receive an annuity, and subject thereto, and to an annuity given in certain events which have not happened to the wife of T., to the use of D. during so much of a certain period as she should live. St. J. died in 1873, and the uses limited in favour of A. and D. thereupon took effect:—*Held*, that the case fell within section 2 and was not within section 4 of the Succession Duty Act. And *held*, following *Lord Braybrooke v. The Attorney-General* (9 H.L. Cas. 150; 31 Law J. Rep. Exch. 177), *The Attorney-General v. Floyer* (9 H.L. Cas. 477; 31 Law J. Rep. Exch. 404), and *The Attorney-General v. Smythe* (9 H.L. Cas. 497; 31 Law J. Rep. Exch. 404), that duty was payable upon the interests of A. and D. as successions derived from W. as predecessor. *Charlton v. The Attorney-General* (H.L.), 86

— See Revenue.

SUMMARY JURISDICTION ACT—Court of summary jurisdiction: proceedings for the recovery of poor rates: distress warrant. *Reg. v. Price* (M.C. 49), 492

SUPERFLUOUS LAND. See Lands Clauses Consolidation Act. Railway.

SURRENDER. See Landlord and Tenant. Limitations, Statute of.

TENANT FOR LIFE. See Waste.

TEST ACTION. See Practice.

THIRD PARTIES. See Practice.

TIME. See Practice.

TOLLS. See Ancient Market. Railway.

TOWNS IMPROVEMENT CLAUSES ACT—*meaning of "street": road without line of buildings: power of commissioners to divert highway: indictment*—By 10 & 11 Vict. c. 34. s. 66, the commissioners may allow, upon such terms as they may think fit, any building within the limits of the special Act, to be set forward for improving the line of the street in which such building is situated:—*Held*, that the term "street" as used in the above section did not include a road without a line of buildings, and that the commissioners had no power under that section to divert any portion of a highway by widening it and obliterate a portion of the old highway which had thereby become necessary. *Reg. v. Platts*, 848

TRANSFER OF ACTION. See Practice.

— of Stock. See Company.

TREATY OF WASHINGTON. See Marine Insurance.

TRIAL, NOTICE OF. See Practice.

— . See Practice.

TURNPIKE TOLL—Carriage drawn by steam or other power: bicycle. *Williams v. Ellis* (M.C. 47), 642

ULTRA VIRES. See Company.

UNLOADING CARGO. See Charter-party.

VALUED POLICY. See Marine Insurance.

VENDOR AND PURCHASER. See Bill of Sale.

VESTRY—*mandamus: vicar and churchwardens: authority to fix hour of vestry meeting*—The vicar and churchwardens of a parish have power to fix the hour of holding vestry meetings, and the parishioners cannot, by *mandamus*, compel them to alter it. Judgment of the Queen's Bench Division affirmed. *Reg. v. The Vicar and Churchwardens of Tottenham* (App.), 870

VICAR. See Church.

VIS MAJOR. See Canal, overflow of.

VOLUNTEER ACT, 1863—Administrative battalion: dismissal of member: commanding officer: regulations of. *Tombs v. Magrath* (M.C. 75), 871

WAIVER. See Contract.

WAREHOUSEMAN. See Railway Company. Ship and Shipping.

WARRANTY—*sale of horses: condition that horse not answering warranty shall be returned within a fixed time: construction of condition*—In an action for breach of warranty of a horse, the statement of defence alleged that the horse was sold by the defendant to the plaintiff at a public auction held at the Royal City Repository, subject to a condition that "horses warranted quiet in harness, &c., not answering such warranty, must be returned before five o'clock, the day after the sale, shall then be tried by a competent person to be appointed by the proprietor of this establishment, and the decision of such person shall be final"; and that the plaintiff did not return the horse before five o'clock the day after the sale, in compliance with the condition:—*Held*, on demurrer, that the defence was a good answer to the action, because the condition substituted the right of returning the horse within the time fixed for the general remedy for breach of warranty which the buyer would otherwise have had. *Hincholiffe v. Barwick* (App.), 495

WASHINGTON, Treaty of. See Marine Insurance.

WASTE—*tenancy for life subject to obligation to repair: action by remainder-man against executor of tenant for life*—Where houses had been devised to A. for life, "she keeping them in repair," with remainder to the plaintiff in fee, and A. entered into possession but neglected to repair:—*Held*, that she was during her lifetime liable at common law to an action for waste by the remainder-man; and that consequently after her death A.'s executors were, under 3 & 4 Will. 4. c. 42. s. 2, liable to be sued by the plaintiff for such waste. *Woodhouse v. Walker* 609

WATER, DAMAGE BY. See Landlord and Tenant.

WORDS—"Entrusted for Payment," 536

— "Excessive weight," 643

— "Extraordinary expenses," 643

— "It shall be lawful," 577

— "Person," 338, 736

— "Return Day," 445

— "Safe Port," 350

— "Street," 848

— "Writing under their hand," 437

WRIT. See Practice.

TABLE OF CASES.

QUEEN'S BENCH, COMMON PLEAS AND EXCHEQUER.

LAW JOURNAL REPORTS, VOL. XLIX.

[In this Table the letters M.C. denote that the case belongs to the MAGISTRATES' CASES.]

- Aitchison v. Lohre (H.L.), 123
 Akroyd; Tunbridge Wells Local Board, v. (App.), 403
 Alderson v. Maddison, 801
 ———; Wagstaff, v. (App.), 485
 Allen v. Crookes, 201
 Alliance Bank of Simla v. Carey, 781
 Anderson v. Oppenheimer, 456 (App.), 708
 Andrade; Lazarus, v., 847
 Anglo-American Telegraph Co.; Simm, v. (App.), 392
 ———, v. Spurling (App.), 392
 Arbuthnot; Norfolk, Duke of, v. (App.), 782
 Arkwright v. Evans (M.C. 82), 842
 Asquith v. Molineaux, 800
 Attorney-General; Churlton, v. (H.L.), 86
 ——— v. Dowling, 621
 ——— v. London & North Western Rail. Co., 670
 Attwood v. Sellar (App.), 515
 Aveland v. Lucas (App.), 643
 Babcock v. Lawson (App.), 408
 Barber v. Gregson (App.), 731
 ——— & Co.; Swann, v. (App.), 253
 Barker & Co. v. Hemming, 730
 ——— & Sons; Lowrey, v. (App.), 433
 Barnes; Elphick, v., 698
 Barton v. Titmarsh (App.), 573
 Barwick; Hinchcliffe, v. (App.), 495
 Baylis; Pickard, v., 182
 Beaton; Leeds and County Bank, v. (App.), 380
 ———; Yorkshire Banking Co., v. (App.), 380
 Bennett v. Bury, 411
 Betteley; Hamlyn, v., 465
 Betts v. Great Eastern Rail. Co. (H.L.), 197
 Birmingham Canal Co.; Thomas, v., 851
 Bodmin Union; Spear, v. (M.C. 69), 656
 Boor; Hoch, v. (App.), 665
 Bourne; Hooper, v. (H.L.), 370
 Bradshaw; Hawksley, v., 207 (App.), 333
 Brighton, Guardians of; Brighton, Mayor, &c., v., 648
 ———, Mayor, &c., v. Brighton Guardians, 648
 British Waggon Co. (Lim), v. Lea & Co., 321
 Brunswick Benefit Building Society; Chapleo, v., 796
 Budden v. Walker, 159
 Burke v. South Eastern Rail. Co., 107
 Burnand v. Rodocanachi, 732
 Burns v. Nowell (App.), 468
 Bury; Bennett, v., 411
 Button v. Woolwich Building Society, 249
 Byrne & Co. v. Leon Van Tienhoven & Co., 316
 Campbell v. Fairlie, 445
 Capital and Counties Bank v. Henty (App.), 830
 Capper & Co. v. Wallace Brothers, 350
 Carden; Regina, v. (M.C. 1), 219
 Carey; Alliance Bank of Simla, v., 781
 Carr; Manchester Bonding Warehouse, v., 809
 Castle v. Downton, 6
 Castro; Regina, v. (App.), 747
 Cavendish; Crump, v. (App.), 491
 Chapleo v. Brunswick Benefit Building Society, 796
 Chapman v. Great Western Rail. Co., 420
 ——— v. Knight, 425
 ——— v. London and North Western Rail. Co., 420
 ——— v. Midland Rail. Co., 245 (App.), 449
 Charlton v. Attorney-General (H.L.), 86
 Chesworth v. Hunt, 507
 Civil Engineers' Institution; Regina, v. (M.C. 34), 710
 Clare's Trusts, In re, 557
 Clark; Singer Manufacturing Co., v., 224
 Clarke; Gothard, v., 474
 Clay; Walker, v., 560
 Clementson; Coulthart, v., 204
 Cobbold v. Fryke, 8
 Colley v. London and North Western Rail. Co., 575
 Collins v. Paddington Vestry (App.), 264 (App.), 612
 ——— v. Welch (App.), 260
 Cook v. Vernon (App.), 767
 Corpus Christi College v. Rogers (App.), 4
 Corsten; Godden, v., 112
 Cotton; Potter, v. (App.), 153
 Coulson; Seymour, v. (App.), 604

Coulthart v. Clementson, 204
 Crookes v. Allen, 201
 Cropper; Hall, v., 160
 Crump v. Cavendish (App.), 491
 Cwmorthin Slate Co.; Jones, v. (App.), 110

Danby v. Hunter (M.C. 15), 219
 Darlington, Mayor, &c., of; Lax, v. (App.), 105
 Davies v. Goodman, 101 (App.), 344
 —; Robinson, v., 218
 Dawson v. Shepherd (App.), 529
 Debenham v. Mellon (App.), 497
 Defries; Myers, v. (App.), 266
 De Morgan v. Metropolitan Board of Works (M.C. 51), 454
 Denham; Mellor, v. (App.), (M.C. 89), 872
 Dicker; Lucas, v., 415
 Dickinson; Gill, v., 262
 Ditcham v. Worrall, 688
 Dix v. Groom, 430
 Dixon v. Sea Insur. Co., 408
 — v. Whitworth (App.), 408
 Dowling; Attorney-General, v., 621
 Downton; Castle, v., 6
 Drew; Ford, v., 172
 —; Porter, v., 482
 Duckworth; Goldstraw, v. (M.C. 73), 770

East; Webb, v. (App.), 250
 — and West India Docks; Mills, Currie & Co., v., 303
 Ecclesiastical Commissioners for England v. Rowe (H.L.), 771
 Ellis; Williams, v. (M.C. 47), 642
 Elphick v. Barnes, 698
 Essex Justices; Regina, v. (M.C. 67), 770
 Evans; Arkwright, v. (M.C. 82), 842

Fairlie; Campbell, v., 445
 Fall; Powell, v. (App.), 428
 Farnworth; Spaight, v., 356
 Farrer; Mortlock, v., 160
 Ferguson; Gilbertson, v., 536
 Fletcher v. Hudson, 697 (App.), 793
 Ford v. Drew, 172
 Forwood v. North Wales Mutual Marine Insur. Co., 243 (App.), 598
 — v. The Provincial A 1 Mutual Marine Insur. Co. (Lim.), (App.), 593
 — & Co. v. Watney, 447
 Foster v. Medwin, 297
 — v. Wright, 97
 Foulkes v. Metropolitan District Rail. Co. (App.), 361
 Fox; White, v. (M.C. 60), 563
 Freeland; Postlethwaite, v. (H.L.), 630

Gaskarth; Regina, v., 509
 Gilbertson v. Ferguson, 536
 Gill v. Dickinson, 262
 Gilpin; M'Collin, v., 558
 Glyn, Mills, Currie & Co. v. East and West India Docks, 303
 Godden v. Corsten, 112

VOL. 49.—Q.B., C.P. & EXCH., INDEX.

Godfrey; Woodgate, v. (App.), 1
 Goldstraw v. Duckworth (M.C. 78), 770
 Goodman; Davies, v., 101 (App.), 344
 —; Saltash, Mayor, &c., of, v., 565
 Gothard v. Clarke, 474
 Grant v. Holland, 800
 Great Eastern Rail. Co.; Betts, v. (H.L.), 197
 — Western Rail. Co.; Chapman, v., 420
 Gregson; Barber, v. (App.), 731
 Green; Whaley Bridge Calico Printing Co., v., 326
 Greer v. Poole, 463
 Grey; Shippey, v. (App.), 524
 Grice; Protector Endowment Society, v., 247 (App.), 812
 Groom; Dix, v., 430
 Guilsfield, Overseers of; Kenrick, v. (M.C. 27), 415

Hall v. Cropper, 160
 — v. Hopwood (M.C. 17), 272
 — v. Jupe, 721
 Hamilton & Co. v. Johnson & Co. (App.), 155
 Hamlyn v. Betteley, 465
 Hampson; National Mercantile Bank, v., 480
 Harrison; Spencer, v., 188
 Harvey; Reed, v., 295
 Hawkins v. Morgan, 618
 Hawksley v. Bradshaw, 207 (App.), 333
 Hayward v. Scott, 167
 Hemming; Barker & Co., v., 730
 Henty; Capital and Counties Bank, v. (App.), 830
 Hereford Election Petition, In re, 686
 Hill v. Metropolitan Asylums District, 228 (App.), 668 (H.L.), 745
 Hills v. Renny (App.), 710
 Hinchcliffe v. Barwick (App.), 495
 Hoch v. Boor (App.), 665
 Holland; Grant, v., 800
 Horner v. Oylar, 655
 Hooper v. Bourne (H.L.), 370
 Hopwood; Hall, v. (M.C. 17), 272
 Horder v. Scott (M.C. 78), 792
 Hough; Jones, v. (App.), 211
 Howarth; James, v. (App.), 169
 Hudson; Fletcher, v., 697 (App.), 793
 Hull Corporation; Nissler, v., 501
 Hunt; Chesworth, v., 507
 Hunter; Danby, v. (M.C. 15), 219
 Hutchins; Regina, v. (M.C. 64), 563
 Hutchinson; St. Werburgh, Derby, v. (M.C. 23), 265

Imperial Ottoman Bank, In re, 536
 In re Clare's Trusts, 557
 — Hereford Election Petition, 686
 — Imperial Ottoman Bank, 536
 — Tewkesbury Petition, 685
 — Wallingford Election Petition, 681
 — West Bromwich School Board, 641
 Irvine v. Watson, 239 (App.), 531

Jack; Leigh, v. (App.), 220
 Jackson; Oppenheim, v. (App.), 216
 James v. Howarth (App.), 169
 Johnson & Co.; Hamilton & Co., v. (App.), 155

F

Jones v. Cwmorthin Slate Co. (App.), 110
 — v. Hough (App.), 211
 — v. Monte Video Gas Co. (App.), 627
 Juggins; Rainbow, r. 353 (App.), 718
 Julius v. Bishop of Oxford (H.L.), 677
 Jupe; Hall, v., 721

Kenrick v. Guilsfield, Overseers of, v. (M.C. 27),
 415
 Knight; Chapman, v., 425

Lawson; Badcock, v. (App.), 408
 Lax v. Darlington, Mayor, &c. of (App.), 105
 Lazarus v. Andrade, 847
 Lea & Co.; British Waggon Co. (Lim.), v., 321
 Leeds and County Bank v. Beatson (App.), 380
 Leigh v. Jack (App.), 220
 Leonard & Son; Lewis, v. (App.), 308
 Leon Van Tienhoven & Co.; Byrne & Co., v., 316
 Letchford v. Oldham (App.), 458
 Lewis v. Leonard & Son (App.), 308
 Liverpool Corporation; Prison Commissioners, v.
 (App.), 431
 Lohre; Aitchison (H.L.), 123
 Loibl; Paraire, v. (App.), 481
 London and North Western Rail. Co.; Attorney-
 General, v., 670
 —; Chapman, v., 420
 —; Colley, v., 575
 — and Provincial Supply Association; Phar-
 maceutical Society, v. (App.), 338 (H.L.), 736
 — and South Western Rail. Co.; Phillips, v.
 (App.), 233
 — and South Western Bank (Lim.) v. Went-
 worth, 657
 —, Mayor, &c. of, v. Low, 144
 —, Brighton and South Coast Rail. Co.;
 Regina, v. (App.), (M.C. 32), 344
 Lord; Porrett, v., 176
 Low; London, Mayor, &c. of, v. (App.), 144
 Lowrey v. Barker & Sons (App.), 433
 Lucas; Aveland, v. (App.), 643
 — v. Dicker, 415

M'Allister v. The Bishop of Rochester, 114, 443
 M'Collin v. Gilpin, 558
 M'Keand; Taylor, v., 563
 Mackonochie; Martin, v. (App.), 9
 M'Lean; Stevenson, Jaques & Co., v., 701
 Maddison; Alderson, v., 801
 Magrath; Tombs, v. (M.C. 75), 871
 Maidstone Union; Regina, v. (M.C. 25), 432
 Malton Farmers' Manure and Trading Co.; Mal-
 ton Local Board of Health, v. (M.C. 90), 872
 Malton Local Board of Health v. Malton Farmers'
 Manure and Trading Co. (Lim.), (M.C. 90),
 872
 Manchester Bonding Warehouse v. Carr, 809
 Mapleson v. Massini, 423
 Martin v. Mackonochie (App.), 9
 Massini; Mapleson, v., 423
 Medwin; Foster, v., 297
 Mellon; Debenham, v. (App.), 497
 Mellor v. Denham (M.C. 89) (App.), 872

Metropolitan Board of Works; De Morgan
 v. (M.C. 61), 464
 — District Asylum; Hill, v., 228 (App.),
 668 (H.L.), 745
 — District Rail. Co.; Foulkes, v. (App.),
 361
 — Inner Circle Completion Rail. Co. v.
 Metropolitan Rail. Co., 505
 — Rail. Co.; Metropolitan Inner Circle
 Completion Rail. Co., v., 505
 Middleton v. Simpson, 312
 Midland Rail. Co.; Chapman, v., 245 (App.), 449
 Miller; Shanklin Local Board, v., 612
 Mitcalfe; Sullivan, v. (App.), 815
 Molineaux; Asquith, v., 800
 Monmouthshire Rail. and Canal Co.; Pryce, v.
 (H.L.), 130
 Monte Video Gas Co.; Jones, v. (App.), 627
 Morgan; Hawkins, v., 618
 —; Smith, v., 410
 Mortlock v. Farrer, 160
 Mullins v. Surrey Treasurer, 257
 Musgrave; Watney, v., 493
 Myers v. Defries (App.), 266

National Mercantile Bank v. Hampson, 480
 Neptune Marine Insur. Co.; Pallas & Co., v.
 (App.), 153
 Newport and Abercarn Coal Co.; Yorkshire Rail.
 Waggon Co., v., 527
 New Zealand and Australia Land Co. v. Ruston,
 842
 Nissler v. Hull Corporation, 501
 Norfolk, Duke of, v. Arbutnot (App.), 782
 North Wales Mutual Marine Insur. Co.; For-
 wood, v., 243 (App.), 593
 Nowell; Burns, v. (App.), 468

Oldham; Letchford, v. (App.), 458
 Oppenheim v. Jackson (App.), 216
 Oppenheimer; Anderson, v., 456 (App.), 708
 Oxford, Bishop of; Julius, v. (H.L.), 577
 Oyler; Horner, v., 655

Padbury; Regina, v. (M.C. 65), 551
 Paddington Vestry; Collins, v. (App.) 264, (App.),
 612
 Paraire v. Loibl (App.), 481
 Patent Safety Gun Cotton Co. v. Wilson (App.),
 713
 Pearce; Regina, v. (M.C. 81), 829
 Pallas & Co. v. Neptune Marine Insur. Co. (App.),
 153
 Pemberton; Regina, v. (App.), (M.C. 29), 360
 Pharmaceutical Society of Great Britain v. London
 and Provincial Supply Association (App.), 338
 (H.L.), 736
 Phillips v. London and South Western Rail. Co.
 (App.), 233
 Pickard v. Baylis, 182
 Pickles; Wadsworth, v., 454
 Pilley; Ward, v. (App.), 705
 Platts; Regina, v., 848
 Poole; Greer, v., 463

- Porrett v. Lord, 167
 Porter v. Drew, 482
 Postlethwaite v. Freeland (H.L.), 630
 Potter v. Cotton (App.), 158
 Powell v. Fall (App.), 428
 Preece v. Pulley, 686
 Price; Regina, v. (M.C. 49), 492
 Priest; Rotheram, v., 104
 Prison Commissioners v. Liverpool Corporation (App.), 431
 Protector Endowment Society v. Grice, 247 (App.), 812
 Pryce v. Monmouthshire Rail. and Canal Co. (H.L.), 130
 Pryke; Cobbold, v., 8
 Pulley; Preece, v., 686
- Quirk; Swansea, v., 157
- Rail. Commissioners; South Eastern Rail., v., 273
 Rainbow v. Juggins, 353 (App.), 718
 Reed v. Harvey, 295
 —; Regina, v. (App.), 600
 Regina v. Carden (M.C. 1), 219
 — v. Castro (App.), 747
 — v. Civil Engineers Institution (M.C. 34), 710
 — v. Essex Justices (M.C. 67), 770
 — v. Gaskarth, 509
 — v. Hutchins (M.C. 64), 563
 — v. London, Brighton and South Coast Rail. Co. (App.), (M.C. 32), 344
 — v. Maidstone Union (M.C. 25), 432
 — v. Padbury (M.C. 55), 511
 — v. Pearce (M.C. 81), 829
 — v. Pemberton (App.), (M.C. 29), 860
 — v. Platts, 848
 — v. Price (M.C. 49), 492
 — v. Reed (App.), 600
 — v. Sheward, 329 (App.), 716
 — v. Smith (App.), (M.C. 29), 360
 — v. Swindon New Town Local Board, 522
 — v. Tottenham, Vicar of (App.), 870
 — v. Truelove (M.C. 57), 592
 — v. White (M.C. 19), 232
 Renny; Hills v. (App.), 710
 Robinson v. Davies, 218
 Rochester, Bishop of; M'Allister, v., 114, 443
 Rodd; Sargent v., 195
 Rodocanachi; Burnand, v., 734
 Rogers; Corpus Christi College, v. (App.) 4
 Rotheram v. Priest, 104
 Rowe; Ecclesiastical Commissioners for England, v. (H.L.), 771
 Ruston; New Zealand and Australian Land Co., v., 842
- St. Werburgh, Derby, v. Hutchinson (M.C. 23), 266
 Saltash, Mayor, &c., v. Goodman, 565
 Sampson v. Stevens, 120
 Sargent v. Rodd, 195
 Saunders v. South Eastern Rail. Co., 761
 Scaramanga v. Stamp (App.), 674
- Scott; Howard, v., 167
 —; Horder, v. (M.C. 78), 792
 Scotter; Southwell, v. (App.), 356
 Sea Insur. Co.; Dixon, v. (App.), 408
 Sellar; Attwood, v. (App.), 615
 Seymour v. Coulson (App.), 604
 Shanklin Local Board v. Miller, 512
 Shepherd; Dawson v. (App.), 529
 Sheward; Regina, v., 329 (App.), 716
 Shippey v. Grey (App.), 524
 Simm v. Anglo-American Telegraph Co. (App.) 392
 Simpson; Middleton, v., 312
 Sinfield; Ward, v., 696
 Singer Manufacturing Co. v. Clark, 224
 Smith v. Morgan, 410
 —; Regina, v. (App.), (M.C. 29), 360
 — v. Wilson (App.), 96
 South Eastern Rail. Co.; Burke, v., 107
 — v. Railway Commissioners, 273
 —; Saunders, v., 761
 Southwell v. Scotter (App.), 356
 Spaight v. Farnworth, 346
 Spear v. Bodmin Union (M.C. 69), 656
 Spencer v. Harrison, 188
 Spurling; Anglo-American Telegraph Co., v. (App.), 392
 Stamp; Scaramanga, v. (App.), 674
 Stern; Williams, v. (App.), 663
 Stevens v. Sampson, 120
 Stevenson, Jaques & Co. v. M'Lean, 701
 Stooke v. Taylor, 857
 Sullivan v. Mitalfe (App.), 815
 Surrey Treasurer; Mullins, v., 257
 Swann v. Barber & Co. (App.), 253
 Swansea v. Quirk, 157
 Swindon New Town Local Board; Regina, v., 522
- Taylor v. M'Keand, 563
 —; Stooke, v., 857
 Tenby, Mayor of; Williams, v., 325
 Tewkesbury Election Petition, In re, 685
 Thomas v. Birmingham Canal Co., 851
 Titmarsh; Barton, v. (App.), 573
 Tombs v. Magrath (M.C. 75), 871
 Tottenham, Vicar, &c., of; Regina, v. (App.), 870
 Truelove; Regina, v. (M.C. 57), 592
 Tunbridge Wells Local Board v. Akroyd (App.), 403
- Vernon; Cook, v. (App.), 767
- Wadsworth v. Pickles, 454
 Wagstaff v. Anderson (App.), 485
 Walker v. Budden, 159
 — v. Clay, 560
 — Woodhouse, v., 609
 Wallace Brothers; Capper & Co., v., 850
 Wallani; Wilson, v. 437
 Wallingford Election Petition, In re, 681
 Ward v. Pilley (App.), 705
 — v. Sinfield, 696
 Watney; Forwood & Co., v. 447
 — v. Musgrave, 493
 Watson; Irvine, v., 239 (App.), 531

Webb v. East (App.), 250	Wilson; Patent Safety Gun Cotton Co. (App.), 713
Welch; Collins, v. (App.), 260	——— Smith, v. (App.), 96
Wells v. Wren, 681	——— v. Wallani, 437
Wentworth; London and South Western Bank (Lim.), v., 657	Woodgate v. Godfrey (App.), 1
West Bromwich School Board, In re, 641	Woodhouse v. Walker, 609
Whaley Bridge Calico Printing Co. v. Green, 326	Woolwich Building Society; Button, v. 249
White v. Fox (M.C. 60), 563	Worrall; Ditcham, v., 688
——; Regina, v. (M.C. 19), 282	Wren; Wells, v., 681
Whitworth; Dickson, v. (App.), 408	Wright; Foster, v., 97
Williams v. Ellis (M.C. 47), 642	Yorkshire Banking Co. v. Beatson (App.), 380
—— v. Stern (App.), 663	Yorkshire Rail. Waggon Co. v. Newport and Abercarn Coal Co., 527
—— v. Tenby, Mayor of, 325	

ERRATA.—At page 277, first column, twenty-fourth line from the top, for Commissioners *read* Companies. At page 282, second column, twelfth line from the top, for Moves *read* Mount. At page 82 of the Magistrates' Cases, second column, twenty-fifth line from the top, for Boyle *read* Budge.

PRINTED BY SPOTTISWOODE & Co.

New-street Square; 87 Chancery Lane; 30 Parliament Street; and 38 Royal Exchange.

Stanford Law Library



3 6105 062 835 405

